

---

# Fair Trading Commission

---

Guide to Anti-Competitive Conduct

## Table of Contents

---

<b>1</b>	<b>Introduction .....</b>	<b>1</b>
<b>2</b>	<b>Contacting the Commission.....</b>	<b>2</b>
<b>3</b>	<b>Relevant definitions .....</b>	<b>3</b>
	Market.....	3
	Agreements .....	4
<b>4</b>	<b>Anti-competitive agreements.....</b>	<b>5</b>
<b>5</b>	<b>Abuse of a dominant position .....</b>	<b>7</b>
<b>6</b>	<b>Resale price maintenance .....</b>	<b>10</b>
<b>7</b>	<b>Cartels, bid-rigging, conspiracies and boycotts .....</b>	<b>12</b>
<b>8</b>	<b>Interlocking directorships .....</b>	<b>14</b>
<b>9</b>	<b>General Exceptions from the Act .....</b>	<b>15</b>
<b>10</b>	<b>Fair Trading Commission Investigations.....</b>	<b>16</b>
	Confidentiality.....	17
	Completion of the investigation .....	18
	Powers of the Commission .....	18
	Decisions and directions of the Commission.....	20
	Enforcement and appeals of Commission decisions and directions .....	20
	Court enforcement of the Act.....	21
	Damages .....	22

## 1 Introduction

- 1.1 The Fair Trading Commission (“the Commission”) was established by the *Fair Trading Commission Act 2000-31*. Part of the responsibilities of the Commission includes the administration of the *Fair Competition Act 2002-19* (“the Act”).
- 1.2 Some of the important functions of the Commission under the Act are to:
- promote and maintain and encourage competition in Barbados;
  - prevent anti-competitive practices in Barbados; and
  - ensure that all businesses, irrespective of size, have the opportunity to participate equitably in Barbados.
- 1.3 Vibrant and effective competition is one of the key elements of a successful market economy. It delivers very significant benefits to consumers and encourages the efficient use of the resources of Barbados and its people. Firms can compete to attract their customers by offering better products, better services and better prices. The competitive process provides the incentive for businesses to continually improve, it enhances economic growth and ultimately provides a higher standard of living for all. This is why the Act is important and why the Commission will take the necessary steps to ensure that businesses and consumers alike can operate in an environment free from harmful anti-competitive conduct.
- 1.4 This guideline outlines the Commission’s administration and enforcement policy for dealing with anti-competitive business conduct under the Act. The guideline is designed to assist businesses, their advisers and the public in understanding competition law enforcement in Barbados. The guideline should be read in conjunction with the Fair Competition Act. Persons in doubt about how they may be affected by the legislation should seek legal advice.

## 2 Contacting the Commission

Companies, consumers or ordinary individuals who are aware of the behaviour of businesses operating in Barbados that appear to breach the Act by harming competition are encouraged to contact the Commission and raise their concerns.

The Commission will consider all the information it receives and in appropriate circumstances will carry out formal investigations and even prosecutions of those involved.

To contact the Commission with information:

**Telephone:** (246) 424 0260

**Facsimile:** (246) 424 0300

**Write to:** Chief Executive Officer  
Fair Trading Commission,  
Manor Lodge  
Lodge Hill,  
St. Michael

**Email:** [info@ftc.gov.bb](mailto:info@ftc.gov.bb)

The Commission is able to appropriately handle and deal with confidential information that is provided to it.

### 3 Relevant definitions

#### Market

- 3.1 Competition between firms takes place in a market for goods and/or services. A number of provisions in the Act require the Commission to understand the effect certain conduct is likely to have upon competition. For the Commission to do this it must first define and understand the relevant market or markets in which the conduct takes place.
- 3.2 The Act states that the term “market” is a reference to a market for goods and services supplied in Barbados. Accordingly, any firm, regardless of its physical location, that supplies goods or services in Barbados must do so in compliance with the Act.
- 3.3 A market is essentially the relevant area of competition between firms. To define a market the Commission will identify:
- The relevant **product** market or markets. This will include the goods and services affected by the conduct and any other closely substitutable products. In determining the products to be included in the market the Commission will start with the narrowest definition of the product and ask what substitutable products the consumer may turn to if the price of that product was increased by a small but significant amount (approximately 5 percent) for the foreseeable future. The products likely to be turned to are included in the market. The product market is defined at the point when consumers are unlikely to switch to the substitutable product. The Commission will identify the firms that supply, or could potentially supply, the product or its substitute in Barbados.
  - The relevant **geographic** market or markets. This is the geographic area over which suppliers and buyers compete for the product. The market is determined by the area within which most consumers can practically source their supplies. A similar iterative procedure is used as with the product market determination until it is deemed unlikely that consumers are willing to switch to another area for the substitutable product. Ordinarily the Commission will define a geographic market to be Barbados, or a part of Barbados. This market will include products that are imported into Barbados where appropriate. On some occasions the Commission may define a geographic market to be broader than Barbados, but the Commission will generally only investigate conduct that is likely to have an effect in Barbados.

## Agreements

- 3.4 Several provisions of the Act prohibit certain types of anti-competitive agreements between firms. The Act states that an “agreement” includes any agreement, arrangement or understanding whether oral or in writing and whether or not it is intended to be legally enforceable.
- 3.5 Clearly this definition captures formal agreements between firms, such as written contracts. However, it also encompasses informal arrangements or understandings that may be reached through any form of communication between the parties. Examples include understandings reached during telephone conversations, discussions at social or industry events or decisions made at trade association meetings. In some cases, it may be possible to infer the existence of an agreement, arrangement or understanding through circumstantial evidence such as parallel conduct of seemingly independent firms.

## 4 Anti-competitive agreements

4.1 Subsection 13(2) of the Act prohibits all agreements between enterprises, trade practices or decisions of enterprises or organisations that have or are likely to have the effect of preventing, restricting or distorting competition in a market. These types of agreements are void and parties must not give effect to them.

4.2 Such agreements may include those that:

- Directly or indirectly fix purchase or selling prices or determine any other trading conditions;
- Limit or control production, markets, technical development or investment;
- Provide for the artificial dividing up of markets or sources of supply;
- Affect tenders to be submitted in response to a request for bids;
- Apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or
- Make the conclusion of contracts subject to acceptance, by parties other than the offeror, of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.

4.3 However, not all agreements that could potentially fall under this subsection are prohibited. In particular, subsection 13(2) will not apply to categories of agreements where the Commission is satisfied that the agreement contributes to the improvement of production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit.

4.4 The improvements that are referred to above essentially relate to efficiencies that are likely to result from the agreement. Examples might include, cost savings resulting from the achievement of economies of scale or scope, reduced transportation costs, increased use of superior technology or savings in distribution or research and development. In some instances they may also

include improvements in product service or quality. To satisfy this test some of the benefits from the arrangement must be passed on to the consumers of the product in question. The Act also makes it clear that the restrictions imposed by the agreement must only be those restrictions that are indispensable to obtain the benefits; or

- 4.5 Section 13(2) will also not apply where the agreement in question does not afford the enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.



## 5 Abuse of a dominant position

- 5.1 Section 16 of the Act prohibits the abuse of a “dominant position” by a firm. A firm is said to hold a dominant position in a market if, by itself or together with an affiliated company, it occupies such a position of economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors. It is important to recognise that the Act does not prohibit a dominant position, only its abuses.

### Determination of dominance

- 5.2 To assess whether or not a firm holds a position of dominance the Commission will firstly define the relevant market and consider a number of factors including:

- The market share of the relevant firm. If a firm has a large market share, then it may not be effectively constrained by its existing competitors.

As a general guide, the Commission considers a firm that has had a sustained market share of 50% or more is likely to be in a position of dominance, whereas a firm with a market share of less than 40% is less likely to hold a position of dominance. While market share is an important factor it is not, by itself, determinative of dominance.

- Barriers to new entry. These are any feature of the market that places an efficient new firm at a significant disadvantage compared with the existing firms. For example, high sunk costs, legal or regulatory restrictions, access to scarce resources controlled by incumbent firms, economies of scale or scope, high levels of product differentiation and brand loyalty, and/or the possibility of retaliatory action by powerful incumbents.

If barriers to new entry are low, then a large and seemingly powerful firm may in fact be significantly constrained by potential new competitors, including importers, who might easily enter the market;

- Other competitive constraints such as strong countervailing power from the firm’s customers.

Abuse of dominance

5.3 An enterprise with a dominant position will abuse that position if it acts so as to impede the maintenance or development of effective competition in a market. In determining whether or not an abuse has occurred the Commission will consider whether or not the conduct is likely to adversely affect the competitive process and harm consumers either directly or indirectly.

5.4 The Act sets out various types of conduct that may, in certain circumstances, constitute an abuse of a dominant position in a market. A firm may abuse a dominant position if it takes action to:

- restrict the entry of a firm into a relevant market;
- prevent or deter another firm from engaging in competitive conduct;
- eliminate a firm from a market;
- impose unfair purchase or selling prices that are excessive, unreasonable, discriminatory or predatory;
- limit the production of goods or services to the prejudice of consumers;
- make the conclusion of agreements subject to the acceptance by other parties of unrelated supplementary obligations;
- engage in exclusive dealing, market restriction or tied selling; or
- use any other measure unfairly that allows it to maintain its dominance.

5.5 Exclusive dealing, market restriction and tied selling are particular types of conduct that are defined in the Act. In summary:

- exclusive dealing is where a supplier of goods requires or induces a customer to deal primarily in goods supplied or designated by the supplier. For example, a requirement that a customer not stock competitors' products;
- market restriction is a practice whereby the supplier of goods requires a dealer to only supply goods in a defined market. For

example, where a supplier states that a dealer can only resell the goods in a particular geographic area;

- tied selling is where a supplier requires or induces a customer to also obtain other goods from the supplier or a nominee, or refrain from using, in conjunction with the goods, any other goods that are not of a brand or manufacture designated by the supplier. For example, the supplier requires a customer to purchase a “bundle” of goods from it or from some other person.

#### Exemptions to Abuse of dominance

5.6 An enterprise will not be considered to have abused a dominant position in any of the following circumstances:

- if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress (i.e. enhancing efficiency) and consumers were allowed a fair share of the resulting benefit.

This exception is similar to the exception discussed in paragraph 4.3 above;

- if the likely effect of its behaviour in the market is the result of its superior competitive performance.

This exception makes it clear that conduct which stems from the superior efficiency of a firm is not an abuse. For example, if a firm is able to offer lower prices or higher quality products than its competitors because it is more efficient, this will not be an abuse; or

- if the firm is seeking to enforce an intellectual property right, except if the exercise of the right has the effect of substantially lessening competition and impeding the transfer and dissemination of technology.

## 6 Resale price maintenance

- 6.1 Resale price maintenance is prohibited outright by the Act. In simple terms resale price maintenance is conduct where a supplier takes action to try to ensure an independent dealer does not try to resell the goods below a price specified by the supplier.
- 6.2 There are a number of ways that a supplier might illegitimately try to impose or maintain a minimum resale price for its goods upon an independent dealer. For example, it may request a dealer to agree not to sell below a minimum price. Alternatively, it might withhold supply from, or otherwise discriminate against, dealers who are, or are likely to, sell below the desired minimum price.
- 6.3 The provisions of the Act do not prevent a supplier publishing a recommended retail price provided that it is made clear that the product may be sold at a lower price without sanction.
- 6.4 The primary sections of the Act prohibiting resale price maintenance are summarised below:
- Section 24 of the Act prohibits any agreements between suppliers or between dealers that are designed to enforce a minimum resale price for a good;
  - Section 25 prohibits any agreement between a supplier and a dealer to the extent that it tries to establish a minimum price to be charged upon the resale of a good;
  - Section 27 prohibits a supplier from maintaining a minimum resale price by withholding goods from a dealer who has, or is likely to, resell them below a specified minimum price;
  - Section 33 states that a person who supplies goods or services must not attempt to influence an increase, the maintenance of, or discourage a reduction of the price at which another person supplies those goods or services. A supplier must also not refuse to supply or discriminate against another person because of the low pricing policy of that person.

6.5 It will generally not be a breach of the resale price provisions where a firm imposes a minimum resale price upon:

- an affiliated company; or
- an agent of that firm.

## 7 Cartels, bid-rigging, conspiracies and boycotts

- 7.1 Probably the most serious of all anti-competitive offences are cartel type agreements and other conspiracies between otherwise competitive firms ordinarily designed to reduce competition and artificially boost profits at the expense of consumers and the economy. Accordingly the Commission will vigorously enforce the Act where it finds evidence of “hard core” collusion.
- 7.2 The most common form of a cartel type conspiracy between competitors will involve one or more of the following elements:
- price fixing;
  - output restriction;
  - market or customer sharing; or
  - bid-rigging.
- 7.3 Price fixing between competitors can include agreements or understandings relating to the price that will be charged, increases in price levels, or limitations upon discounts that will be offered.
- 7.4 Another way for competitors to artificially inflate prices and limit consumer choice is to agree to restrict production. This can be done, for example, by setting production quotas that must not be exceeded or by agreeing not to produce certain products.
- 7.5 Market or customer sharing agreements or bid-rigging essentially involves competitors agreeing to distort the ordinary competitive process. For example, competitors may agree not to compete in certain geographic areas, or agree not to “poach” each others’ pre-existing customers, or agree to allocate tenders among themselves.
- 7.6 There are a number of sections of the Act that prohibit conspiracies between competitors. However, the primary provisions are:
- section 34, which prohibits conspiracies, combinations or agreements that unduly restrain or injure competition;
  - section 35, which prohibits bid-rigging agreements; and

- section 13, which prohibits anti-competitive agreements.

7.7 Another type of agreement between competitors that is prohibited by the Act are “exclusionary provisions”. In simple terms an exclusionary provision in an agreement between otherwise competitive persons that has the effect of restricting or limiting their dealings with particular persons, for example, where competitors agree not to supply a product to a particular customer. Exclusionary provisions (which are sometimes referred to as primary boycotts) are prohibited outright by section 14 of the Act.

## **8 Interlocking directorships**

- 8.1 Section 23 deals with the situation where a director serves on the board of directors of two or more companies that are significant competitors. If this occurs and the director's conduct has the effect of welding together the policies of those companies in a way so as to significantly reduce competition between them, the Commission will take action to ensure that the director serves on only one of the boards of the relevant companies.



## 9 General Exceptions from the Act

9.1 There are certain commercial activities to which the Act does not apply. These general exceptions are set out in subsection 3(1) of the Act. In summary the exceptions include:

- conduct of employees for their own reasonable protection as employees;
- arrangements for collective bargaining between employers and employees for the purpose of agreeing terms and conditions of employment;
- the making or giving effect to an arrangement that relates to the use of certain intellectual property rights, subject to subsection 16(4);
- conduct that is authorised by the Commission under Part V of the Act;
- activities expressly authorised or required under any treaty or agreement to which Barbados is a party;
- activities of professional associations designed to develop or enforce standards of competence reasonably necessary for the protection of the public;
- such other business activity declared by the Minister by order subject to affirmative resolution.

## 10 Fair Trading Commission Investigations

- 10.1 Section 5 of the Act gives the Commission a broad authority to carry out inquiries or investigations related to the administration of the Act and to take action to prevent anti-competitive conduct.
- 10.2 The Commission is likely to receive information or complaints about alleged anti-competitive practices of firms from a variety of sources. These may include:
- competitors;
  - consumers;
  - current or former employees;
  - businesses;
  - the media;
  - individuals;
  - anonymous sources;
  - Government departments or authorities;
  - the Community Competition Commission or a competition agency of a CARICOM member State; and
  - other foreign agencies.
- 10.3 The Commission may also initiate its own inquiry or investigation into an industry or the practices of a firm where it considers it appropriate to do so.
- 10.4 A Commission inquiry into the conduct of a firm or an industry is a less formal process than an official investigation and will be conducted on a voluntary and cooperative basis, where this is possible. The Commission will normally make an inquiry in writing and may seek answers to questions or other information from firms or particular persons. On some occasions the Commission will ask to meet with industry participants to discuss or explain issues that have arisen. However, the Commission will not use its investigative powers when making an inquiry.

- 10.5 In appropriate circumstances the Commission will initiate a formal investigation into the alleged conduct of a firm or firms. If the Commission seeks information from a company or individual after an investigation has commenced, it will inform that person of the facts of the investigation.
- 10.6 The Act gives the Commission a number of investigative powers that are designed to enable it to conduct its investigations efficiently. In summary these powers include the ability to:
- compel a person to provide information to the Commission (such as written answer to questions);
  - compel a person to provide documents to the Commission;
  - compel a person to give oral evidence before the Commission; and
  - enter and search premises, and to inspect and remove copies of documents.
- 10.7 Persons who are being investigated by the Commission should be aware that there are a number of offences directed at anyone who interferes improperly with a Commission investigation. For example, it is an offence to obstruct an investigation or to give information to the Commission that is known to be false or misleading. Persons who commit these criminal offences are subject to monetary fines, terms of imprisonment or both.
- 10.8 The Commission will use its investigative powers only when it is appropriate to do so and will always encourage all persons who are under investigation to cooperate voluntarily and fully with the Commission.
- 10.9 If, at any stage of an investigation or inquiry, the Commission forms the opinion that the matter does not justify further investigation or inquiry, the Commission may discontinue the investigation or inquiry. When the Commission discontinues an investigation or inquiry it will ordinarily notify the relevant parties.

### **Confidentiality**

- 10.10 Information provided to the Commission by persons contacted by it in the course of an inquiry or investigation will be regarded as confidential, in accordance with section 49 of the Act, except insofar as disclosure of the information is considered necessary for the Commission in the proper discharge of its functions.

10.11 It will often be important for the Commission to use information to properly carry out its inquiry or investigation. The Commission will not be bound to maintain the confidentiality of material where:

- it has already been published in the public arena; or
- the person providing the information waives confidentiality in respect of the information.

10.12 The Commission may also in some cases provide information to other competent authorities within the Caribbean Community whilst maintaining and protecting its confidentiality.

### **Completion of the investigation**

10.13 After completing an investigation the Commission will assess all of the evidence before it and consider whether or not a contravention of the Act has occurred.

10.14 When the Commission is of the opinion that no contravention has occurred, it will notify the affected parties of its decision in writing and discontinue the investigation. The Commission may also elect to notify other interested parties and inform the public of its decision and its reasons. The Commission can reopen an investigation at any time, particularly if new and important evidence comes to its attention.

10.15 When the Commission considers that a contravention has occurred then it may take one of, or a combination of, the following actions after taking into account all of the relevant circumstances:

- negotiate an agreed administrative resolution of the matter with the affected parties;
- make a decision and give directions in accordance with its powers;
- institute proceedings in the High Court seeking Court ordered remedies.

### **Powers of the Commission**

10.16 The powers of the Commission that may be exercised for the purpose of carrying out its function under the Act after completing an investigation are set out in section 6 of the Act. Relevantly, this includes the power to:

- declare business practices to be abuses of a dominant position;

- prohibit a firm from withholding supplies;
- prohibit the making of or giving effect to an anti-competitive agreement;
- prohibit the attachment of extraneous conditions to any transactions; and
- prohibit price discrimination or resale price maintenance.

10.17 Some other sections of the Act also specify in more detail the action that may be taken by the Commission in response to certain anti-competitive conduct. For example:

- where the Commission formally determines that an agreement or trade practice is anti-competitive under section 13 or 14 of the Act, it will serve a notice on the parties to the agreement or trade practice requiring them to cease the practice or terminate the agreement;
- where the Commission makes a decision that a firm has abused its dominant position under section 16 of the Act, the Commission will prepare a report setting out the practice(s) that constitute the abuse. It will also provide a copy of this report to the relevant firm and direct the firm to cease the abusive practice within a specified timeframe.

In addition to the above:

- if the abuse constitutes tied selling, the Commission will issue a written notice directing the enterprise concerned to discontinue the practice;
- if the abuse constitutes exclusive dealing or market restriction and this conduct is likely to substantially lessen competition in the relevant market then the Commission may direct the firm to discontinue the conduct and require it to take such other action as the Commission considers necessary to restore or stimulate competition.

## Decisions and directions of the Commission

- 10.18 As outlined above, the Act gives the Commission the power to give certain directions designed to stop anti-competitive conduct after it has made a decision that the Act has been contravened.
- 10.19 A decision by the Commission that a contravention has occurred will be in writing and will describe the conduct or agreement that constitutes the contravention and the reasons for the decision. The decision will be served on all relevant parties.
- 10.20 Before making a final decision that the Act has been contravened the Commission will prepare a draft decision and provide copies to all relevant persons. These persons will be given an opportunity to make written and/or oral representations in response to the draft decision within a specified time period. After receiving and considering these representations the Commission will prepare the final decision, which may confirm or vary the draft decision.
- 10.21 Any proposed directions of the Commission will usually accompany the draft decision and final decision. These directions may require the party or parties concerned to modify or terminate the offending agreement or conduct. In appropriate circumstances directions may also require positive conduct by a contravening party (for example, if the conduct constitutes an abuse involving exclusive dealing or market restriction the Commission may direct a firm to take necessary action to restore or stimulate competition). In most cases the direction will be drafted so as to have immediate effect. In some cases a direction will specify a timeframe in which the required steps are to be taken by the persons involved.
- 10.22 The final decision and direction of the Commission will be made pursuant to section 30 of the *Fair Trading Commission Act, 2000* - 31.

## Enforcement and appeals of Commission decisions and directions

- 10.23 Where a firm fails to comply with a Commission direction the Commission will institute proceedings in the High Court to enforce the direction. The Commission will always seek to ensure that its directions are fully complied with.
- 10.24 The Act also allows a person who is dissatisfied with a finding of the Commission a right of appeal to a Judge in Chambers. The appeal must be lodged within 15 days after the receipt of the notice from the Commission. The

Judge in Chambers may confirm, modify or reverse the Commission's finding or any part of it.

### **Court enforcement of the Act**

10.25 The ultimate enforcement powers under the Act are given to the High Court. The powers of the Court include:

- The power to enforce Commission directions;
- The power to impose injunctions. An injunction is essentially a Court order to restrain a person from contravening the Act;
- The power to impose fines. The maximum fine for an individual involved in a contravention of the Act is \$150,000. The maximum fine for a business involved in a contravention of the Act is ordinarily \$500,000;
- the power to impose a term of imprisonment of up to 6 months for an individual involved in a contravention of the Act.

10.26 If a person does not abide by an order of the Court they will be in contempt of Court and may be subject to additional sanctions including a fine or a term of imprisonment.

10.27 Where the Commission has completed an investigation and considers it appropriate to do so, it may elect to institute proceedings in the High Court without making a decision or giving any directions to the persons that have allegedly contravened the Act.

10.28 In these circumstances the Commission is not required to consult with potentially affected parties regarding its decision to institute proceedings, although it may choose to do so.

10.29 When considering whether or not to institute proceedings without giving directions, the Commission will have regard to all of the relevant circumstances of the matter, including:

- the urgency of the matter and the best procedure to obtain fast and effective relief;
- the seriousness of the alleged offence; and

- the outcomes sought by the Commission.

10.30 Where the Commission believes that the offence(s) are serious enough to warrant the imposition of Court ordered injunctions, fines and/or terms of imprisonment for executives, then it must institute proceedings.

### **Damages**

10.31 In addition to any fines or other relief obtained by the Commission or ordered by the Court, a firm or individual who contravenes the Act may be liable to compensate any person who was harmed by the contravention in accordance with section 44 of the Act.