
Fair Trading Commission

Guide to Authorisation of Anti-Competitive
Conduct

The guideline is designed to assist businesses, their advisers and the public in understanding competition law enforcement in Barbados. It outlines the Fair Trading Commission's administration and enforcement policy on authorisation of anti-competitive business conduct under the Fair Competition Act.

This document is produced for guidance purposes only. It is not a substitute for the Fair Competition Act 2002-19 nor the regulations and orders made under it. Persons in doubt about how they may be affected by the legislation should seek legal advice.

Table of Contents

1	Introduction	3
2	Timelines	3
3	Grant Of Authorisation	3
	What can be Authorised	3
	What does an Authorisation do	4
	Whether to apply for Authorisation.....	4
	Who can make an application for Authorisation	5
	Who will be protected	5
	The Public Benefit Test	5
	The Market	6
	Public Benefit	6
	The Public Nature of the Benefit.....	7
	Public Detriment	8
	Reasonable	8
	Duration Of An Authorisation.....	8
	Conditional Authorisation.....	9
4	The Application Procedure	10
	Making An Application	10
	Confidentiality.....	10
	Public Consultations.....	11
5	Revocation or Amendment of an Authorisation	12
6	Commission Decisions	13
7	Register of Authorisations	13
8	Authorisation Form	13

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 One of the key objectives of the Act is to prevent harmful anti-competitive business practices in Barbados, thereby promoting more competitive and efficient industries for the benefit of consumers and businesses alike.
- 1.3 However, the Act recognises that the goals of society are not always best achieved by perfectly competitive markets. For example, some commercial practices that restrict competition may not be harmful to society because they produce significant offsetting benefits to the public. To ensure this type of beneficial business conduct is not prohibited, exemptions from the application of the Act are available.
- 1.4 To obtain an authorisation, a person involved in the proposed conduct must make an application to the Commission and demonstrate that the conduct produces net benefits to the public. This guideline provides information to businesses and their advisors on how to make such an application and how the Commission will assess it.

2 Timelines

- 2.1 On receipt of a completed application the Commission will use its best endeavours to ensure a decision is reached within three months. Applicants are therefore encouraged to provide all relevant information and material, to the Commission to justify its claims.

3 Grant of Authorisation

What can be authorised

- 3.1 Under Part V of the Act the Commission can authorise any agreement between two or more businesses or any business practice of a firm that may breach the Act. In this guideline agreements and businesses practices are referred to collectively as “conduct”.

3.2 Section 3 of the Act states that:

“This Act shall not apply to the entering into or carrying out of such agreement as is authorised by the Commission under Part V or the engagement in such business practice as is so authorised”.

What Does an Authorisation do

3.3 An Authorisation protects a business from what would otherwise be a breach of the Act.

3.4 Accordingly conduct that is authorised by the Commission in accordance with the test and procedure described below will *not* contravene the Fair Competition Act.

3.5 An authorisation cannot provide a general exemption from the Act to any person. Only the conduct specifically set out in the Commission’s written authorisation decision will be protected.

Whether to Apply for Authorisation

3.6 Before making an application persons should consider the following issues:

- is the conduct likely to breach the Act?
- are there demonstrable benefits to the public which are likely to result from the proposed conduct?
- what is the magnitude of the detriment to the public which is likely to result from the proposed conduct and how will competition be affected?
- will there be a *net* public benefit as a result of the proposed conduct.
- how can the anti-competitive effects be minimised?

3.7 The Commission encourages persons to carefully consider, or seek advice, on whether or not the application is required and appropriate in all the circumstances.

Who Can Make an Application For Authorisation

- 3.8 Section 29 of the Act allows that any person who proposes to engage in conduct which, in that person's opinion, is prohibited by the Act can apply to the Commission for an authorisation.

Who will be Protected

- 3.9 An authorisation will protect all the participants in the conduct.
- 3.10 Where there is more than one party seeking authorisation for conduct arising out of the same or related transaction or transactions there is no need to submit multiple applications. Once that the conduct and all parties seeking authorisation are clearly described and identified, an authorisation can be granted so as to cover and protect each party.
- 3.11 If a party is seeking to obtain authorisation of more than one type of conduct then if the types of conduct are not closely related, such that the Commission should properly consider them separately, more than one application will ordinarily need to be made.
- 3.12 If the Commission grants an authorisation, it will specify the nature of the conduct, the parties protected from action, and time period for which the protection will last.
- 3.13 An authorisation will only take effect after it has been formally granted and a written decision issued by the Commission.

The Public Benefit Test

- 3.14 Section 29(2) of the Act states that the Commission may grant an authorisation where it is satisfied that the agreement or practice is likely to promote the public benefit and is reasonable in the circumstances.
- 3.15 The test requires the Commission to consider any public benefits and any public detriments that are likely to result from the conduct and to weigh these against each other. Only where there is a net public benefit will authorisation be granted.

The Market

3.16 Public benefits arising from conduct associated with an application for authorisation are considered by the Commission in the context of the relevant market for goods or services that will be affected.

3.17 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. The Commission will identify the firms that supply, or could potentially supply, the product or its close substitute in Barbados;
- The relevant **geographic** market or markets. This is the geographic area over which suppliers and buyers compete for the product. The Commission will generally only have regard to public benefits that occur in Barbados. On some occasions it may be necessary for the Commission to review a geographic market to be broader than Barbados.

Public Benefit

3.18 The concepts of public benefit and detriment are the key factors in the authorisation process. An applicant must clearly demonstrate how the conduct will produce a net benefit result for the community. The conduct in question must cause or significantly contribute to the claimed detriment or benefit.

3.19 In determining public benefit the Commission will consider the following

- nature and degree of the expansion of any employment;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- promotion of competition in an industry;
- fostering business efficiency,
- improved international competitiveness and growth in export markets;

- development of import replacements;
- assistance to efficient small business through initiatives which promote competitiveness;
- improvement in the quality and safety of goods and services;
- the supply of better information to consumers and business to permit informed choice in their dealings;
- instances when resources are better allocated so as to reflect the preferences and needs of the community (allocative efficiency);
- instances when fewer resources are used to produce the same level of output (productive efficiency); and
- instances when resources are better used to improve product quality, type or mix in response to changing market conditions (dynamic efficiency).

3.20 The list of matters set out in 3.19 is not exhaustive.

3.21 Whilst the Commission will give great weight to efficiency considerations it notes that some improvements to society are not linked exclusively to enhanced efficiency. For example:

- improvements to the natural environment;
- the promotion of public health and safety;
- improved standards of business behaviour or ethics; and
- the provision of assistance to disadvantaged groups in society.

The Public Nature of the Benefit

3.22 Another important consideration for the Commission in evaluating public benefit claims is to consider who in society is likely to share in the benefit. Where the benefit is likely to be enjoyed by the community at large it will be recognised as a truly *public* benefit. If, however, the benefit is likely to

be enjoyed by a smaller cross-section of the community the Commission may reduce the weight it is given in its analysis. On the other hand, conduct that benefits only a small number of individuals or businesses at the expense of the community will ordinarily not be considered a public benefit.

- 3.23 Finally, the Commission will consider whether or not a claimed public benefit is likely to be sustained over a longer period of time. Benefits to society that are transitory will generally be given less weight.

Public Detriment

- 3.24 When considering any benefits to the public resulting from the conduct the Commission must also analyse any likely negative effects. Business conduct that is likely to contravene the Act will almost always be anti-competitive to some extent. In most circumstances anti-competitive conduct will produce detriments to the public, such as “higher prices”, lower quality products, reduction in the number of effective competitors reduced choice and ultimately reduced efficiency.

- 3.25 Clearly, where the likely harm to society from the conduct is large, the test for authorisation will be more difficult to satisfy than where there is minimal detriment.

Reasonable

- 3.26 To grant an authorisation the Commission must be satisfied that the agreement or practice in question is reasonable or rational in all the circumstances. Ordinarily the Commission believes that any conduct that satisfies the net public benefit test is also likely to be reasonable.

Duration of an Authorisation

- 3.27 The Act states that the Commission will grant an authorisation for a specific period of time. Over time, circumstances and markets change and there will always be a need to reconsider the appropriateness of any authorisation in light of the changed conditions. Accordingly, authorisations will be granted for specific time periods. When considering the proper duration for an authorisation the Commission will have regard to all the relevant circumstances, including:

- the reasonable interests of the affected parties and the public,

- the magnitude of the benefits and detriments involved,
- the history of the industry involved, and
- the likelihood that circumstances will change or that new developments will occur.

3.28 In some situations authorisation may only be required for a short period of time to achieve the desired outcomes. In other circumstances a longer term authorisation will be reasonable and appropriate.

Conditional Authorisation

3.29 The Act states that the Commission may grant an authorisation subject to any terms and conditions it thinks fit. In general terms, the Commission will impose conditions upon an authorisation in the following circumstances:

- where the conditions will help to ensure that the benefits of the conduct will be achieved in a sustainable manner and that they will be enjoyed by a broader cross-section of society; or
- where the conditions will limit the anti-competitive effects of the conduct, or otherwise mitigate any likely harm.

3.30 In this way terms or conditions imposed by the Commission will be designed to ensure that the proposed conduct is clearly in the public interest, making the exemption from the law appropriate.

3.31 In some circumstances the Commission may consider it reasonable and appropriate to grant authorisation for some parts of the proposed conduct and refuse authorisation for other parts. For example, the Commission may consider some aspects of a proposed agreement to be particularly anti-competitive and therefore unsuitable for authorisation.

4 The Application Procedure

Making an Application

- 4.1 A person wishing to make an application for authorisation must fill out the appropriate form and pay the prescribed fee.
- 4.2 The onus is on the applicant to satisfy the Commission that the proposed conduct is in the public benefit and reasonable in all the circumstances. To do this an applicant should provide all relevant information or documents to the Commission and carefully prepare its responses to the questions on the form. Particular attention should be paid by applicants to describing the proposed conduct and justifying the public benefit and detriment claims.
- 4.3 Parties who are considering an application can contact the Commission to have preliminary discussions about the type and extent of material that will be required to support an application.
- 4.4 An application for authorisation can be withdrawn or varied at any time by the applicant before the Commission makes a final decision. However, if an application is withdrawn the fee paid is not refundable.

Confidentiality

- 4.5 All information provided to the Commission by businesses must be treated confidentially by the Commission as dictated by the Fair Trading Commission Act 2000-31. Section 49 of the Fair Competition Act emphasises the sanctity which the Commission must give to corporate information given to it by requiring that information submitted under the Fair Competition Act must be treated confidentially. The Commission will not disclose information except insofar as disclosure of the information is considered necessary for the Commission in the proper discharge of its functions.
- 4.6 To assist the Commission the applicant may request that all or part of the materials submitted to the Commission be held in confidence by the Commission. Any material that is provided to the Commission by the applicant or any other interested party that is considered commercially or otherwise sensitive should be clearly marked as being confidential.

- 4.7 The Commission will carefully consider any confidentiality claims that are made to it. However, there is a statutory requirement that the Commission conduct public consultations and publish a reasoned and public decision. Applicants must be aware that these provisions dictate that the Commission must be able to (a) publicly describe the conduct for which authorisation is sought and (b) set out the substantive arguments in support or against the grant of authorisation. Applicants should therefore endeavour to present this information in a manner that allows the Commission to fulfil these requirements. This type of material will rarely, if ever, be considered confidential by the Commission.

Public Consultations

- 4.8 The Commission will consult on authorisation applications through a transparent and public process.
- 4.9 Before making a decision the Commission will request submissions from parties who may have an interest in or be affected by the proposed conduct.
- 4.10 The Commission will publish a notice in the *Official Gazette* and at least one daily newspaper informing the public of the application and advising interested persons who have an interest in the matter that they may submit written objections to the Commission within a specified time period.
- 4.11 Before issuing a decision on an application for authorisation the Commission will prepare a draft decision. The draft decision will state whether or not the Commission proposes to grant authorisation to the application and set out reasons for the decision. Copies of the draft decision will be made available to the applicant and persons who have made written submissions.
- 4.12 On issuance of a draft decision the applicant and interested parties may request a conference. Conferences will be conducted informally and allow interested parties and the Commission to discuss the operation and effect of the application for authorisation.
- 4.13 After the conference parties will be allowed to make written submissions. The Commission will assess the application taking into account issues raised at the conference and additional submissions.

- 4.14 If a conference is not requested a final decision will be issued by the Commission at any time after expiry of the time for requesting the conference.

5 **Revocation or Amendment of an Authorisation**

- 5.1 Section 31 of the Act states that the Commission may revoke an existing authorisation where:

- the authorisation was granted on information that was false or misleading;
- there has been a breach of any terms or conditions subject to which the authorisation was granted; or
- the circumstances that justified the grant of the authorisation no longer exist.

- 5.2 Section 31 of the Act also states that the Commission may amend an existing authorisation where it is satisfied that the conditions in the market necessitate an amendment.

- 5.3 The Commission will commence the procedure for revoking or amending an authorisation at any time where it is of the opinion that one or more of the circumstances set out above may have occurred. The Commission may receive information about these matters from the public or from its own inquiries.

- 5.4 Before making a decision to revoke or amend an authorisation, the Commission will serve on the applicant a written notice giving the reasons for the possible revocation or amendment. The applicant will be given an opportunity to respond and be heard on the matters in the notice within a specified time period.

6 Commission Decisions

- 6.1 On completion of its inquiries and consultations the Commission will make a decision to either:
- grant the authorisation unconditionally;
 - grant the authorisation subject to terms and conditions; or
 - deny the application for authorisation.
- 6.2 A copy of the written decision with reasons will be served on the applicant and made available to the public.

7 Register of Authorisations

- 7.1 The Commission will keep and maintain a complete register of all authorisations it has granted. The register will be kept at the offices of the Commission and will be available for inspection by members of the public during normal business hours free of charge.

8 Authorisation Form

Application for Authorisation of Anti-competitive Conduct

- 8.1 A fee is required on the filing of the application for authorisation of any potentially anti-competitive agreement or business practice.
- 8.2 The form set out below (Authorisation Form) must also be completed by the applicant.

AUTHORISATION FORM - INSTRUCTIONS

General Instructions:

This form must be completed by an applicant seeking authorisation of any agreement or business practice that it believes is likely to contravene the *Fair Competition Act 2002 – 19*.

The applicant must answer all of the relevant questions. The onus is on the applicant to provide all relevant information and material to the Commission to justify its claims.

Applications must be submitted in typed form. Additional information must be submitted in typed form on A4 paper. Any material that is considered properly confidential must be clearly marked and should be included in an annexure to the main submission.

The application must include a *non-confidential* detailed description of the conduct and the arguments for authorisation.

For the application to be properly lodged, the filing fee must be paid in full. The Commission will not begin to consider any application until the fee has been paid in full.

The applicant should be aware that the Commission will usually request additional information from it and a variety of other sources prior to making its decision. The Commission is required by the Act to conduct public consultations.

All applications must be sent to: Manor Lodge, Lodge Hill, St. Michael, Barbados. If you have any queries, please contact the Commission at (424 0260).

Specific instructions:

Section 1.1

Details to this section must include:

- *full name and contact details for the applicant;*
- *a brief description of the business activities conducted by the applicant;*
- *full details of any companies related to the applicant that could be relevant to this application.*

Section 1.2

Details to this section must include:

- *full names and contact details of any other parties or potential parties to the conduct;*
- *a brief description of the business activities conducted by any other parties.*
- *A general description of the other parties and their business activities will suffice where there are a very large number of other parties or where they cannot be individually identified for other reasons;*
- *full details of any companies related to any other parties that could be relevant to this application.*

Section 1.3

Details to this section must include:

- *a complete, accurate and detailed description of the proposed conduct including copies of any relevant documents or agreements.*

Section 2.1

Details to this section must include:

- what products are involved and what are the closely substitutable products;
- what is the market share of the applicant and any other parties to the conduct;
- who are the other existing market participants and what are their market shares;
- what is the total annual value/quantity of the products sold or acquired in Barbados;
- are there any barriers to new firms entering the market? For example, legal or regulatory requirements, economies of scale or scope, high sunk costs, restricted access to essential inputs. Have any firms recently entered or left the market;
- who are the buyers/sellers of the relevant product;
- what are the geographic boundaries of the market/s;
- describe any other relevant characteristics of the relevant product or market such as the degree of vertical integration or the degree of product differentiation.

Provide relevant materials supporting your claims where possible.

Section 3.4

Details to this section must include:

- *full names and contact details where possible. A general description of the individuals/businesses directly affected is acceptable where there are a very large number of persons or where they cannot be individually identified for other reasons. Applicants may wish to respond to any likely opposition to the conduct by those who may be adversely affected.*

Section 4.1

- *Please refer to paragraph 3.16 to 3.22 of the guideline for assistance in preparing these submissions.*
- *Public benefit claims must be supported by evidence and quantified wherever possible.*
- *The submissions should carefully explain how each claimed benefit is linked to the conduct. Claimed benefits that are likely to occur without the authorisation will be discounted or disregarded by the Commission.*
- *If not included elsewhere, the submissions should carefully identify who will benefit from the conduct and to what extent.*



AUTHORISATION FORM

1. GENERAL INFORMATION	
1.1	Provide details of the Applicant.
1.2	Provide details of all other parties to the proposed conduct.
1.3	Full particulars of the conduct.

1.4	How has the conduct been adjusted to minimise anti-competitive effect
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2. MARKET

2.1	Describe the market or markets for goods or services (products) supplied in Barbados that is likely to be affected by the conduct. In particular, to the best of your knowledge:
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3. COMPETITION AND DETRIMENT

3.1	What is the degree of price, and other competition in the market or markets? Are there are any circumstances that limit the degree of competition in the market or markets?
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3.2	To what extent do imported products compete in the market and what is the market share of imported products? Are there any relevant trade restrictions affecting the level of imports (such as quotas, tariffs or duties)? Are there any other factors limiting the degree of import competition (such as perishability of the product, high transportation costs, product standards or quarantine requirements)?
3.3	How will the conduct affect competition in the market. In particular, to what extent will the conduct affect price levels, product quantity, product quality, consumer choice and efficiency in Barbados.
3.4	Provide details of the individuals/businesses/organisations directly affected by the conduct. Indicate how the public in general will be affected whether adversely or beneficially, and to what extent.

4. PUBLIC BENEFITS

4.1 Provide details of all claimed public benefits that are likely to result from the conduct.

4.2 Explain why the public benefits are likely to outweigh any public detriments, particularly any anti-competitive effects.

5. REASONABLE

5.1 Explain why the proposed conduct is reasonable or rational and should be authorised in all the circumstances. Give details and reasons for the period of time for which authorisation is sought, and the reasons why the period is considered necessary.

6. OTHER SUBMISSIONS

6.1 Please provide any other material or submissions relevant to the application.

6.2	Are there any persons you believe the Commission should contact in relation to this matter?
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7. CERTIFICATION AND SIGNATURE

I have
PRINT FULL NAME PRINT POSITION/TITLE
reviewed the matters reported in this application and appendices and certify that the information contained in these documents is complete, true and accurate.

Under Section 42 of the Fair Competition Act 2002-19 it is an offence to give false or misleading information to the Commission.