



**ESSENTIAL KNOWLEDGE, ADVICE &  
PROCEDURAL CLARITY IN COMPETITION  
LAW FOR STATE COUNSELS**

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

1. Introduction
2. Commercial Activity
3. Public Procurement and Competition
4. Bid Rigging
5. Abuse of Dominant Position
6. Cartels
7. Mergers
8. What's Next?
9. Call to Action



TODAY'S  
AGENDA

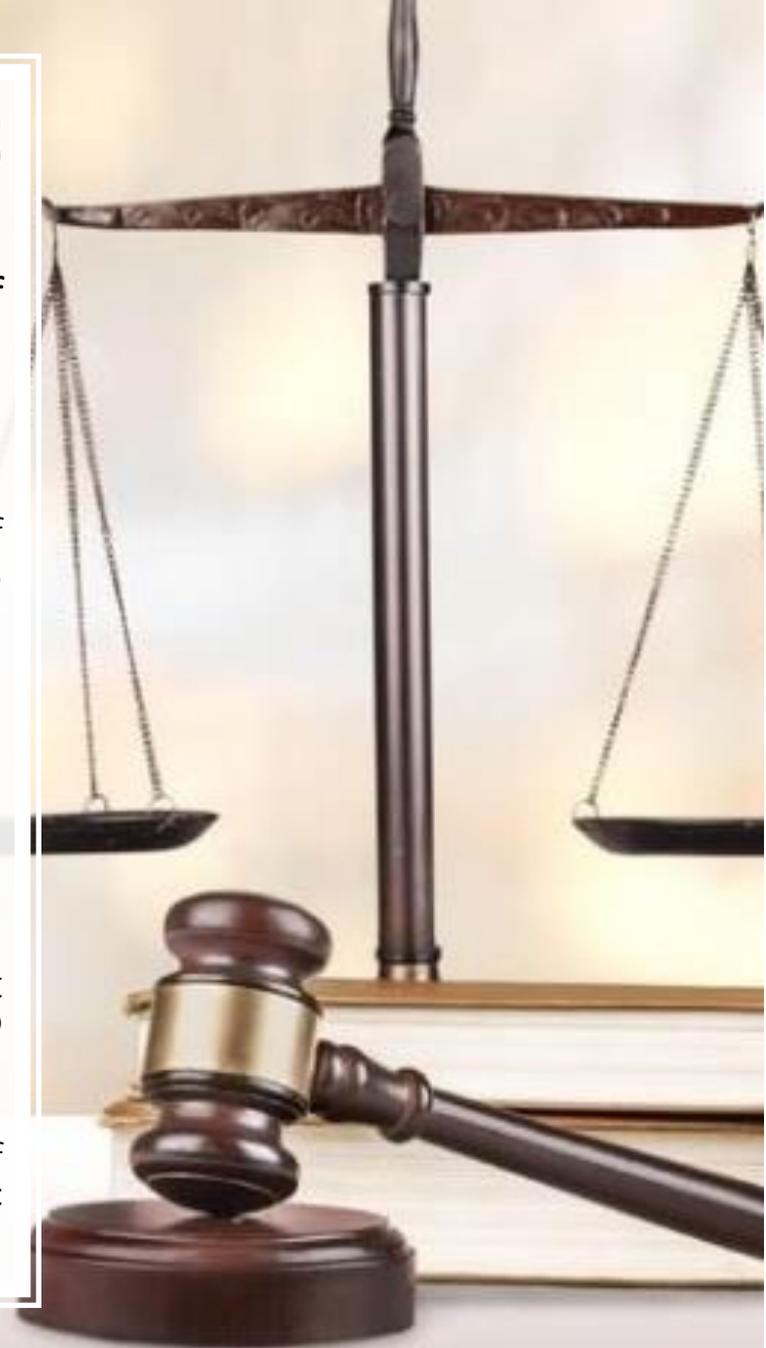


Section 2 of the Fair Trading Act, “enterprise”, means an individual, partnership or body (corporate or incorporate) engaged in business.

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

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

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



# Commercial Activity

**The Fair Trading Act will apply to public bodies/authorities  
who are involved in commercial activity**

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Which of the following sector(s) does not involve commercial activity in its operations?



A. Energy Services

B. Finance

C. Agriculture

D. Both A and C



**A public body should ask itself the following questions for each of its activities separately**

- Am I offering or supplying a good or service, as opposed to, for example, exercising a public power?
- If so, is that offer or supply of a 'commercial' rather than an exclusively 'social' nature?
- If the answer to both these questions is yes, then for the purposes of that activity (and any related upstream purchasing) the public body is likely to be regarded as an enterprise subject to the provisions of the Fair Trading Act.

**The pursuit of 'profit' is not by itself a determining factor when deciding whether a course of action or conduct amounts to being a commercial activity.**



Exercise of certain public powers are deemed not to involve a supply of goods/services.



Profit making activities in competition with private sector companies may be interpreted as commercial activity.



Non-profit making activities can also be commercial if they are or could be provided by the private sector.



Upstream purchasing will be considered an economic activity if the purchased goods/services are subsequently used to conduct an economic activity downstream.

**Competitive neutrality** is the principle that government should compete with private business on an equal footing

### External

- ❑ A level playing field with private companies is essential to foster competitive markets which create efficiencies and can also lead to open international trade and investment climate.
- ❑ It can be undermined by the provision of selective subsidies or other forms of support/State Aid, the setting (or enforcement) of favourable public procurement rules, or the setting (or enforcement) of favourable market regulations or governance rules.
- ❑ Are your commercial activities:
  - Seeking to prevent, restrict or distort competition?
  - Hindering economic recovery especially during the Covid 19 pandemic?
  - Creating barriers to entry in the market?
  - Supporting national champions and zombie firms to the detriment of infant industries or SMEs?
  - Promoting or stifling innovation?
- ❑ Are your commercial activities directly/indirectly contributing to T&T's underperformance in the Global Competitiveness Index (GCI)?

### Internal

(Examine your employment contracts/consultant/independent contractor agreements)

During employment, the employee should not:-

- Work for a competing business
- Set up in competition with his employer
- Use the commercially sensitive information gathered during the course of his employment for his private activities.

Once an employee leaves employment, he will generally be free to work for himself or another in competition with his ex-employer. This will in most cases involve some preparatory steps being taken before the employment ends. However, there is no definitive list of what is and is not permitted by way of preparatory steps during employment and each case will be considered on its facts.





COMPETITION  
LAW

**TIPS!**

Each Public Body must assess its own competition law risks and determine what is required to ensure compliance.

How? Review your existing contractual and non-contractual arrangements/ agreements to determine whether there are any existing concerns.

A review of your business arrangements will offer an opportunity to consider the conduct of your competitors, suppliers and other business contacts to determine whether there is any detriment to the consumer or the economy (this can be pecuniary or non-pecuniary in nature).

An effective compliance program should reflect industry specific risks, business specific risk and the jurisdictional context.



## Advice for State Counsels/Head of Legal/Director, Legal Services etc.

- Establish ethics and compliance as a strategic priority;
- Gain Board buy-in and position your programme as a top priority ;
- Learn the key steps to design and implement a programme tailored to your organization;
- Measure and demonstrate a successful and effective programme to your leadership.

## Role of the Board

- Make sure all Board members understand their responsibilities with respect to the programme, and applicable regulations;
- Report on the content and operation of the programme on a regular basis (at least quarterly);
- Submit the compliance budget and staffing levels for review and approval;
- Establish an escalation process to ensure timely reporting and resolution of matters;
- Provide effective and role-relevant training;
- Make the Board aware of risk assessments and board-specific risks to the organization;
- Update the Board members on emerging trends and topics of interest.





Identifying and mitigating competition  
law risks in your organization



## ❑ **Forms of Competitor Contact include:**

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

❑ **Agreements with Competitors-** some types of agreements entered into between competitors such as information exchange agreements or joint purchasing or selling may have the effect of preventing, restricting or distorting competition in breach of the Act.

❑ **Agreements with Non-competitors**—agreements with suppliers or distributors could also be anti-competitive in nature if they contain certain types of provisions such as resale price maintenance or exclusivity provisions.



## Look out for key buzz words/phrases



**Limits the number or range of suppliers**-Grants exclusive rights for a supplier to provide goods or services.

- Establishes a license, permit or authorization process as a requirement of operation.
- Limits the ability of some suppliers to provide a good or service.
- Significantly raises cost of entry or exit by a supplier.
- Creates a geographical barrier for companies to supply goods, services or labour or even invest capital.

## Limits the ability of suppliers to compete

- Limits the sellers' ability to set prices for goods and services.
- Limits freedom of suppliers to advertise or market their goods and services.
- Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.
- Significantly raises costs of production for some suppliers relative to others.



## Information that should not be shared

- Information on prices, price formulae, costs, business strategy, rebates, discounts, volumes, productivity levels.
- Information on customers, suppliers, marketing strategy, sales volumes and targets.
- Future strategy and plans.

## Information that can be shared

- ✓ Published industry statistics
- ✓ Annual reports
- ✓ Legislative developments
- ✓ Historic cost and sales data
- ✓ Information in the public domain
- ✓ Aggregated data



**ACTION PLAN**

Revisit the “Publications” and “Resources” Tabs on your organization’s website to ensure that there is no commercially sensitive information inadvertently placed there etc.

## Agreements can be:

- **Explicit:** “We all need to agree that we are going to increase our prices by 10%”
- **Implicit:** “Our company’s not interested in this job, so we’re not going to bid too aggressively but we are interested in the job coming up at the next round”
- Any form of understanding in writing (letter, e-mail), verbal or a “gentleman’s agreement”
- Implied from recommendations issued by a trade association and followed by members
- Don’t have to be effective – the intent to distort competition is sufficient

## Mind your language! Applicable to those organizations with competitors and those involved in commercial activities

Remember nothing is ever “off the record”

Communication = letters, e-mail, internal memos, social media, etc

- ⊗ Don’t speculate whether an activity is legal;
- ⊗ Don’t imply you have “inside” or “confidential” information on a competitor;
- ⊗ Don’t use ambiguous or inappropriate language for example, Market dominance;
- ⊗ Don’t communicate with your competitor without a legitimate business reason;
- ⊗ Don’t communicate with your competitor indirectly e.g. via a common supplier;
- ⊗ Don’t use phrases such as destroy or delete after reading, no copies / records, this is off the record.



# What does this mean in practice?

## Bid Rigging

- Letting a competitor win a job in return for him letting you win a job
- Agreeing with a competitor that one of you bid intentionally high or not bid

## Price Fixing

- Agreeing with a competitor to charge the same price, eliminate discounts or refuse to go below a minimum price

## Price fixing (customers)

- Basic rule: we cannot fix the price or rules at which customers resell products:
- Fixed resale prices (i.e. Recommended, minimum or maximum resale price)
  - Export bans (i.e. Restricting to who or where the customer resells the product)

## Market Allocation

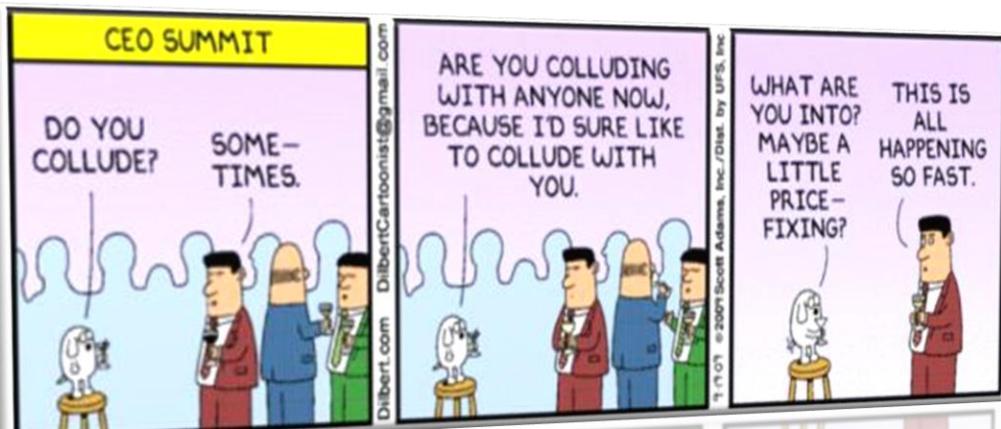
- Only soliciting a particular type of customer or region while competitor only solicits another
- Dividing up customers among competitors in any way

## Abuse of Dominance

- Excessive or predatory pricing (i.e. pricing below costs without a legitimate business reason)
- Refusal to supply products or output restrictions
- Tying (i.e. forcing a buyer to purchase one product before supplying another)

## Exchange of Confidential Information

- Sharing information concerning (future prices, margins, discounts, credit or other terms)
- Sharing information on commercial strategies, market share or allocation of customers/markets



"That should read \$20.00. I'd make the correction, but don't want to be accused of price-fixing."



# Bid Rigging



- ❑ Bid rigging is a form of anti-competitive behaviour, in part because it normally includes elements of other serious anti-competitive conduct such as price-fixing, the sharing of markets/customers and the exchange of confidential information between competitors.
- ❑ Whether this occurs on government projects or in the private sector, these increased costs are ultimately passed on to the public.

## Bid-rigging

### Warning Signs in Documents Submitted

Similar anomalies in documentation

- Same type of paper
- Same misspellings and grammatical errors
- Handwriting
- Wording
- Calculations and miscalculations
- Alterations
- Bids come from the same place (from the same fax number or email address)

### Similar prices are quoted from different suppliers

- The same price for a long period of time
- Previously different from one another
- Increased price and it is not justified by increased cost
- Eliminated discounts especially in a market where discounts were previously given
- A large difference between the price of a winning bid and other bids





## Observed after the call for bids

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





## Awarding Contracts

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



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



Keeping records allows for comparisons over time and helps staff spot patterns. Letting bidders know that you conduct this level of analysis could help to deter potential bid-rigging.



Conduct interviews with unsuccessful vendors and vendors who no longer offer supply of the product.



# ABUSE OF DOMINANT POSITION



**Examples of behaviour that could amount to an abuse by a business of its dominant position include:**

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

These are no more than examples, and are not exhaustive

**The Commission's Considerations**

- ❑ The dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets.
- ❑ The abusive conduct must cause the anticompetitive effect. Causation should be established by comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur.
- ❑ The anticompetitive effects must be sufficiently significant to create or reinforce market power
- ❑ Detrimental effects on consumers, competitors and the economy alike.



Dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to:-

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- i. Prevent effective competition being maintained in the relevant market
- ii. Affording it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers.

Dominance per se by an enterprise in a relevant market is not unlawful.

Abuse occurs when an enterprise or group of enterprises uses its dominant position in an exclusionary & exploitative manner.

Case 27/76 United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207



## Do's and Don'ts

- Treat similar customers and distributors/vendors/suppliers consistently and without any discrimination and any changes should have proper economic justification.
- Ensure that refusal to supply is discussed in advance with your internal legal department and record the business reasons such as concerns about creditworthiness or shortage of product.
- Provide quantity rebates, which reflect cost savings in economies of scale, and are available to all buyers and without any restriction on buyer's choice of supplier.

X Grant discounts rebates or bonuses only after consulting with CEO and internal Compliance officer.

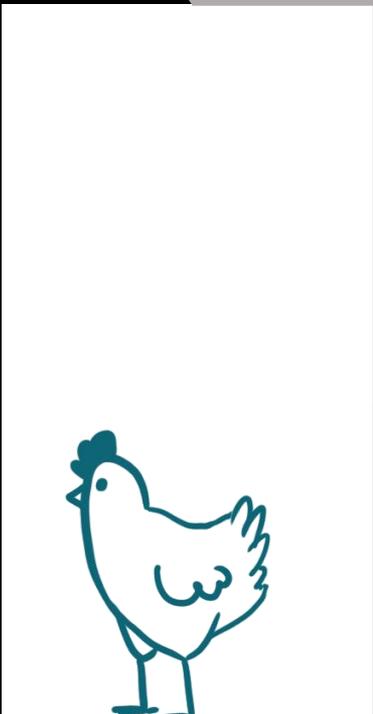
X Pricing should not give a false impression of excessive or predation in market.

X Unreasonably and without any commercially written reason cut off or reduce supplies to an existing customer/supplier.

X Agree to refuse to deal based on discussions or agreements with competitors.

X Do not apply different discounts / rebates for different customers unless it is economically justifiable.

X Grant loyalty rebates or discounts which have the effect of tying a customer to a supplier or any rebates which are based on the percentage of its requirements purchased by a customer.



**Is it cheating or competing? It's your business as Counsel to know the difference...The Curious Case of Cartels**

□ There are certain forms of anti-competitive conduct that are known as cartel conduct.

They include:

- Price fixing, when competitors agree on a pricing structure rather than competing against each other
- Sharing markets, when competitors agree to divide a market so participants are sheltered from competition
- Rigging bids, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price
- Controlling the output or limiting the amount of goods and services available to buyers.

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

Look out when the supplier:-

- Raises prices by the same amount and at around the same time
- Offers the same discounts or have identical discount structures
- Quotes or charges identical or very similar prices
- Refuses to supply a customer because of their location,
- Uses give-away terms or phrases, such as:

‘the industry has decided that margins should be increased’  
 ‘we have agreed not to supply in that area’, and  
 ‘our competitors will not quote you a different price.’

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

**A cartel may be more likely to exist in an industry where:**

- There are few competitors
- The products have similar characteristics (which leaves little scope for competition on quality or service)
- Communication channels between competitors are already established and
- The industry is suffering from excess capacity or there is general recession.





Mergers may occur in the sector(s) which you regulate and have oversight for or a company in which you are a Board Member/Director, part of the Sub-Committee etc.

## MERGERS

You need to determine how this will impact on your organization's operations.

Remember your 3 Hats? Think as the Counsel, Competitor & Consumer.



# Pre-merger due diligence considerations



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Public Bodies must be vigilant of the risks of sharing information with a competitor before and during merger negotiations. A concern that remains until the merger closes. Effective protocols should be designed and maintained to prevent anticompetitive information sharing.
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If competitively sensitive information must be exchanged for diligence and integration planning purposes, parties should employ third-party consultants and other safeguards that limit the dissemination and use of that information within the parties' businesses.
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State Counsel should fully analyze potential competitive issues raised by the proposed transaction as early as possible. This will allow counsel and clients to articulate a sound business rationale for the merger.
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Anticipate and address customer/competitors' concerns. Impact on employees of target company.
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Identify the regulatory approvals/permits/licenses that may be required (local and/or foreign).
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Would the proposed merger transaction lead to any detriment to the consumer or the local economy? Would it lead to a monopoly being created? Compare the post-merger outcomes with and without the deal.

# NEVER

X Dictate to the merging entity the prices and terms of trade to be offered by it to its customers, or what customers it may not approach.

X Limit the merging entity's participation in other business development opportunities.

X Agree upon prices, sales terms, customers, and geographical areas prior to closing of the merger.

X Avoid the 'gun-jumping' fever

If the investigation does reveal that the target company has engaged in anti-competitive conduct, the acquiring firm is then faced with further difficult choices. Do you forge ahead with the acquisition regardless? If so what are the risks?



Information the Commission may require to better understand the proposed transaction include but is not limited to:

- The rationale for the merger;
- Copies of any documents (including planning documents, due diligence reports, strategy documents, minutes of meetings, customer research, pricing studies, reports, presentations, surveys, analyses, industry/market reports and recommendations) which have been prepared exclusively for the intended merger;
- Details of any arrangements necessary to perfect the merger
- A copy of the agreement prescribing the terms and conditions of the merger or in the alternate the terms and conditions in contemplation;
- Whether there has been any director and/or shareholder dissent with respect to the intended merger.
- A copy of the Business Plans/Business Profile;
- Copies of the Incorporation Documents;
- The parties have assessed or analyzed the proposed merger with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new a product or geographic area, market conditions, market shares and any other factors as deemed relevant to the aforementioned;
- The parties have assessed the likely effect of the proposed merger on local consumers;
- Copies of any market or industry study reports that support the merger (if any); and
- Confirmation whether any foreign regulatory approval is required.



## Post-Merger Considerations

- ❑ Will the merger negatively affect prices and other market conditions?
- ❑ Will the merged entity engage in the following practices:
  - Tied selling and bundling of discounts (if it constitutes an abuse of monopoly power);
  - Unfair selling prices/predatory pricing/discriminatory behaviour;
  - Abusive increase of prices compared with the increase of costs;
  - Engaging in exclusive dealing/market restriction or even seeking to merger/acquire new entrants/nascent pharmaceutical distributors in the local market;
  - Fixing or restricting the resale price of products;
  - Engaging in collusion to prevent the commercialization or supply of affordable product substitutes;
  - Constructing barriers to supply/distribution of goods.





## KNOW YOUR ROLE

- Responding to the Commission's Request Letter for Documents and Information.
- Preparing and Completing a Complaint Form or Merger Application Form to the Commission.
- Representing the Complainant, Defaulter/Providing advice.
- Determining whether the provisions of the Fair Trading Act have been potentially breached.
- Revising/Amending internal Compliance Documents to include Competition Law.
- Reviewing agreements/contracts for anti-competitive clauses.
- Advisory role to Senior Management about the provisions of the Fair Trading Act and its impact on the organization's operations.



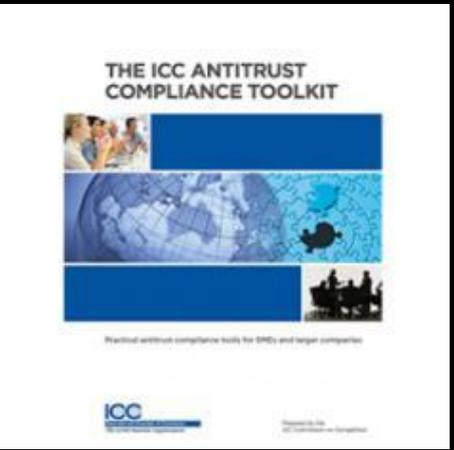
**WHAT'S  
NEXT?**

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**HOMework  
ON THE GO**







CALL TO ACTION



## Report

Report potential breaches of the Fair Trading Act to the Commission.

## Review

Review your existing (and future amendments) governing piece of legislation, Treaties/State to State Agreements for potential conflicts/inconsistencies with the Act.

## Think

Think of the roles of the Auditor General and Joint Select Committees and the questions that may arise about your commercial activities and the monies received.

## Examine

Examine your regional and international counterparts on how they integrate and incorporate competition law into their policies and processes.

## Address

Address anti-competitive practices into your internal Compliance documents/programmes.

## Decide and Consider

Decide how to identify anti-competitive practices, risks and trends, ideally as part of your general risk management process. Consider what controls are needed to manage, minimize or eliminate the risks identified.

## Integrate

In your market/sector studies, questionnaires to customers/consumers and competitors, seek to ascertain the state of the market environment and any anti-competitive issues.

## Embed

Embed a successful reporting culture that supports timely reactions and fair outcomes (updating your case management software).

**CONTACT US**



**THANK YOU**