

Guide to the FAIR TRADING ACT



GUIDE TO THE FAIR TRADING ACT

TABLE OF CONTENTS

FOREWORD FTC.....	3
FOREWORD IDB	4
INTRODUCTION	5
GENERAL CONCEPTS AND PRINCIPLES	5
Objectives of the FTA	5
Geographic and material scope of application of the FTA	6
Exemptions.....	6
Foundational Economic Concepts.....	7
SUBSTANTIVE PROVISIONS OF THE FTA: ANTICOMPETITIVE AGREEMENTS AND PRACTICES	8
What is an agreement?.....	8
Horizontal Agreements.....	8
Trade association meetings and activities	10
Vertical Agreements	12
Abuse of monopoly power	13
What is monopoly power?	13
What is abuse?	13
Prohibited conducts.....	14
Potential pro-competitive effects	17
ENFORCEMENT AND PENALTIES	17
Remedies and penalties	17
Functions of the FTC	18
Investigation of possible offences	18
Powers of the FTC	19
Merger Control.....	19
HOW TO FILE A COMPLAINT	20

FOREWORD FTC

A Guide to the Fair Trading Act

The Fair Trading Commission (“the FTC”) is committed to protecting consumers and businesses from anticompetitive activity while furthering its advocacy agenda by advising stakeholders to refrain from practices such as tied selling and bundling, unfair and excessive selling prices, engaging in exclusive dealing/market restrictions, price fixing, bid rigging and other discriminatory behaviour.

The FTC has also remained steadfast and judicious in ensuring that our merger control regime produces good outcomes for consumers and businesses whilst identifying any anti-competitive practices that may adversely impact productivity, innovation and service quality.

Against this backdrop, the FTC as the vanguard for competition law and policy in Trinidad and Tobago in collaboration with the Inter-American Development Bank (IDB) has developed a Guide to the Fair Trading Act, Ch.81:13 (“the Act”)

This Guide has been formatted in a simplified and practical manner to enable both consumers and the business community to understand the provisions of the Act with the objective being to ensure that all enterprises are made aware of their responsibilities and that consumers and businesses are protected from anti-competitive activity and exploitative abuses of market power.

The Guide provides extensive case examples drawn from jurisdictions such as the United Kingdom, Australia and India and the work of other competition law authorities to highlight relevant concepts and legal tests.

While this Guide is focused on the interpretation of the Act, it also addresses other fascinating aspects of competition law and policy such as industry structures (monopolistic and oligopolistic markets) and market conduct (such as tied selling and predatory pricing) that require a marriage of law, economics and business principles.

The FTC may revisit certain aspects of this Guide in the future based on amendments to the Act, decisions of the courts, market developments and the FTC’s investigative case experience.

The FTC takes this opportunity to express its gratitude to the IDB for its continued assistance and support in the strengthening of the Competition Law Policy Framework in Trinidad and Tobago.

The FTC is committed to continue shaping and enforcing our local competition law and policy thereby fostering a collective, resilient and economic inclusive Trinidad and Tobago which can facilitate competitive outcomes which are important to the country’s developed-nation thrust.

Dr. Ronald Ramkissoon, Chairman of the Fair Trading Commission

FOREWORD IDB

The Inter-American Development Bank, through its Integration and Trade Sector, is pleased to support the Fair Trading Commission of Trinidad and Tobago and the Ministry of Trade and Industry with the drafting of these guidelines for the implementation of the Fair Trading Act.

Contestable markets are fundamental to improve the competitiveness of the economy, higher productivity rates, and increased flows of Foreign Direct Investment. The newly proclaimed Competition Legislation will give additional tools to the TTFTC as a guardian of the correct functioning of markets. Given the technical nature of Competition Law, these guidelines offer the general public an opportunity to understand better the scope of the legislation and the rights and obligations of the different economic actors in the economy.

Competition legislation is not designed to protect competitors from each other. Instead, it is aimed at protecting the competitive process within each market. While it establishes rules and even sanctions for anti-competitive behavior, the main objective is to allow markets to set efficient prices based on free competition. Markets in smaller jurisdictions are often concentrated and potentially can foster cartels or abuses of dominant positions, which impede the construction of competitive prices in the domestic economy. We are confident that the TTFTC will be playing a stronger role as a protector and advocate of competition policy in the years to come.

INTRODUCTION

The purpose of this guide is to help understand the main provisions of the Fair Trading Act (FTA).

The FTA is the first law of its kind enacted in Trinidad and Tobago. It introduces certain provisions of conduct in the market, creates the institution in charge of its enforcement (the Fair Trading Commission or FTC), and determines the penalties and enforcement measures.

The substantive provisions contained in the FTA can be divided into two groups: Provisions regulating the structure of the market, in the form of merger regulations; and provisions that refer to the conduct of enterprises, reflected in the prohibition of anticompetitive agreements and abuse of monopoly power. This guide refers to the second group only. A specific guideline dealing with mergers was issued by the FTC in the year 2020.

The guide is divided into three sections. The first section defines certain basic concepts, relevant to having a better understanding of the FTA. The second section refers to the substantive provisions of the FTA, describing the agreements and conducts that are illegal and, thus, subject to enforcement actions. Finally, the last section summarizes the functions and powers of the FTC, the investigation process, and possible penalties for infringement of these substantive provisions.

In the context of this guide, reference to goods or products should be understood to also cover services. Provisions related to the sale of such products or services include the purchasing markets as well.

GENERAL CONCEPTS AND PRINCIPLES

The following are some general concepts and considerations that are relevant to having a better understanding of the FTA and the way it applies to different economic activities in Trinidad and Tobago.

Objectives of the FTA

The FTA rests on a basic premise: competition in the market stimulates businesses to increase production, lower prices, and promote innovation. In general, it promotes efficiency in the allocation of resources.

Generally, consumers seek to buy the best possible products at the lowest possible price. Businesses, on the other hand, try to satisfy consumer needs at the lowest possible cost. In a competitive market, businesses know that if they fail to satisfy consumer needs at a fair price a competitor might.

In a competitive market, businesses struggle for the preference of customers, with the possibility of losing sales to a competitor if they fail to satisfy their customers' needs. This creates long lasting incentives to increase efficiency, improve the quality of products (or services), innovate, and reduce prices. This translates into an increase in welfare for consumers and the economy in general. For this reason, society is better off if markets behave competitively.

The FTA is an essential tool to promote free and fair competition, seeking to avoid restrictions on the functioning of the market that originate from anti-competitive agreements and abusive

practices. This protects business freedom and provides equal opportunities to all legitimate businesses, and the welfare of consumers.

Geographic and material scope of application of the FTA

The FTA has a wide scope of application. Except for certain exclusions, mentioned below, it applies to all economic activities, and all enterprises - are bound to comply with its provisions regardless of their nationality, place of incorporation, domicile, or main place of business. In other words, all agreements and conducts having effects in the local market can be subject to enforcement actions under the FTA, even if they take place outside the territory of Trinidad and Tobago.

It is also important to distinguish the scope and reach of the FTA from other related but different pieces of local legislation. These complementary, but independent, pieces of legislation, like the FTA, also seek to protect consumers and promote a fair and equitable playing field in commerce, but they do so by different means, and their application and enforcement are under the responsibility of other Agencies or the Courts of Law.

One of the aforementioned areas is *Consumer Protection*. While it shares the goal of protecting a market economy and promoting the best interests of consumers, this area of the law seeks to protect the public from unsafe, false, and misleading trade practices. Generally speaking, the FTA promotes the underlying notion that consumers find a reasonably wide range and variety of options in the market, undiminished by illegal trade practices that eliminate competitors or reduce the intensity of competition in the market. Consumer Protection Laws protect the ability of consumers to freely choose among the options provided by the market, unimpeded by deception or withholding of material information.

Another related but different area is known as *Unfair Competition*, which seeks to eliminate distortions to competition in the market caused by misrepresentations and unfair practices, mostly in the interest of competitors. The activities of interest to unfair competition laws prevent disparagement of competitors and their products, misleading consumers, violation of trade secrets, infringement of intellectual property rights, and others.

Hence, while these other areas also promote a transparent and fair marketplace, their focus and application differ from the prevention of distortions to competition in the market caused by anticompetitive agreements and abuse of monopoly power.

Exemptions

There are certain situations that are exempted from the application of the FTA. These exceptions should be interpreted restrictively. Only the situation expressly mentioned is considered exempted and should not apply to other cases by analogy or interpretation.

The existing exemptions are:

- Combinations or activities of employees for the reasonable protection of their labour rights.
- Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment.

- Agreements related to the use, license, or assignment of intellectual property rights, as well as the application of such provisions. In this case, only the relevant provisions related to such rights will be exempt, and not the remaining stipulations of the agreement.
- Activities of professional associations directly related to the development or enforcement of professional standards of competition reasonably necessary for the protection of the public.
- Activities expressly authorised or required under international treaties or agreements to which Trinidad and Tobago is a party.
- Companies that fall within the purview of the Telecommunications Authority Act.
- Banks and non-bank financial institutions falling within the purview of the Securities Act or declared as such by the Minister by Order subject to affirmative resolution of Parliament.

The FTA is applicable to service providers within the meaning of the Regulated Industries Commission Act. However, with respect to service providers (and within the scope of the regulated services), the FTA will be enforced by the Regulated Industries Commission. The Regulated Industries Commission shall consult with the FTC before deciding on a case involving the review of a merger.

Foundational Economic Concepts

Understanding the FTA implies the application of some general economic concepts, some of which are expressly mentioned in the Act. All of these are relevant in the understanding of how markets work, and in the proper interpretation of the FTA and its application in practical situations:

- **Enterprise:** For the purposes of the FTA, the notion of “enterprise” focuses on the activities carried out by the entity concerned rather than its legal identity. For this reason, an enterprise is any person or entity engaged in an economic activity, regardless of its legal status or the way it is financed. It does not need to have a particular type of legal personality and can apply to not-for-profit entities. The key element to be considered as an enterprise for the application of the FTA is that it is engaged in the supply or demand for goods or services in the market.
- **Market:** A market is the means by which a group of products or services that are close substitutes for one another are offered for consumption in Trinidad and Tobago, or export from Trinidad and Tobago through exchange or trade. Anticompetitive conducts always occur in a market, and for this reason, a relevant market for each investigation should be defined before a breach of the FTA can be found. This definition of the relevant market will identify what products are considered substitutes by consumers (product market), and the geographic area in which these products are sold in similar conditions (geographic market).
- **Perfect competition:** A perfectly competitive market is one in which there are many buyers and sellers, all producing homogeneous products or services, in which consumers

have plenty of information about market conditions, there are no barriers to entry preventing new competition, nor barriers to exit limiting enterprises that wish to exit the market. In such a market, resources are allocated efficiently, and the market defines the price of the products, without any specific market agent holding individual power above the rest.

- **Monopoly:** The antithesis of competition is a monopoly, which is a market where there is only one seller (and a market where there is one single buyer is called “monopsony”). Such a firm is not constrained by any competition, so prices will be higher, quality may be inferior, and allocation of resources in the market shall be inefficient, as compared to price-taking firms in other market structures. Any behaviour or activity practiced by a monopoly or a dominant single entity to further reduce current or potential competition is referred to as unilateral conduct.
- **Oligopoly:** An oligopoly is a market structure in which there are only a few firms, who are likely to know (and be able to anticipate) each other’s behaviour in the market. In oligopolistic markets, collusion is easier to achieve than in unconcentrated markets. While in some oligopolistic markets, competition is aggressive, in others, firms may replicate each other’s conduct in such a way that it leads to higher prices or lower quality, sometimes without express coordination by market participants.
- **Barriers to entry:** A barrier to entry is a cost of producing or which must be borne, or an obstacle that must be surpassed, by a new entrant and is not faced by those already in the market. The identification of entry barriers in a market is key in competition analysis, as it will help determine how likely it is for potential competitors to enter the market and discipline the behaviour of current participants.
- **Anticompetitive conduct:** Any practice or behaviour of existing firms within a market which tends to reduce or discourage competition. Anticompetitive conducts impair the positive effects of competition, such as affordable prices, the availability of goods, the accessibility to quality products, opportunities for firm innovation, and efficient company operation.

SUBSTANTIVE PROVISIONS OF THE FTA: ANTICOMPETITIVE AGREEMENTS AND PRACTICES

Enterprises carrying out business or transactions with effects in Trinidad and Tobago are expected to abide by the FTA. This includes refraining from participating in certain agreements, and from carrying out certain actions. These agreements and conducts are described in this Section.

What is an agreement?

For the purposes of the FTA, the concept of an agreement is wide and encompasses many different forms of coordination, cooperation, or collusion between enterprises. It includes not only expressed contracts (both written and verbal), but also less evident forms by which enterprises may coordinate their actions.

Some of such other forms of coordination include tacit agreements (an implied common understanding, without direct expressions), “gentlemen’s agreements”, concerted actions, and any other possible form of conduct by which a concurrence of the wills of the parties can be identified. Sometimes, non-binding agreements, or even the mere exchange of commercially sensitive information between enterprises may lead to a collaboration or to a joint intention to behave in a certain way and, thus, the existence of an agreement can be inferred.

Horizontal Agreements

Agreements among competitors, that is enterprises operating at the same level of the production/distribution chain, that restrict or prevent competition, also known as “cartel agreements” or “horizontal agreements”, are the most serious type of infractions in the FTA. Through these arrangements, current or potentially competing enterprises agree not-to-compete, to the detriment of their clients and consumers.

Coordination between current or potentially competing firms deprives consumers of the benefits of competition in the market, reducing their welfare mainly by raising prices and/or restricting output. They may also delay or impede innovation and variety in a market. These agreements are fundamentally anticompetitive, and businesses must always avoid them.

The most common examples of cartel arrangements are:

- **Price fixing:** Any arrangement between competitors to fix, raise, or lower prices in which products or services are sold or purchased will be regarded as price fixing. The prohibition to fix prices also covers understandings that affect prices indirectly, such as profit margins, costs, discounts, pricing methods, terms of credit and payment, and others.
- **Market sharing:** Agreements among competitors to stay away from each other’s predefined markets also have a restrictive effect on competition, as they grant each member of the agreement a group of clients which it is free to exploit without competitive pressures from otherwise rival enterprises. This includes agreements covering geographical areas, specific customers or customer groups, or particular products or product groups.
- **Output restrictions:** Agreements reached between competing enterprises that limit, restrict and/or control sales volumes, production or capacity levels, investment, technical development, etc.
- **Collusive tendering or Bid rigging:** These anticompetitive agreements occur when enterprises coordinate their bids in procurement processes. Instead of competing to submit the best possible offer, the infringing enterprises decide among themselves who should be the winning bidder. Forms of bid rigging include agreements regarding prices or terms and conditions to be submitted, on whether a bid will be filed, or any other form of understanding that may affect the result of the procurement process.

- **Information sharing:** The exchange of certain sensitive information may have a direct impact on the method in which products or services are sold or purchased in the market. These may also be a form of cartel agreement. Thus, enterprises must refrain from revealing or exchanging with competitors confidential or strategic information including future plans on pricing, production volumes, costs and suppliers, profit margin, strategic information on customers and the dealings with them, future commercial plans, etc. Public disclosure of such information can be also considered a form of illegal information exchange, also called “price signalling”.

Important note: Both express and implied agreements (and even informal understandings) are prohibited. This means that express agreements, written or verbal, are illegal, but also agreements may be inferred from certain conducts. This includes public announcements regarding future commercial strategies.

**Case Example: Concrete Cartel
The United Kingdom. 2019.**

Three concrete companies were fined guilty with £36 million (and two of their directors were disqualified for 6.5 and 7.5 years) for participating in an illegal arrangement to coordinate their prices, share the market by allocating customers, and exchange competitively sensitive information. The businesses manufactured pre-cast concrete drainage products, essential for roads and railways and used in large infrastructure projects.

In 2006, and to end a “price war” of aggressive competition and low prices, the parties agreed to use a common price list; to refrain from competing for each other’s customers on certain deals; and to regularly exchange competitively sensitive information that allowed them to monitor each other’s actions.

Source: <https://www.gov.uk/government/case-studies/concrete-companies-construction-cartel>

**Case Example: Marine Hose cartel.
Australia. 2010**

Four foreign companies that supplied rubber hosing to transfer oil and gas from production and storage facilities to offshore tankers were found guilty of participating in a cartel that involved price fixing, bid rigging and market sharing.

A committee formed by representatives of all companies met regularly and coordinated the bids to be filed in response to certain tendering processes, allocating the jobs among its members.

Even though the members of the cartel were foreign companies, and key meetings were held overseas, it infringed on local laws because the agreement had effects within the Australian market. Prosecution was the result of a global effort involving the cooperation between the competition authorities of the USA, UK, Europe and Japan.

In 2010 the Federal Court of Australia made orders restraining the parties from repeating such conduct and imposed penalties exceeding \$8 million.

Source: <https://www.accc.gov.au/business/anti-competitive-behaviour/cartels/cartels-case-studies-legal-cases>

Trade association meetings and activities

In general, trade associations seek legitimate purposes and provide benefits to trading in the market and to consumers. Legitimate activities of trade associations generally do not cause risk of infraction to the provisions of the FTA.

However, the fact that these associations are often a space where competitors regularly meet, they are often a source of illegal information exchanges and cartel agreements. Hence, the trade association must not become a forum in which anti-competitive agreements are discussed or agreed upon.

Case Example: Estate agents and trade association cartel The United Kingdom. 2015

In 2015, the Competition and Markets Authority (CMA), United Kingdom's Competition Agency, imposed a fine of over £735,000 to an association of estate and lettings agents, 3 of its members and a local newspaper.

The agents were part of a trade association that prohibited its members from advertising their fees or discounts in the local paper. Two of the agents also agreed with the newspaper that no other estate or lettings agents could advertise their fees, whether they were members of the association or not.

The agreement not to advertise their fees limited the ability of the agents to compete against each other, and made it harder for consumers to compare prices and receive a better value for money. Preventing agents from advertising their fees may also have made it harder for new or smaller businesses to attract new customers.

According to the CMA, advertising fees may be an important way for businesses to compete on price and attract new customers. Decisions affecting the contents of the advertisements, including whether to advertise its prices or not, must be taken individually by each competing enterprise.

This is also an example of how trade associations, while offering many legitimate benefits, can also become an instrument to infringe the law and affect competition in the market.

Source: <https://www.gov.uk/government/case-studies/advertising-of-estate-agents-fees-competition-law-lessons>

Vertical Agreements

Certain agreements between businesses operating at different levels in the supply chain, such as current or potential suppliers, dealers, or customers (also known as “vertical agreements”) may also be illegal under the FTA.

These agreements may be anticompetitive either by object or by effect, and include the following:

- **Resale price maintenance:** These agreements occur when a business (supplier, distributor, or dealer) attempts to control the price at which its client may resell the products initially supplied, including fixed, minimum, or maximum prices and/or profit margins. This prohibition also encompasses stipulations affecting other terms for the resale of the products, such as terms of credit, discounts and promotions, quality levels, and others.
- **Other anticompetitive agreements:** The FTA also prohibits all agreements between suppliers and customers with the object or effect of monopolizing the market, or otherwise restricts, distorts, or prevents competition.

Case example: Resale price maintenance The United Kingdom. 2019

Between February 2013 and April 2018, a well-known brand of digital pianos and keyboards imposed a policy upon resellers for mandatory sales above a minimum price. If resellers did not comply, they were subject to sanctions, such as withholding products from them.

The company also used other methods, such as calling the reseller and telling them to increase their price, followed by an email communication to other resellers along the same lines. Resellers mostly abided by the requests, fearing sanctions. In some cases, they even asked the supplier for its approval before setting its own prices.

The supplier used price monitoring software to make sure resellers were selling at or above the price they specified. Also, resellers reported to one another when they found a competitor lowering the price in violation of the policy.

The infringer received a penalty of £3.7 million for breaking the law.

Source: <https://www.gov.uk/government/case-studies/why-we-fined-casio-37-million-for-breaking-competition-law>

Case example: Resale price maintenance Australia. 2021

The Federal Court of Australia ordered a wholesale distributor to pay an AUD 350,000 penalty after declaring that it engaged in resale price maintenance in relation to cycling and sporting products.

Between February 2017 and June 2019, the defendant provided several agreements to its dealers prohibiting them from advertising or promoting certain brands of products online for less than the recommended retail price.

In addition to the penalty, the Court ordered the company to refrain from including terms prohibiting discounting in its contracts with dealers, and to write to affected dealers indicating that they are free to set their own prices.

According to the ACCC, when commenting on the case, the prohibition to impose resale prices includes: making it known they will not supply unless a distributor or retailer agrees to advertise or sell at a price not less than a specified minimum price; inducing or attempting to induce the retailer not to advertise or sell below a specified minimum price; withholding supply of goods or services because the distributor or retailer has advertised or sold at a price below a specified minimum price.

Source:<https://www.accc.gov.au/media-release/fe-sports-to-pay-350000-penalty-for-resale-price-maintenance>

Abuse of monopoly power

The FTA not only deals with anticompetitive agreements. It also prohibits unilateral conduct by businesses holding monopoly power, who exclude competitors from the market or exploit their power in such a way that distorts competition.

What is monopoly power?

An enterprise holds monopoly power when it is able to control prices or production or to exclude competitors from a market. It is a position of strength that allows it to behave without effective constraints from current or potential competitors, customers, and ultimately consumers.

The determination of whether an enterprise holds monopoly power depends on several factors, such as its market share, the existence and extent of barriers to enter the market, the existence and size of competitors, countervailing power from clients or suppliers, and others. The determination on whether an enterprise holds monopoly power is always made on a case-by-case basis. That being said, no enterprise will be considered as holding such a position when its share of the relevant market is below 40%.

What is abuse?

It is not illegal for an enterprise to hold monopoly power. However, an enterprise in that position holds a special responsibility to behave in such a way that competition is not distorted by its conduct. The higher the degree of monopoly power of an enterprise, the more likely it is that its conduct may unduly affect competition in the market and, thus, be determined to be abusive.

Not all exclusions of competitors from the market are illegal. When a firm obtains a privileged position in the market by virtue of its own merit (i.e.: by being more efficient, offering a superior product or service at a better price), it is not to be censured. It is only when an enterprise abuses its power, or if it exploits such position unfairly that it will be violating the FTA.

Prohibited conducts

The most common forms of abuse of monopoly power are:

- **Exclusive dealing:** Through exclusive dealing, a firm with monopoly power may be able to foreclose competitors through exclusive purchasing obligations or unreasonable rebates. This can be achieved by many different forms, such as requiring customers to deal only (or primarily) with certain supplier or suppliers; offering more favourable terms or conditions if the customers agree to deal only with specific suppliers; creating artificial and/or commercially unreasonable obstacles for customers to deal with competitors; retaliating against customers who purchase competing products; and other means.
- **Market restriction:** This is conduct by which a dominant supplier imposes upon their customers the condition to resell the supplied goods only in a defined market (defined either as a geographic area or as a group of customers). This obligation can take many forms, such as the inclusion of such condition in a contract, the refusal to fulfil orders unless the condition is met, the imposition of penalties for infringing such obligation, the concession of a rebate or other commercial benefits conditioned upon said obligation, the allocation of territories and/or retail customers among resellers, etc.
- **Tied sales:** Tying occurs when an enterprise with monopoly power that sells one product (“tying product”) forces a customer to purchase another product (“tied product”) as a condition to supply the tying product (tie-in). Tying also takes place when the seller imposes the obligation to refrain from using, buying, or distributing another article as a condition to supply the tying product (tie-out). Offering a pricing or benefits package with the same effect as a tie is also a form of this conduct known as “bundling”.
- **Conditioning:** The conduct known as conditioning is a form of abuse by which an enterprise with monopoly power, as a condition to enter into an agreement or to provide a product or service, imposes upon its counterpart obligations that are not customarily related to the product or service being supplied, or the object of the agreement being negotiated.
- **Unfair pricing:** The imposition of unfair prices (or other trading conditions) is a form by which an enterprise with monopoly power may exploit its position of strength. Unfair prices may typically take to forms:
 - **Excessive prices:** This is an unreasonably high price that has no relation to the economic value of the product sold. That is, when the difference between the costs incurred and the price charged is disproportionate in such a way that it is either unfair in itself or when compared to the value of equivalent products offered in that same market or in similar markets that can be reasonably used as a reference.
 - **Predatory pricing:** Through this practice, an enterprise with monopoly power prices adopts a strategy of low pricing, designed to drive competitors out of the market (or make it difficult for new competitors to enter the market), in hopes to increase the prices and recoup its losses once this goal is achieved.

- **Increasing rivals' costs:** Another prohibition for enterprises holding monopoly power is to engage in conduct that unreasonably impedes others from competing in the market or in other markets. This kind of “*non-price predation*” refers to conducts that generally do not serve any legitimate business purpose, and that it would not provide any appreciable benefit to such enterprise, other than harming rival firms. These conducts may have as a result the increase of barriers to enter the market or to expand operations, the reduction of output of other firms, the increase of production costs or, in general, the prevention or determent of others to behave competitively and efficiently in the market.
- **Discrimination:** Applying dissimilar conditions, whether in the form of products offered or products/services supplied, to equivalent transactions is a form of abusive conduct by an enterprise holding monopoly power that may create competitive disadvantages in the market. All material differences in price or in any relevant trading term must follow objective criteria, and such criteria must be applied uniformly to all clients. A valid reason to establish any such differences may be saving on production or distribution costs, payment condition, compensation of services rendered by the client to the supplier, or other market related factors.
- **Monopolization:** The FTA prohibits actions by enterprises with monopoly power to seek deliberately the exclusion of other competitors from the market or to prevent their entry by illegitimate means, which go beyond the normal and reasonable interest of an enterprise to maximise its profits and to increase its position on the market. It is important to bear in mind that the goal of any business is to capture an ever-increasing portion of the market. Hence, if a firm excludes its competitors simply because it operates more efficiently, this is not illegal conduct. Relevant actions prohibited by the FTA are those that help to maintain or achieve monopoly power by anti-competitive means.
- **Refusal to supply:** Generally, all enterprises may decide with whom they choose to do business and with whom they do not. However, when an enterprise holds monopoly power this right is qualified, and particularly if the products offered are indispensable to be able to compete in a downstream market (i.e., a must-have product or service). In these cases, an unjustified refusal to deal may lead to affect competition in the downstream market. Thus, enterprises with monopoly power must offer their products in fair, reasonable, and non-discriminatory conditions to all existing and potential customers. A valid justification will be required to be able to refuse supply under these circumstances. Examples of valid justifications are: if a customer is delinquent in the payment of previous purchases; if the supplier does not have adequate stock to supply customers' needs; if a customer violates the supplier's legitimate commercial policies; etc.

**Case example: Abuse of market power
Australia 2006**

The Australian Competition and Consumer Commission (ACCC) filed a claim against a popular chain of supermarkets for abusing its market power in relation to the sale of fresh bread.

According to the claim, on several occasions, independent retailers near a supermarket of this chain commenced selling bread of a particular baker at a discounted price. The defendant then demanded from the baker special discounts and, whenever the baker did not grant special trading conditions, they discontinued the sale of bread of that baker.

The Court considered this conduct to be inherently anti-competitive and deliberately calculated to restrict competitive conduct. They went further to state that "The penalties imposed make it clear that businesses which possess market power need to be careful about the way in which they go about their activities".

The Supermarket was imposed a penalty of AUD 8.9 million

<https://www.accc.gov.au/media-release/89-million-penalty-on-safeway-for-price-fixing-and-misuse-of-market-power-in-bread>

Case example: Price discrimination India 2020

The Competition Commission of India (CCI) found a supplier of Viscose Staple Fibre for abuse of dominant position, by imposing discriminatory prices to its customers.

The Commission found that this enterprise had imposed unfair and discriminatory prices in the sale of the fiber upon clients who are similarly placed. The reasons offered in explaining the price differentiation were unsatisfactory, and thus, the prices charged were discriminatory.

Because of such discriminatory prices, downstream firms were adversely affected in their ability to operate competitively in the market.

The defendant was imposed a penalty of Rs. 301.61crore, the equivalent of 5% of its average revenue in the relevant product market. Also, it was ordered to discontinue the discriminatory practices and to put in place a discount policy that is transparent and non-discriminatory to all the market participants, and make it easily and publicly accessible/ available.

Source: www.cci.gov.in/sites/default/files/press_release/PR472019-20.pdf

Case example: Exclusive dealing Australia 2018

The Federal Court of Australia imposed penalties totalling AUD 11.95 million to one manufacturer and two distributors of roof sheeting for conduct intended to substantially lessen competition.

The manufacturer threatened existing distributors that unless they each purchased significant amounts of product, it would supply polycarb directly to retailers. To avoid competition from the manufacturer, the distributors agreed to increase their purchases on the condition that the manufacturer did not supply directly to retailers.

The Federal Court declared today that the three companies were contravening the exclusive dealing prohibition in the Competition and Consumer Act (CCA) of Australia. A director of the manufacturer was personally imposed a penalty as an individual, for being knowingly concerned in the illegal action.

Source: <https://www.accc.gov.au/media-release/egr-to-pay-6m-penalty-for-exclusive-dealing>

Potential pro-competitive effects

The conducts described above, even if carried out by an enterprise with monopoly power, will not be considered a contravention of the FTA if they are exclusively directed to (and contributes to) improving the production or distribution of goods or to promoting technical or economic progress, where consumers will get a fair share of the resulting benefits. Also, the conduct will not be illegal if it consists of an enforcement action of an intellectual property right.

ENFORCEMENT AND PENALTIES

The investigation, prosecution, and penalties for non-compliance with the FTA are regulated as follows:

Remedies and penalties

As described above, except for the orders issued by the FTC in the case of abuse of dominance (which may be adjudicated on in Courts), the Commission is entrusted with - investigation powers, while the Court has the adjudication duties. Within such duties, the court may impose the following remedies and penalties:

- a. Prohibition of an agreement, practice, or decision from being carried out.
- b. Termination of an agreement or practice.
- c. Prohibit or restrict the transfer of shares, or the acquisition of assets.
- d. Require a company to divest specific assets or shares.
- e. Imposition of fines up to ten percent (10%) of the annual turnover of the enterprise concerned.
- f. Disqualification of persistent offenders from serving as company directors.
- g. Review decisions made by the FTC or appeals against decisions made by the Regulated Industries Commission and the cases decided by that authority under the Regulated Industries Commission.

When imposing a fine, the Court takes into account several factors, including the economic cost of the agreement, its duration, the existence of recidivism, and any other relevant factor related to the seriousness of the offence.

Concerning possible actions from third parties (other than filing a claim at the Commission), any person who suffers direct injury by reason of any contravention of the FTA may institute a separate and independent civil action. It is not required for an affected party to resort to the FTC or to other authorities as a prior step before filing a direct judicial claim.

Functions of the FTC

The general powers of the FTC include the promotion (advocacy) of competition in the local market, as well as the investigation and enforcement of the substantive provisions of the act. This includes carrying out investigations on the conduct of businesses, providing advice to the Minister in matters related to the FTA, informing the public about their rights and obligations, undertaking studies and publishing reports, and others.

In accordance with the FTA, the FTC has ample powers to accomplish these functions.

Investigation of possible offences

The investigation of conduct that may potentially contravene the Act is entrusted to the FTC. Such investigations may be self-initiated by the FTC or be carried out following a complaint. All investigations are carried out by the staff of the FTC.

In general, complaints to investigate conducts in contravention of the Act may be filed by any interested person. However, if the investigation relates to the abuse of monopoly power, complaints may be filed by “any person adversely affected by the investigated conduct”.

Investigations, in summary, are carried out by the following procedure:

- a. The procedures are initiated by a formal decision from the FTC. This decision shall be motivated and expressly justified. In the case of a complaint, it must express the reasons for which the FTC considers that the matter deserves further investigation. If the FTC is acting *ex-officio*, it must indicate why it considers that the enterprise or enterprises are acting in contravention of the FTA.
- b. Once this decision is made, the FTC will notify in writing all relevant parties of its intention to initiate such an investigation.
- c. At the end of the investigation, the FTC will make a report of its findings, and send a copy to the relevant parties, enabling them to make their submissions within the time period granted by that same decision.
- d. Once all the relevant hearing is conducted and concluded, the Commission prepares a final report. This report must include the submissions made by the parties, and comments of the FTC on those submissions.
- e. At the end of an investigation, if the Commission confirms the existence of a breach of the Act it may:

- i. Make an application to the Court for the determination of a contravention of the Act (other than the abuse of monopoly power).
- ii. In cases of abuse of monopoly power, the FTC may prepare a report indicating the practices that constitute the abuse (if any) and submit such report to the enterprise concerned, with a request to cease the abusive practice within six months.

In such case, the enterprise concerned may, within 30 days, propose the measures to be taken to remove the abusive conduct, which will be subject to the approval by the FTC.

If the enterprise does not comply with the request made by the Commission or with the proposed (and approved measures), the Commission may apply to the High Court for an order.

- f. At any stage, the FTC may discontinue the investigation and close the file if it is of the opinion that the matter does not justify further investigation. This decision must be justified, and all parties concerned will be informed of the decision and the reasons for the same.
- g. At any time before an application to the Court is made, the FTC and the investigated enterprise may enter into an agreement for the termination or the phasing out of the anti-competitive agreement or practice. Failure to comply with such an agreement would generate a penalty.
- h. The Court will have jurisdiction to hear applications made by the Commission for the prohibition of an agreement or practice, as well as their termination. Additionally, it may also impose fines on the concerned enterprises.
- i. Any interested party may request from the Court a revision of any decision made by the Commission.
- j. Decisions taken by the Court may be appealed by any dissatisfied party within 21 days from the delivery of the decision.

Powers of the FTC

In the course of its investigations, the FTC has the power to obtain any information that it considers necessary. Where necessary, an authorized officer of the FTC may, with a warrant issued by the Court, enter and search any premises; inspect and remove for the purpose of making copies, any documents, or take extracts thereof.

In exercise of this powers of search, the FTC can obtain all sorts of internal and external documents, both physical and/or electronic, including corporate strategy documents, audit reports, board decisions, circulars and sales reports, evidence of communications (emails, internal memorandum, fax documents, records of telephone conversations), minutes or notes of meetings, internal documents evidencing understanding or knowledge of a competitor's pricing strategy, documents evidencing or alluding to parallel pricing, abnormally high profits, tender

documentation highlighting possible bid rigging or collusive practices, evidence of internal or external complaints made to the enterprise, etc

In addition, the FTC's Commissioners have the power to summon and examine witnesses; to call for and examine documents, and to administer oaths. Additionally, documents may be removed from the premises for examination or copying, and they must be returned within fourteen (14) days.

All orders made by the FTC within the scope of their duties will be binding upon the recipient enterprise, and failure to comply may generate penalties. Similar consequences are established for the destruction of records, or for otherwise obstructing the investigation.

MERGER CONTROL

The FTA also regulates merger agreements. For these purposes, a merger is a transaction by which two or more previously independent enterprises combine their businesses or assets. A merger can take the form of a purchase or lease of shares or assets, amalgamation, combination, joint venture, or any other means through which influence over the policy of another enterprise is acquired.

Although mergers are generally legitimate transactions, in some cases they may affect the market structure in such a way that they may restrict or distort competition in a market. For this reason, certain mergers are subject to clearance by the FTC before they can be completed.

The FTC developed the Merger Guidelines and a Merger Application Form to help businesses in the interpretation and compliance of these legal provisions. Both documents are available on the FTC's website.

HOW TO FILE A COMPLAINT

Anyone suspecting anticompetitive behaviour by a business enterprise, whether being directly affected or not by such behaviour, may file a complaint with the FTC. Complaints may be provided to the FTC directly, anonymously or through an intermediary (such as a legal adviser). They may be submitted on behalf of more than one person or party.

Complaints may be made by telephone, e-mail, post, in person at the Commission's office, or via its [Complaints Form](#) by clicking the embedded link or by visiting the Commission's website. There are no costs associated with filing a complaint.

To assist the Commission in assessing the matter, a Complainant should submit any information that it has or has access to, and is encouraged to provide as much of the following information as possible:

- a) A description of the relevant facts regarding the conduct the Complainant is concerned about;
- b) Information on any documents that relate to the conduct including copies of those documents where possible;

- c) Information about the business enterprise or individual(s) involved in the conduct, including their contact information where known;
- d) Specify the nature and scope of the business activities pursued by the business enterprise or individual involved in the conduct;
- e) Indicate if a relationship exists between the legal entity or natural person submitting the complaint and the subject(s) of the complaint (e.g., customer, competitor, etc);
- f) Where necessary, a description of the Complainant's position on the market, i.e., a list and description of the customers buying/selling the product or service, the suppliers thereof and the rivals active on the same level of the distribution chain;
- g) Submit statistics or other data available that relate to the facts set out, in particular where they show developments in the marketplace (e.g., information related to prices and price trends, barriers to entry to the market for new suppliers, etc.) to support the allegations complained about; and
- h) Copies of statements/complaints which have been submitted to the Complainant by external parties, employees, agents, witnesses, who have been affected by the conduct complained about.

To support the Commission's ability to conduct effective investigations, the Commission requests that Complainants keep their complaints confidential. If a Complainant elects to disclose their complaint publicly, the Commission asks that the Complainant inform the Commission, as well as the parties concerned, in advance of any such disclosure.