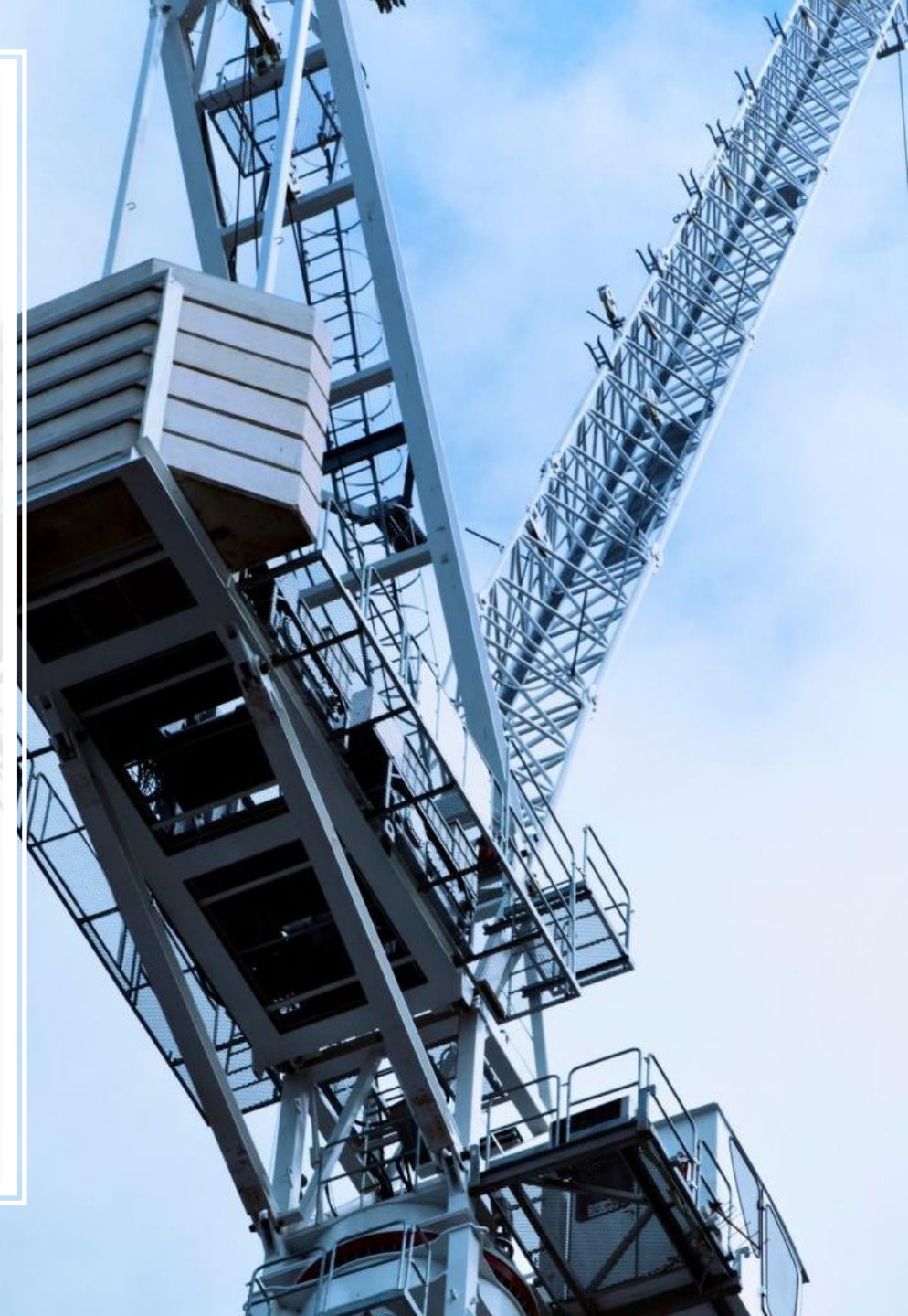




MEETING WITH STAKEHOLDERS IN THE LOCAL CONSTRUCTION INDUSTRY

Presented by Mr. Bevan Narinesingh, Executive Director
Trinidad and Tobago Fair Trading Commission

Thursday 5th August 2021



Agenda

- ☐ About the Commission
- ☐ Role, powers and functions of the Commission
- ☐ Importance of Competition and the FTA
- ☐ Competition Issues in the Construction Industry
- ☐ Do's and Don'ts on Competition in the Construction Industry
- ☐ Questions and Comments

- Independent Statutory Body established pursuant to the Fair Trading Act 2006.

- Our objectives are to promote, protect and maintain competition in the Trinidad and Tobago market. We do this by:

- Preventing anti- competitive conduct;
- Taking action against abuse of dominance, restraint of trade and unfair or deceptive trade practices;
- Diffusing and publishing information about competition policy;
- Advising the Government on other laws affecting competition.

- The Commission is one of more than 130 competition/anti-trust agencies that are presently functioning globally.

ABOUT US

Powers of the Commission

The Commission's powers are set out in several provisions in the Fair Trading Act. They include the power to:-

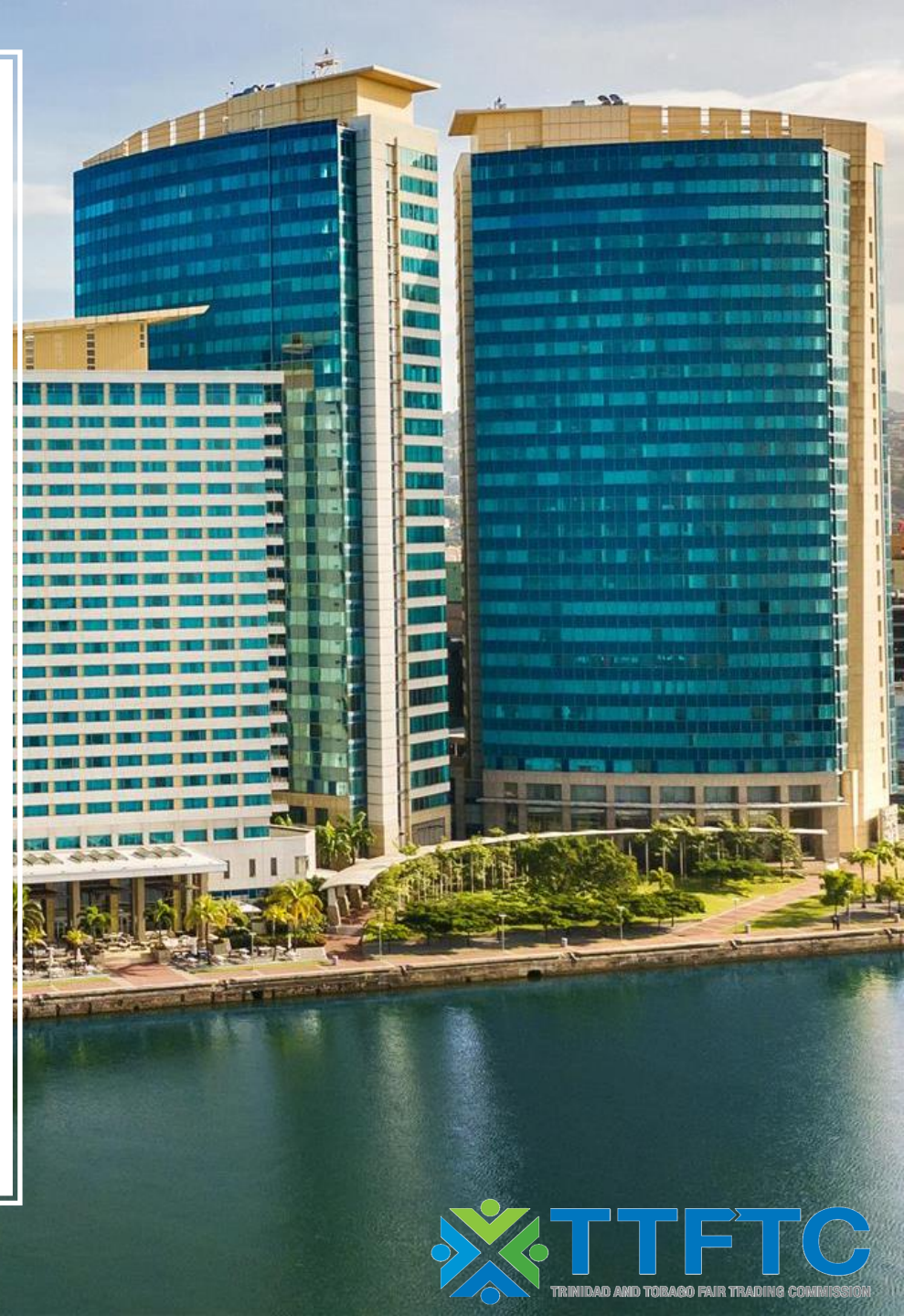
- Carry out investigations,
- Summon and examine witnesses,
- To call for, require the production of and examine documents in connection with an investigation, and
- To direct an enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse of dominance in a relevant market.



What is competition and what do we mean by a competitive market?

Competition:

- A situation in a market in which firms or sellers independently strive for buyers' patronage in order to attain a particular business objective, in most cases profit, market shares, and/or sales (OECD 1993:22).
- A competitive market is characterized by there being many sellers with every seller trying to increase its profits by offering to the buyers a better combination of price, quality, and service than the combinations offered by its competitors.
- Having an effective competition law framework in place is expected to enhance the investment climate, safeguard the liberalization process and promote an enabling environment for sustainable growth and development.
- An effective competition regime is even more important during a period of economic slowdown.



THE FAIR TRADING ACT

- Creates an institutional framework for the enforcement of competition policy and deals with many major issues including:
 - Anti-competitive agreements;
 - The abuse of monopoly power (dominant position is defined as controlling more than 40% of the market);
 - Anti-competitive mergers; and
 - The enforcement of the relevant clauses or enforcement measures.
- **These are strict/liability per se violations** are condemned outright, with no need for the Commission competition authority to prove they have been actually put into practice or that they have actually produced harmful effects on prices or other adverse market conditions.
- The legislation was passed in Parliament in 2006 and fully proclaimed in 2020.



Spotlight on the Local Construction Industry

- The local construction industry has traditionally been one of the largest within the Trinidad and Tobago economy. In 2017, it accounted for 6% of the country's GDP but decreased by 0.2% in 2018 to 5.8% with an estimated value of about TT\$9.38 billion.
- Influenced and shaped by externalities such as supply and demand, levels of local and foreign direct investment, raw material costs, foreign exchange rates, etc.
- Characterised as an industry where competition issues are frequently found.
- Therefore for transformation, growth and long-term survival to exist within this industry in and out of a pandemic time, businesses must put aside the known way of 'doing business' and embrace a new but not so new mind-set, called the '**Competition Culture**'.

The Work of the Commission

- The Commission has conducted a preliminary study into the Clay Block Industry in Trinidad and Tobago (2019); and
- Continues to monitor and evaluate prices through hardware surveys and complaints via the Consumer Affairs Division (CAD, MTI).
- Press Releases and Stakeholder Sensitization Sessions



A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are arranged in a circular pattern, creating a sense of height and scale. The sky is a vibrant blue with scattered white clouds. A bright sun is visible near the top center, creating a lens flare effect. The overall color palette is dominated by deep blues and bright whites.

Competition Issues in the Construction Industry

Hardcore restrictions on competition are the most serious forms of contravention of the Fair Trading Act and attract the most serious penalties for firms and their directors and employees

- **Price fixing** – this involves competitors agreeing not only to the price to charge third parties for their products, but also agreeing to the components a price will include, the levels of price increases, discounts or rebates, the timing of price changes and any other price-related matter(s). Resale price maintenance is vertical price fixing, this involves an agreement for e.g. between a producer and supplier where the producer's pressure the suppliers to not to sell the producer's goods to third parties below or above a particular price.
- **Agreements to limit or withhold supply or production** – these involve firms agreeing to restrict the availability of a product or service in order to push prices up.
- **Market or customer sharing** – this involves competitors agreeing to focus on different product or geographic markets, or different customer groups. This reduces competition for the market or customers concerned and strengthens the firms' ability to put prices up.
- **Bid rigging** – this involves competitors agreeing in advance which of them will win a particular contract.
- **Disclosures and exchanges** – whether direct or indirect of competitively sensitive information to facilitate cartel conduct and are therefore also treated as very serious infringements of competition law. Competitively sensitive information is information a firm would normally keep confidential and includes information on future prices, costs, target markets, target customers, bid strategies and general market strategy. **A single exchange of competitively sensitive information can result in liability. Social events involving competitors create a particular risk of inadvertent disclosure.**

Common Anti-Competitive Practices: The case of Hardwares

- Collusion on prices
- Agreements to restrict output
- Abuse of dominant position
- Tying arrangements
- Group boycotts – competitors get together and agree not to deal with a competing hardware, supplier or customer.
- Discriminatory treatment of customers





Do's and Don'ts on competition in the construction industry



Do:

- Disclose commercially sensitive information only on a "need to know" basis;
- Share the minimum amount of information necessary between the consortium members;
- Agree to the scope of co-operation before discussions start – the scope should be limited to what is required to submit the bid; and
- In all areas outside the bid, continue to compete as normal.



Don't:

- Agree to future pricing strategies or output, or share or allocate customers;
- Disclose sensitive information unrelated to the bid, including general commercial strategy, prices offered to other customers or detailed information on your cost base;
- Hide your participation in competing consortia from either the tendering body or the other consortia members; instead, put appropriate measures in place for the exchange of information; or
- Take risks if you are in any doubt about whether the joint bid/information exchange infringes the competition rules – seek legal advice.



What companies and their staff in the construction industry need to do to comply with the provisions of the Fair Trading Act

- Identify the exact competition risks your company faces in each of the markets in which it operates. For most companies, this will involve assessing:
 - whether they are subject to cartel or information exchange risks, for example, through contacts with competitors in various fora, including trade associations and;
 - whether there is a risk that their contracts may not comply with the rules on anti-competitive agreements
- For construction companies with a strong market position in specific product or geographic areas, this will also involve an assessment of the extent to which they may be subject to the additional competition law obligations on dominant businesses. This involves an assessment of the scope of the market concerned and the power of the firm within that market. **This risk does not generally arise where a firm has a market share of below 40%.**
- Assess the level of those risks. For example, in relation to cartel risk, a firm will need to review the frequency of contacts between its staff and the staff of competitors.



What companies and their staff in the construction industry need to do to comply with the provisions of the Fair Trading Act continued

- Put measures in place to mitigate those risks:-
 - Provide training to staff
 - Make competition law compliance as part of the firm's business code of conduct;
 - Ensure contacts with competitors, in trade associations or otherwise, are controlled;
 - A reporting mechanism– for example, a hotline and placing an obligation on all employees to report any suspected violations of the Fair Trading Act;
 - Provide adequate opportunities for employees to discuss concerns; and
 - Ensure certain contractual provisions are subject to legal review before being agreed.
- Review the above steps to ensure that risks have not changed and that the measures put in place remain appropriate.



Why does this matter?

- The Commission can take to Court any business or individual who it believes is guilty of anti-competitive conduct and has failed to take corrective measures, after being instructed by the Commissioners.
- The possible consequences of in cases of violation of the Fair Trading Act include:
 - Fines (up to 10% of global turnover)
 - Lengthy investigation and loss of management time
 - Reputational damage
 - Entire Contracts (or parts thereof) may be null and void



The Cost of Getting it Wrong

Construction is one of the sectors most frequently involved in competition law breaches.

Cases of Breaches include:-

- Fines totaling £15m for two suppliers of groundworks products for sharing confidential information and coordinating on pricing.
- More than £7m of fines and six director disqualifications as a result of five office fit-out firms engaging in “cover bidding” (i.e. agreeing which of them will win a contract so the others can submit deliberately unattractive bids, rather than competing with each other).
- More than £2.6m of fines, and a six-month suspended prison sentence for one director, after three firms engaged in price-fixing, market-sharing and bid-rigging in relation to galvanised steel water storage tanks (a fourth firm was fined £130,000 for sharing commercially sensitive information, despite declining to participate in the cartel).

**Questions or
comments?**





Thank you for your attention!

- Visit our website at:

<http://www.tandtftc.org/>

- Email:

tandtftc@gmail.com

