

The Bahamas Fair Competition Act 2018: LAY MAN'S DRAFT

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THE BAHAMAS

LAY MAN'S DRAFT: Fair Competition Act 2018

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THE BAHAMAS THE FAIR COMPETITION ACT []

CHAPTER []

An Act to provide for the prohibition of anti-competitive conduct, unfair and misleading trading practices, investigation and determination of cases, and review and control mergers for the purpose of promoting, maintaining, and encouraging competition in markets in The Bahamas.

[Day, Month, Year]

PART I: PRELIMINARY

Title and Date of Commencement 1. This Act shall be cited as the Fair Competition Act [] and shall come into operation six months after the date ¹as the Minister may prescribe by Order published in the Gazette.

Interpretation 2. In this Act, all terms have the meaning attributed to them by the Interpretation and General Clauses Act unless expressly defined herein-

“**agreement**” includes any agreement, arrangement or understanding, whether oral or in writing or whether it is legally enforceable or is intended to be legally enforceable;²

“**Board of Commissioners**” or “**Board**” means the Board of Commissioners constituted as such under section 6;

“**CARICOM**” the Caribbean Community as established under the Treaty of Chaguaramas.

“**Commission**” means The Fair Trading Commission established by section 5;

“**Commissioner**” means a member of the Board of Commissioners;

“**complaint**” means a complaint initiated under section 18(2);

¹ This enables the funding and set-up of the agency/staff, etc. to be planned ahead of the official inauguration date of the competition authority.

² The definition of agreement in competition law differs from the definition of agreement at Common Law or under any applicable contract law statute. Therefore, even if the interpretation statute has a current definition of agreement, this law must have a separate definition.

“concerted practice” means an activity consisting of unified or cooperative conduct, or series of such activities, undertaken by enterprises by means of an agreement or by any conduct that substitutes individual action or decision-making;

“confidential information” means-

- a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the enterprise to which it relates; or
- b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests; or
- c) information whose disclosure the Commission thinks is contrary to the public interest.

“consumer” means any person, whether an individual or organisation, enterprise, or other entity, for whom goods or services are or are intended to be supplied in the course of a business carried on by a supplier or potential supplier and who does not seek to receive the goods or services in the course of a business carried on by the person;

“Court” means the Supreme Court which shall have jurisdiction over matters arising under this Act.

“Directorate for Competition” means the department within the Commission charged with investigating matters arising under this Act.

“document” includes electronic records and any other thing in which information is recorded;

“enterprise” means a firm, partnership, joint-venture, corporation, company, association, or other juridical person, irrespective of whether created or controlled by individuals in the private sector or by the state, that engages in economic activity, and includes any branch, subsidiary, affiliate, or other entity, directly or indirectly, controlled by the person;³

³In competition law, there is a significance in defining “enterprise”. This definition signifies to whom the law is to apply. It gives the competition authority and the courts “personal jurisdiction” over certain actors and makes the prohibitions under the Act applicable to them. In other words, the legal definition of the term “undertaking” (in EU competition law, for example) or “enterprise” in this law, helps us to understand who the proper subjects of competition law are. In CARICOM, for example, the proper subjects of competition law are “enterprise”, that is, “any person engaged for gain in the production or distribution of a commodity or service”. However, this is a faulty definition because even non-profit organisations not in business for a “gain” can affect competition on a market. For example, an association of churches that engage in group purchasing ventures and resells products to its congregation may do so for “non-profit” or charitable reasons but, nevertheless, the law must apply to them because such group purchasing arrangements where the church association achieves buyer power is perfectly capable of running a business out of the market through use of anticompetitive business means. Generally, a law applies to all natural persons whether legal entities or individual citizens. In competition law, a deliberate effort is made by the legislature to explicitly make the case that the law only applies to market players, that is, all those publicly or privately-owned firms that impact on competition in the market and any owners, managers or employees authorised to act on behalf of those market players. The prohibitions under the various pieces of legislation – that is, prohibitions on abuse of dominance and anticompetitive agreements- will not apply unless the firm in question is of a class that is covered by the competition legislation.

“functions” includes powers and duties;

“goods” shall include all kinds of moveable and immovable property, money, securities, choses in action and any reasonable substitutes thereto, taking into account ordinary use, functionality, commercial practice, and geographical, technical, and temporal constraints.

“investigating officer” means the authorised officer within a department of the Commission responsible for the investigation and enforcement of the Act;

“know-how” means information that is kept confidential in order to preserve competitive gains and shall include unregistered designs, business processes, trade and business secrets, and other practical and non-patented information, identifiable business processes, or other secret, significant, useful, and practical methods;

“legally privileged information” means information that contains request for advice to, and advice from, external counsel qualified to practice if made for that purpose, and in the interests, of the enterprise's rights of defence;

“market” in relation to goods or services is a reference to goods or services, as the case may be, supplied in or into The Bahamas and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services;

“Minister” means the Minister responsible for industry, trade, and commerce or otherwise responsible for business affairs;

“service” includes a service of any description whether industrial, trade, professional or otherwise;

“turnover” means the amounts accrued from the sale of goods and/or services;

“writing” includes text that is-

a) transmitted by electronic means;

- b) received in legible form; and
- c) capable of being used for subsequent reference.

Objects of the Act 3. The objects⁴ of this Act are to-

- a) promote, maintain, and encourage competition and enhance economic efficiency in production, trade, and commerce;
- b) prohibit anti-competitive business conduct that prevents, restricts, or distorts competition or constitutes the abuse of a dominant position in a market;
- c) regulate mergers which could result in harm to competition and adverse effects to the interests of consumers and the economy;
- d) facilitate an enabling business environment to enlarge The Bahamas's prospects for economic development;
- e) promote the welfare and interest of consumers.

⁴ This section outlines the key underlying policy goals of the competition law of The Bahamas. Most developing countries tend to focus their competition policy on the enhancement of levels of consumer welfare. Consumer welfare is typically manifested as low prices, with high quality goods, wide choice in goods, with a high consumer-to-product accessibility ratio, and excellent after-purchase services. Competition regulators seek to regulate competition to keep markets competitive or to ensure that they become competitive. And, as alluded to previously, the main goal of doing so is to seek competitive market conditions that lead to high levels of consumer welfare. When we say competition, law strives to protect against harm to the consumer, it must not be interpreted to mean that competition law is focused on the consumer. Competition law is designed to protect competition or the competitive process. The main prohibitions within this law (on anticompetitive agreements, abuse of dominance and anticompetitive mergers) will be assessed from the perspective of the underlying goal. Therefore, the case assessor will always use the goals outlined in this section to ascertain whether there is any harm to competition in a market in the Bahamas. The additional goals on development, etc. are a direct outcome of applying the consumer welfare approach policy approach; but these goals are also capable of being realized directly when the case assessor reviews anticompetitive conduct with a view to maintaining/achieving those outcomes. So, the goal is to protect competition and this in turn benefits the consumer.

Application of the Act 4. (1) This Act applies to all economic activities within or having an effect within The Bahamas.⁵

(2) If a body charged with public regulation has jurisdiction in respect of any conduct regulated in terms of this Act within a particular sector, the Commission and that body shall-

- a) identify and establish procedures for management of areas of concurrent jurisdiction;
- b) provide for the exchange of information and the protection of confidential information; and
- c) promote cooperation to ensure consistent application of the provisions of this Act,

(3) Provided that in all matters concerning anti-competitive business conduct and review and control of mergers, if there is any conflict or inconsistency, the object of this Act, its provisions, regulations made pursuant thereto, and decisions of the Commission shall prevail.

PART II: ADMINISTRATION AND FUNCTIONS

Establishment and functions of The Fair Trading Commission 5. (1) The Fair Trading Commission is hereby established as a statutory body with perpetual succession and shall have jurisdiction to carry out the functions and powers designated to it under this Act.

(2). The functions of the Commission are to -

- a). keep under review commercial activities in or into The Bahamas with a view to ascertaining practices which may adversely affect the economic interests of consumers in a market in The Bahamas;
- b). undertake, on its own initiative or at the request of any person, such investigations in relation to the conduct of business as will enable it to determine whether any enterprise is engaging in practices in contravention of this Act;
- c). conduct such inquiries as it may consider necessary or desirable in connection with any matter falling within the provisions of this Act;

⁵ The conduct of multinational corporations—where those corporations sell goods in or into The Bahamas is covered under this Act. For example, if GLAXO-SMITH KLINE is merging with a North American company and that company sells pharmaceuticals, for example, in or into the Bahamas, then that merger may be subject to the merger review and control procedures under this Act.

- d). advise the Minister on such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister;
- e). take such action as it considers necessary with respect to any abuse of a dominant position by any enterprise that has an effect on consumers in a market in The Bahamas;
- f). eliminate any anti-competitive agreement that has an effect on consumers in a market in The Bahamas;
- g). eliminate unfair and misleading trading practices in The Bahamas;
- h) review and control mergers having an effect in or into The Bahamas
- i). undertake advocacy, research, and market studies to advance the goal of this Act;
- j). carry out such other functions as are required to give effect to this Act.

(3). The Commission is also required to –

(a) make available –

(i) to persons engaged in business, general information with respect to their rights and obligations under this Act;

(ii) for the guidance of consumers, general information with respect to the rights and obligations of persons under this Act affecting the interests of consumers;

(b) undertake studies and publish reports and information regarding matters affecting the interests of consumers;

(c) co-operate with and assist any association or body of persons in developing and promoting the observance of standards for the purpose of ensuring compliance with the provisions of this Act.

(4). The Commission is further required to co-operate with –

(a) the CARICOM Competition Commission and other Regional Competition Authorities for the purpose of enforcing compliance with the provisions of this Act; and⁶

⁶ It may become necessary in the future to coordinate and exchange information with regional competition authorities in CARICOM Member States and in Latin America or the United States, for example. This is especially the case if bilateral or multilateral trade treaties require this type of coordination or cooperation of competition law enforcement activity. This type of cooperation is to the benefit of The Bahamas and it not only enhances trading outcomes but also directly impacts on the outcomes of competition law cases. See for example the level of cooperation and coordination required to prosecute the Vitamins Cartel Case COMP/E-1/37.512 and the Airfreight Cartel Case COMP/39.258 which affected, monetarily, consumers from all over the world.

(b) competition authorities of other Member States for the purpose of detecting and preventing anti-competitive conduct and exchanging information relating to such conduct.

(6). Except as otherwise provided in this Act, for the purpose of carrying out its functions under this Act, the Commission may –

- (a) declare certain business practices to be abuses of dominant position;
- (b) order enterprises to cease and desist from any form or conduct that has or is likely to have as its object or effect the lessening of competition
- (c) order the termination of an agreement;
- (d) prohibit the making or carrying out of an agreement or the putting into effect of any anti-competitive term or condition of an agreement;
- (e) prohibit unfair and misleading trading practices;
- (f) suspend and order the application of conditions to a merger which is likely to substantially lessen competition on a market in The Bahamas.

(7) The Commission shall have the power to obtain such information as it considers necessary to assist it in its inquiry and where it considers appropriate, shall examine, and obtain verification of documents submitted to it.

(8). The Commission shall have power to –

- (a) summon and examine witnesses;
- (b) call for and examine documents;
- (c) administer oaths;
- (d) require that any document submitted to the Commission be verified by affidavit;
- (e) adjourn any inquiry from time to time;
- (f) require the furnishing of such returns or information as it may require by such persons as it may specify by notice;
- (g) make applications to the Court for the purpose of enforcing an order.

(9). The Commission may require a person engaged in business or trade or such other person as the Commission considers appropriate, to state such facts concerning goods manufactured, produced, or supplied by that person or services so supplied, as the Commission may think necessary to determine whether the conduct of the business is relation to the goods and services constitutes an anti-competitive business practice.

(10). A summons to attend, give evidence or produce documents before the Commission shall be served on the person required so to attend and give evidence or to produce documents and shall be issued by the hand of the Director General or any member of the Commission.

(11). All persons summoned to attend and give evidence or produce documents at any sitting of the Commission shall be bound to obey the summons served upon them.

(12). Hearings of the Commission shall take place in public, but the Commission may, whenever the circumstances so warrant, conduct a hearing in camera.

(13). Any person who-

(a). without sufficient cause, fails or refuses –

(i) to attend or give evidence before the Commission in obedience to a summons issued under this Act;

(ii) to produce any document which he is required by such summons to produce; or

(iii) refuses to take an oath or make an affirmation as a witness or to answer any question put to him;

(b) being a witness leaves a sitting of the Commission without the Commission's permission;

(c) wilfully –

(i) insults any member or officer of the Commission;

(ii) obstructs or interrupts the proceedings of the Commission; or

(iii) refuses to comply with a requirement of the Commission under this Act;

(d) makes a complaint to the Commission that a business enterprise is acting in contravention of this Act, which the Commission finds to be a vexatious, frivolous, or malicious complaint,

commits an offence and is liable on summary conviction to a fine upon conviction to a fine not exceeding one million dollars or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

Director General and Other Staff 6. (1). There is to be a Director General of the Commission, appointed by the Minister, who is responsible for overseeing the management and administration of the Commission.

and the Board of Commissioners (2) The Director General shall have responsibility to report on the affairs, functioning and activities of the Commission to the Minister.

The Director General may appoint full-time employees, temporary, specialised, or technical staff for the purpose of administering the functions of the Commission.

(3) The Director General may determine the remuneration of the full-time employees, temporary specialised or technical staff, subject to the approval of the Minister.

(4) The Director General may establish departments or divisions within the Commission for the purpose of ensuring the proper exercise of the administrative, investigative and decision-making functions of the Commission.

(5). There shall be established a Board of Commissioners which shall consist of not fewer than seven and not more than eleven members (of whom at least half of the appointed members shall be women) appointed by the Minister in consultation with the Director General.

(6). The Board of Commissioners shall be appointed in writing for a period not exceeding three years, provided that only two members of the Board of Commissioners are replaced every three years and every constitution of the Board of Commissioners has a member of the legal profession as a member.

(7). Members of the Board of Commissioners shall be appointed from among persons of character and integrity, having satisfied pre-defined professional qualifications as set out under regulations made by the Commission and having had extensive and relevant professional expertise in law, commerce or trade, finance, industrial organisation or micro-economics, science and technology, statistics, or accounting.

(8). The Minister acting on the advisement of the Director General, shall appoint one member of the Board of Commissioners as Chairman.

(9). The Commission may, subject to the approval of the Minister, make Regulations governing all employees, specialised and technical staff of the Commission, and members of the Board of Commissioners, and regarding Commission organisation and structure, qualifications, internal code of conduct, management of conflict of interest, disclosure of financial interests and confidentiality in proceedings before the Commission and rules governing the proper internal administration and management of the Commission and penalties for violation of the regulations .

Funds of the Commission 7. (1) The funds of the Commission consist of –

and Power to Charge (a). such sums as may be appropriated by an Act of Parliament for the purposes of this Act;

Fees (b) fees collected pursuant to subsection (3);

(c) fines and fixed penalties paid to the Commission;

(d) all monies paid to the Commission by way of grants or donations;

(e) all monies made available to or borrowed by the Commission under this Act for the purpose of the Commission with the approval of the Minister; and

(f) any other moneys which may in any manner become payable to or vested in the Commission in respect of any matter incidental to its functions.

(2). All fines and fixed penalties paid to the Commission shall be used solely to defray the expenses generated in connection with the performance of its functions under this Act.

(3). The Commission may charge such fees as may be prescribed from time to time in connection with services rendered by it under this Act and such fees shall be remitted to the Commission and shall be used to defray the expenses generated in connection with the performance of its functions under this Act, including the funding of the remuneration of regular, temporary, specialised, or technical staff.

Accounts and Audit 8. (1) The Commission shall maintain proper accounts and other records in connection to its functions under this Act and shall undergo an annual audit by the Auditor General or by any auditor approved by him.

(2) The Commission shall –

b) within four months after the end of each financial year, submit to the Minister statement of accounts audited in accordance with subsection (1); and

c) not later than four months prior to the beginning of each financial year, submit to the Minister for approval, estimates of revenue and expenditure for that financial year.

Report 9. A report on merger activities shall be produced by the Commission annually and supplied to the Minister and that report shall include a report on the annual audit conducted in line with section 8(1) of the Act.

General Powers of the Commission 10. In connection with its functions under this Act, the Commission and any divisions or departments established thereunder shall have the power to-

a) order an enterprise to provide it with information necessary to assist it in its investigations and where it considers appropriate, shall examine, and obtain verification of documents submitted to it;

b) summon and examine witnesses;

c) call for and examine documents;

d) administer oaths;

e) require that any document submitted to the Commission be verified by affidavit, adjourn any inquiry from time to time; and

f) require the furnishing of such returns or information as it may require by such persons as it may specify by notice.

Communication with the Commission 11. All communication to the Commission, or to a member of the staff of the Commission, may be –

Communication with the Commission

- b) Delivered by hand
- c) Addressed by post
- d) Communicated by telephone
- e) Transmitted by electronic mail

Business Hours 12. The office of the Commission shall be open to the public on such days as prescribed by subsidiary regulation or notice.

Documents Properly Delivered 13. (1) Delivery or transmission of invitations and other documents to the Commission may be effected in any of the following ways-

Documents Properly Delivered

- a) delivery by hand against receipt;
- b) registered letter with acknowledgement of receipt;
- c) facsimile with a request for acknowledgement of receipt; or
- d) electronic mail with a request for acknowledgement of receipt;

(2) Where the document is delivered or transmitted outside of the office hours of the Commission, the document shall be deemed to have been delivered on the next working day.

(3) Any document that is delivered by fax must include a cover page, and a document that is transmitted by electronic mail shall be accompanied by a cover message, in either case setting out-

- a) the name, address, and telephone number of the sender;
- b) the name of the person to whom it is addressed, and the name of that person's representative, if it is being sent to the representative of a person;
- c) the date and time of transmission;
- d) the total number of pages sent, including the cover page; and
- e) the name and telephone number of the person to contact if the transmission appears to be incomplete or otherwise unsuccessful.

(4) Where this Act requires the Commission to issue a document-

- a) the document will be deemed to have been issued by the Commission when it has been signed, and served on any person to whom it is addressed; and
- b) notwithstanding section 12, the document may be signed and served at any time of the day.
- (5) The Commission shall assign case numbers, in accordance with its filing system, to each document filed in respect of proceedings under the Act.
- (6) The Commission shall ensure that every document subsequently filed in respect of the same proceeding is marked with the assigned case number.
- (7) The Commission may reject a document under subsection (1) if it is not properly marked with the assigned case number.
- (8) A person who files any document under the Act shall provide to the Commission that person's-
- a) legal name;
- b) address for service;
- c) telephone number;
- d) if available, email address and fax number; and
- e) if the person is not an individual, the name of the individual authorised to deal with the Commission on behalf of the person filing the document.

PART III: PROHIBITION OF ANTI-COMPETITIVE BUSINESS CONDUCT

- Prohibition of Anti-competitive Agreement** 14. (1) An agreement between enterprises, or a decision by an association of enterprises or concerted practice, whose object or effect [or likely effect] is the

prevention, restriction, or distortion of competition in trade in any goods or services is prohibited and void.⁷

(2) Without limiting the generality of subsection (1), an agreement under this section includes an agreement that-

- a) directly or indirectly fixes purchase or selling prices or any other trading conditions;
- b) limits or controls production, markets, technical development, or investment;
- c) shares markets or sources of supply;
- d) applies dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
- e) makes 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 such contracts;

(3) For greater certainty, the defences under section 15 do not apply to an agreement, or a decision of an association of undertakings or a concerted practice between enterprises in a horizontal competing relationship in a market.

(4) A person proposing to enter into an agreement or class of agreement under subsection (3) may apply for a grant of authorisation pursuant to Part IX .

⁷ Agreements between competitors at the same level of production and agreements among market players at different levels of production, i.e., horizontal, and vertical agreements, to the extent that they distort or restrict competition, are prohibited at law. In practical terms, this means that agreements between competitors at the same level of production and agreements among market players at different levels of production, i.e., horizontal, and vertical agreements, to the extent that they prevent or significantly lessen competition, are prohibited at law and are unenforceable by the parties to the agreement. Examples of the types of agreements that restrict or distort trade typically include: price fixing agreements, production quota agreements, geographic market divisions, bid-rigging agreements, tied selling; and, collective arrangements among suppliers to directly or indirectly fix the resale price of a good or service. Certain exemptions are carved out under the Act for certain agreements that, though restrictive or bear some risk of distortion of competition, have certain redeeming qualities. Also, firms may apply to the Commission for a review and, where applicable, the grant of an authorisation for an agreement that may infringe the rules of competition.

Defences re potential anti-competitive agreements, etc. 15. Section 14(1) does not apply where the Commission can be satisfied that the agreement, decision, or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not:

- a) impose on the enterprises concerned, restrictions that are not indispensable to the attainment of these objectives;
- b) afford the enterprises the possibility of eliminating competition in respect of a substantial market for the goods or services in question.

Prohibition of Abuse of Dominance 16. (1) Abuse of dominance by one or more enterprises in a dominant position is prohibited.⁸

(2) An enterprise abuses its position of dominance if it impedes the maintenance or development of effective competition in a market and, in particular, but without limiting the generality of subsection (1), it engages in conduct that includes-

- a) the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions;
- b) limiting production, markets, or technical development to the prejudice of consumers;
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) as a party to a contract or other agreement, making the conclusion of the agreement subject to the acceptance by any other party of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the agreement;

⁸ In the context of abuse of dominance, the scrutiny of the Commission is courted when a firm acts, on its own or jointly, to abuse its position of economic strength on a market. Any abuse of a dominant position by one or more enterprises in a market is prohibited. The dominance question is concerned with whether a firm has significant or substantial market power to Act unconstrained by other competitors on the market or, put another way, whether a firm has the ability to control prices or other market conditions. Once the Commission has determined that the firm is dominant, the next stage in the case assessment is to determine whether the dominant firm has engaged in a form of conduct that constitutes an abuse that is harmful to competition. Various business activities and strategies can constitute abuse including, restriction of entry into a market, preventing a competitor from engaging in competitive conduct, eliminating, or removing a competitor from a market, imposing unfair purchasing, and selling prices, limiting production of products to the prejudice of consumers, exploitation of consumers or suppliers through the usage of exclusive dealing, market restrictions or tied selling.

- e) engaging in any business conduct that results in the exploitation of its consumers or suppliers including but not limited to exclusive dealing, market restriction or tied selling.

(3) An enterprise, either by itself or acting together with others, has a dominant position in a market if it has-

- a) the actual capacity to control prices or other commercial conditions;
- b) the actual capacity to eliminate or restrain competition in the market;
- c) the actual capacity to set barriers against entry of others into the market;
- d) a position in the market which enables it to operate in the market to an appreciable extent independently of competitors, suppliers, and buyers;
- e) at least 40 per cent of the shares in the market; or
- f) operated, or continues to operate, in a manner which demonstrates a combination of any of the factors sated in any of the preceding paragraphs.

Defences re potential Abuse of 17. (1) An enterprise is not to be treated as abusing a dominant position if the Commission can be satisfied that-

- Dominance**
- a) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;
 - b) the effect or likely effect of its behaviour in the market is the result of its superior competitive performance;
 - c) where it seeks to enforce any right existing by virtue of any copyright, patent, registered design or trade mark, other property right, or know-how, the exercise of that right –
 - (i) has the effect of unreasonably lessening competition in a market; and
 - (ii) impeding the transfer and dissemination of technology.

PART IV: PROCEDURES FOR ACTION ON ANTI-COMPETITIVE CONDUCT⁹

Decision to Conduct an Investigation 18. [(1) The Commission has discretion to set its own priorities for investigation so as to maximise the effective use of its resources.

n (2) A person may initiate a complaint alleging a prohibited or restrictive trade practice by submitting information thereon to the Commission -

a) in any manner or form; or

b) [where applicable,] in the prescribed Form.

(3) Without limiting the effect of section 19, the Director General shall undertake a preliminary decision on the facts available to him to decide whether a complaint is to be subject to full investigation.

(4) For the purposes of subsection (3), the Director General may make such enquiries as appear appropriate so as to be satisfied that there are reasonable grounds to believe that a prohibited anti-competitive business practice has occurred or is occurring or about to occur, including-

a) a specific request for information from any enterprise or groups of enterprises;

⁹ A competition investigation may be summarised as follows: The Commission conducts a preliminary investigation to ascertain whether the conduct complained of satisfies the requirements for a full investigation. The Commission considers that it has a duty to carefully consider the legal and factual arguments presented by a party in its complaint in order to satisfy itself that the conduct complained of (i) falls within the jurisdiction of the Commission, (ii) is likely to infringe one of the rules of competition as set out under Parts III, IV, VII of the legislation. During this preliminary stage, an examination of the complaint is conducted to decide how to proceed on the complaint. As a practical matter there may be informal meetings and phone calls or other communications between the Commission and the complainant to clarify the legal and factual issues raised by the complaint. It is at this stage that the Commission utilises an objective standard whereby the Director assesses the facts made available by the complainant or the facts otherwise available to satisfy himself that there are reasonable grounds to suspect that a restrictive business practice has occurred, is likely to occur or is about to occur. Where there are insufficient grounds for acting on the complaint, the Commission will inform the complainant and may also allow the complainant a chance to submit additional information such as substantiating evidence within a set time-limit. Ultimately where the Commission comes to a view that the conduct complained of is not likely to harm competition, or does not constitute a serious infringement, or conducting a full investigation is not in the public's interest, the Commission will notify the complainant and close the complaint file. A full investigation is launched where the Commission considers that there is a serious risk to competition on the market. A full investigation is carried out by the Secretariat which is the department within the Commission charged with investigation and enforcement. The Commission (working through the Directorate for Competition) has the power to issue summons and requests for information to complainants, third parties to the investigation, interested parties such as other government departments in The Bahamas, or in CARICOM Member States or regional States, for example, and to the party subject of an investigation. The information gathered is used to substantiate the legal arguments to be raised by the Directorate in its Case Report. The Report is a document which sets out all the legal and factual elements of the Commission's case and is issued to the party subject of investigation together with all evidence held by the Commission on file. The party subject of investigation is then given sufficient time to respond in writing to the Case Report. Once a response with the alleged infringing party's substantiating evidence is received by the Commission within the stipulated timeframe for submitting a response, the matter is referred to the Board of Commissioners for a determination on whether a rule or rules of competition, as pleaded by the Directorate, has been infringed. Throughout its investigation, the Commission observes strict rules of impartiality and ensures that its investigative procedures are separated from procedures intended to determine a matter. In other words, complete separation of functions and powers is observed by the Directorate charged with investigation and enforcement and by the Board of Commissioners which is charged with determining whether conduct complained of violates any of the rules of competition.

- b) a request to provide information on any specific matter, case, event or business agreement or transaction;
- c) a request to attend the office of the Director General for an interview;
- d) a request for written explanations or otherwise as required for the purposes of the issue at hand; or
- e) an inspection of a locus or site, whether accompanied by the authorised officers or not.

(5) Notwithstanding Section 19(1) and (2), a complaint shall not be entertained where-

- a) the case does not fall under the Act;
- b) the alleges practice has no effect on competition;
- c) in the Commission's discretion and as a matter of priority, it is not worth devoting resources to investigate; or
- d) the same in whole or in part is before any court, tribunal, arbitration, judicial or quasi-judicial body or was previously determined by any court, tribunal, arbitration, judicial or quasi-judicial body.

(6) Any person who supplies information, makes submissions, comments, or subsequently submits further information to the Commission in the course of the same proceedings may be required to clearly identify any material which he considers to be confidential, in the prescribed Form.

Initiation of a Full Investigation 19. (1) Where the Director General has determined that a matter is to be the subject of a full investigation, he or she shall cause there to be a full investigation by the Directorate for Competition, which shall investigate with a view to establishing whether there is a case to answer.

(2) The Director General shall cause there to be an investigation where-

- a) he or she has received a complaint that a prohibited or restrictive trade practice may have occurred or may be occurring or about to occur; or
- b) he or she has reasonable grounds to believe that a prohibited or restrictive trade practice may have occurred, may be occurring or about to occur; or
- c) it has otherwise come to his or her knowledge that a prohibited or restrictive trade practice may have occurred or may be occurring or about to occur.

(3) Pursuant to the powers conferred on the Director General under Section 6(1) of the Act, the Director General may make such enquiries or order an enquiry as he or she thinks appropriate, necessary, or desirable-

- a) to keep under review commercial activities with a view to ascertaining practices that may adversely affect the economic interests of consumers;
- b) as will enable the Commission to determine, on its own initiative or at the request of any person, whether an entity is engaged in conduct subject to prohibition under this Act.

Conduct of a Full Investigation

20. (1) There is established a Directorate for Competition with power to-
- a) gather information;
 - b) examine parties or witnesses;
 - c) verify information;
 - d) decide whether information is protected by legal professional privilege;
 - e) consider exclusion of information from disclosure;
 - f) set out a written statement of the facts and legal issues;
 - g) request and obtain economic data in writing from the main parties through a questionnaire or in a form as may be prescribed;
 - h) request and obtain economic data in writing from third parties;
 - i) request in writing any information relevant to the subject matter of the case;
 - j) discuss with the main parties and with third parties their written submissions;
 - k) establish a case to answer by setting out a Case Report;
 - l) submit to the Director General a report of a statement of the facts and issues in the Case Report;
 - m) make arrangements for the issuance of a case schedule providing for the remaining stages of the case;
 - n) notify the parties that a Case Report will be issued and issue such report to parties;

o) require parties to submit a response to the Case Report of the case within a period prescribed by the Commission;

p) undertake general, market, research, and sector studies.

(2) Without prejudice to the generality of section 19(1) and section 19(2), the Directorate for Competition may engage in discussions with the main parties and third parties on whether the behaviour that is complained against is harmful to competition.

(3) In carrying out its functions under section 20(1) the Directorate for Competition shall collect relevant information concerning-

a) preliminary assessment of the relevant markets;

b) the nature of competition in those markets;

c) the possible role or behaviour of a person who is the subject of investigation;

d) preliminary assessment of whether the conduct under investigation imposes competitive constraints on the market.

(4) Pursuant to section 20(1)(k) where it appears the relevant behaviour does harm or is likely to harm competition the Directorate for Competition shall prepare a Case Report which shall set out-

a) the economic and legal arguments;

b) the findings as proposed by the Directorate for Competition;

c) the options for conditions, if any; and

d) proposed remedial action that may be implemented through compliance orders or agreements, court mandated compensatory orders or fines.

(5) Where it appears that the relevant behaviour does not harm or is not likely to harm competition, the parties involved shall be informed with reasons that the Commission shall not be taking any further action.

Request for Information 21. (1) Where the Commission summons a person to supply information, document, or evidence, it shall-

- a) state the legal basis and the purpose of the request;
- b) specify what information is required;
- c) fix the time within which it is to be provided; and
- d) indicate the penalties provided for under the Act for not complying with a summons.

(2) In the case of natural person or association having no legal personality, their representatives shall supply the information requested on behalf of the legal person or the association concerned.

(3) All persons summoned to attend and give evidence or produce documents upon the request of the Commission shall be bound to obey the summons served upon them.

(4) Any person who without sufficient cause, fails or refuses-

- a) to give evidence before the Commission in obedience to a summons issued under this Act,
- b) to produce any document which he is required by such summons to produce,
- c) to take an oath or make an affirmation as a witness or to answer any question put to him,
- d) to comply with a requirement of the Commission under this Act
- e) to remain, as a witness, at a convening of a meeting or hearing of the Commission and leaves without the Commission's permission, or
- f) wilfully obstructs or interrupts the proceedings of the Commission,
- g) refuses to produce any document or intentionally or recklessly alters or destroys any record likely to be required for any investigation that has commenced under this Act,

commits an offence and is liable upon conviction to a fine not exceeding the level of one million dollars and to imprisonment for a period not exceeding six months.

Search Warrant 22. (1) For the purpose of section 23 of the Act, the Director General shall apply to a Court pursuant to 23(1)(4) for the issuance of a search warrant which shall specifically identify the premises that may be entered and searched.

(2) A warrant issued under section 22(1) shall remain valid until one of the following events occur-

- a) the warrant is executed;
- b) the warrant is cancelled by the person who issued it or,
- c) in that person's absence, by a person with similar authority or power;
- d) the purpose for issuing it has lapsed; or
- e) the warrant has expired.

Entry into Premises 23. (1). A person who is authorised to enter and search premises may-

- a) enter upon or into the premises;
- c) search the premises;
- d) search any person on the premises if he has reasonable grounds for believing that the person has in his personal possession a document that is relevant to the investigation;
- e) enter and search the premises without consent where the Commission has reasonable grounds for believing that documents may be destroyed;
- f) examine any document found on the premises that is relevant to the investigation;
- g) request information about any document from the owner of, or person in control of the premises or from any person who has control of the product or document, or from any other person who may have the information and record the information;
- h) take extracts from, or make copies of, any book or document that is on or in the premises that is relevant to the investigation;
- i) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to-
 - i) search any data contained in or available to that computer system;
 - ii) reproduce any record from that data; and

- iii) seize any output from that computer for examination and copying;
- h) attach and, if necessary, remove from the premises for examination and safekeeping, anything that is relevant to the investigation; and
- i) seal any business premises and books or records for the period and to extent necessary for the investigation.

Conduct of Entry and Search 24. (1) A person who enters and searches any premises shall observe the right to dignity of the person who is the subject of the search.

(2) During the search, only a female officer or female police officer shall search a female person, and only a male officer or male police officer shall search a male person.

(3) A police officer who is authorised to enter and search the premises or who is assisting an officer who is authorised to enter and search the premises, may overcome any resistance to the entry and search by using such force as is reasonably required including breaking doors or windows of the premises.

(4) An authorised officer shall grant a request of the occupier of the premises entered by the officer to allow a reasonable time for the occupier's legal adviser to arrive at the premises before the investigation continues, if the officer considers it reasonable in the circumstances to do so, and if the officer is satisfied that such conditions as he considers appropriate to impose in granting the occupier's request are, or will be, complied with.

(5) The Commission shall not use as evidence any document collected during search which contains legally privileged information.

Use of Information Gathered 25. The information gathered during an investigation, including information volunteered by other enterprises, and consumer organisations will be used by the Directorate for Competition as a basis for their findings on the alleged anti-competitive practice in question.

Submission of a Case to the Board of Commissioners. 26. (1) The findings of the Directorate for Competition are submitted in writing in a Case Report to the Director General who shall submit a copy of the Case Report to the Board of Commissioners.

Commissioners

(2) Where the Directorate for Competition takes the view in due course that an infringement has been committed or is likely to be committed, and that there is a case to answer, it shall send to the respondent written details of the findings and reasoning, together with a copy of the evidence used to substantiate the Directorate for Competition's findings and invite a response within a specified period, not exceeding 60 days.

(3) The findings in section 26(2) shall be notified to the main parties and, if the circumstances warrant such a notification, to third parties.

(4) The parties may seek an extension of the time-limit set in section 26(2) but such an extension shall not exceed an additional 30 days.

(5) The Commission shall not be obliged to take into account any written submissions received after the expiry of the time-limit set in section 26(2) or section 26(4).

(6) The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the findings raised by the Commission.

(7) The parties shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, two paper copies of their submission and of the documents attached to it.

(8) The responses and any other submissions made by the parties shall be submitted by the Director General to the Panel of the Board of Commissioners for a determination of the matter.

Establishment of the Board of Commissioners and Panels of Board. 27. (1) There is established a Board of Commissioners which shall have the power to determine a matter arising under this Act, by a Panel of the Board.

(2) The Panel to determine a matter shall be duly constituted by the Board of Commissioners from among the persons appointed under section 6(6) of the Act, whenever an enforcement case is referred to the Board of Commissioners by the Director General.

(3) A Commissioner who is directly or indirectly interested in any matter which is to be determined by the Board of Commissioners shall disclose the nature of his interest at

a meeting of the Commission and shall not take part in any deliberation or decision of the Panel with respect to that matter.

(4) The Panel shall select from among them a Chairman of the Proceedings for each new matter to be determined who shall be responsible for leading the proceedings to determine a matter arising under this Act.

(5) The Panel to determine a matter shall consist of no more than nine persons but never less than three persons selected from among the members appointed under section 6(6) of the Act.

(6) The Panel when convening to determine the matter presented to it by the Director General shall consider-

- a) the Case Report referred to it under section 26(1);
- b) the written submissions of the respondents in defence of the allegations set out against them in the Case Report; and
- c) any evidence adduced by parties to the investigation during the hearing procedure.

Decision to Conduct a Hearing 28. (1) The Board of Commissioners may conduct a hearing if the party under investigation has requested a hearing and has submitted an application for a hearing in the manner provided for in the prescribed Form in their written submissions.

(2) The Board of Commissioners shall conduct a hearing where-

- a) it intends to issue a direction under section 41(2);
- b) upon determining a matter, it recommends that the Commission apply to the court for an order under Part VIII.

(3) The hearing under subsection (1) or (2) is [to be considered as] part of the investigation procedure and is to be conducted after the Case Report is issued and responses to the Case Report are received by the Board of Commissioners.

(4) Where the Board of Commissioners receives representation from the Director General regarding compliance or non-compliance with a directive, or performance or non-performance by an enterprise, the Board of Commissioners shall, before reviewing the matter with a view to making any decision, conduct a hearing.

(5) Any person (herein called a "third party") who has a sufficient interest in the matter before the Commission may, upon making an application in the prescribed manner, be heard [if they so request in their written submissions].

(6) The Panel may, where appropriate, summon any person to present his arguments at the oral hearing of the parties where a party or a third party has so requested in his written submission

(7) Notwithstanding subsection (6), the Panel may summon any other person to make submissions in writing and to attend the hearing.

(8) Where a person is unable to attend a hearing within the period of twenty-one days and proves to the satisfaction of the Panel that his inability to do so was due to an illness or any other reasonable cause, the Panel may determine to hear the person at a later date, on such terms and conditions as it may determine.

(9) For the purpose of subsection (1), (2) and (4) the Board of Commissioners shall provide a forum for presentation of any additional information or analysis with a view to facilitate the process of investigation.

Summary 29. Without conducting a hearing of a matter, the Board of Commissioners may, on its own motion or on the application of a party, hear and determine the following preliminary points, namely, whether [or not]-

Proceedings on preliminary points

- a) the Commission lacks jurisdiction; or
- b) the complaint or the application contains some other fundamental defects; or
- c) to proceed with the hearing shall amount to abuse of the legal process.

Insufficient Evidence 30. If the Board of Commissioners before or after the hearing decides that-

- a) the material in the Case/Case Report demonstrates that no anti-competitive business conduct exists; or
- b) that the matter under investigation does not have adverse effects for competition, the investigation can be terminated before hearings are held.

- Conduct of Hearing** 31. (1) The Board of Commissioners shall adopt inquisitorial rather than adversarial procedure in conducting the hearings.
- (2) Any person summoned to appear before the Board of Commissioners may appear either in person or by legal representative.
- (3) All oral hearings shall be open to the public.
- (4) The Board of Commissioners, within its sole discretion, may determine that such hearings be conducted in camera.
- (5) The Board of Commissioners may allow the parties, the complainants and other persons summoned to the hearing, to ask questions during the hearing.
- (6) The proceedings at the hearing and the statements made by each person heard under section 31 (5) shall be recorded and shall form part of the proceedings.
- (7) The recordings shall be kept by the Commission.
- (8) Upon request and approval of the Board of Commissioners, the record of the hearing shall be made available to the persons who attended the hearing, but regard shall be given to the protection of their business secrets and other confidential information.
- (9) Summons for the attendance of any person in proceedings under this Act shall be issued in the prescribed Form.
- (10) The hearing shall cover-
- a) the prior issues of whether there has been a breach of the Act or a breach is likely to occur;
 - b) possible remedial actions; and
 - c) whether an authorisation is warranted.

Appearance of Parties 32. (1). Parties appearing at hearings, their representatives and other officials shall conduct themselves in a respectful manner.

(2) Any contemptuous conduct by any person appearing at a hearing shall be a ground for exclusion from the hearing.

(3) The proceedings shall be opened and directed by the Chairman of the Board of Commissioners to determine the matter who shall be responsible for the proper conduct of the hearing.

Opening Statement 33. Unless the Panel otherwise directs, each party shall at the beginning of every hearing give a brief opening statement which includes-

- a) a description of the nature of the application or matter;
- b) an outline of the evidence the party intends to introduce;
- c) a list of witnesses if any; and
- d) the issues to be covered.

Taking of Evidence 34. (1) The Panel shall control the taking of evidence and may give directions as to-

- a) issues on which it requires evidence to be adduced; and
- b) the manner in which evidence is to be presented.

(2) A member of the Board of Commissioners, the Director General or any member of the Commission may administer the oath or affirmation.

(3) The Commission shall not be bound by the formal rules of evidence.

Production of Additional Evidence Before the Board of Commissioners 35. (1) The parties to the proceedings shall not be entitled to produce before the Panel additional evidence, either oral or documentary, which was in their possession or knowledge but was not produced to the Directorate for Competition before the hearing.

(2) Notwithstanding section 35(1), where the Panel requires any documents to be produced or any witness to be examined to enable it to pass orders or for any other substantial cause, or if the Directorate for Competition has not given sufficient opportunity to the party to adduce evidence, the Board of Commissioners, for reasons to be recorded, may allow such document to be produced or witness to be examined or may allow such evidence to be adduced.

(3) Evidence that the Board of Commissioners to determine the matter deems irrelevant or otherwise improper will not be considered.

Adjournment of Hearing 36. (1) The Panel may, either on its own motion or where sufficient cause is shown, adjourn the hearing for reasons to be recorded in writing.

(2) All parties or their authorised representatives shall append their respective signatures in a register maintained for this purpose by the Director General or an officer authorised by the Commission, noting the date of the hearing, or any other day rescheduled for the hearing or on the grant of an adjournment, as the case may be and no separate notice shall be issued to such parties.

(3) Where on the day fixed for the hearing, including the day re-fixed on adjournment, if any party to the proceedings does not appear after service of notice or having noted the date under section 36(2), the proceedings shall continue in the absence of such party.

Continuation of Proceedings after the Death or Insolvency of a Party 37. Where the complainant or the respondent to a proceeding dies or is adjudged insolvent or, in the case of a company, is being wound up, the proceeding shall not abate and may be continued by or against the executor, administrator or other legal representative of the party or by or against the assignee, receiver or liquidator, as the case may be.

Combined or Joint Hearings 38. (1). Where two or more proceedings are pending before the Board of Commissioners, whether before one or more Panels, and it appears that they have a common complaint and that it will be more expeditious, just, and less expensive in the determination of such proceedings, the Board of Commissioners may order that-

- a) the proceedings be consolidated;
- b) the proceedings be heard at the same time.

(2) Notwithstanding section 38(1)-

- a) evidence adduced in one proceeding shall be applied in the other proceeding;
- b) an order or decision made with respect to one proceeding shall be applied to another proceeding.

(3) Before making the orders under section 38(1), the Board of Commissioners to determine the matter shall give each party to the hearing a notice in writing-

- a) specifying what the Board of Commissioners to determine the matter is planning to do; and
 - b) inviting the party to make a written submission on proposal to the Board of Commissioners within fourteen days after the notice is given.
- (4) Where a party objects to such consolidation, the consolidation shall not occur until after the party has had an opportunity to be heard on the issue.

Record of Proceedings 39. (1) Each Panel shall compile a record of any proceedings in which it issues a final decision.

- (2) Subject to section 39(1) the record shall include-
- a) all correspondences regarding the matter;
 - b) any written orders, directions or decisions made during the course of the proceedings;
 - c) documentary evidence, transcript, if any, or oral evidence;
 - d) any video or recording made by the Board of Commissioners to determine the matter;
 - e) written or recorded submissions or arguments; and the decision or order of the Board of Commissioners to determine the matter and the reasons for the decision.

Effect of Non-Compliance 40. Failure to comply with any requirement under this Part shall not invalidate any proceedings, merely by reason of such failure, unless the relevant Panel is of the view that such failure may result in a breach of natural justice.

Remedies and Decision of the Board of Commissioners 41. (1). The Decision of a Panel shall be made in a properly convened and constituted meeting of the Panel through a majority of votes of the members present and, in the event of an equality of votes, the presiding member shall have a deliberative and a casting vote.

(2) Where a Panel proposes to give a direction to impose a penalty under the Act against an enterprise, it shall apply to the Court for an order enforcing its decision, namely whether-

- (a) an order for compensation of a party shall be made;
- (b) a cease and desist order shall be made against one or more parties;

- (c) an order for divestiture of shares or assets;
- (d) a fine and/or penalty shall be imposed to one or more parties, for an aggregate amount that does not exceed 20 per cent of the annual turnover of the enterprise or enterprises that has/have engaged in the prohibited or restrictive trade practice; or
- (e) a combination of any of the above orders.

(3) In determining a fine or penalty the Panel shall consider the following factors-

- a) the nature, duration, gravity, and extent of the infringement;
- b) the damage suffered as a result of the infringement;
- c) the degree to which the infringing party cooperated with the Commission during the investigation;
- d) whether the infringing party has engaged in the infringing conduct complained of or any other infringement of the Act in the past.

(4) Where the Panel intends to apply to the Court for an enforcement order in accordance with subsection (2), it must issue a notice to the enterprise concerned stating-

- a) the intention of the Board of Commissioners to seek the imposition of a penalty by the Court or issue a direction;
- b) the type and terms of the sanction; and
- c) the right of the enterprise to appear before the Board of Commissioners for a hearing within such time as the Board of Commissioners considers appropriate in the circumstances, but not exceeding 21 days from the date of the notice.

Contents of a Decision 42. (1). Every decision made pursuant to section 41(1) shall be composed of the following-

- a) the introductory part;
- b) the date and the place of the meeting;
- c) the issues considered;
- d) the opinions, arguments, and pleadings of the parties;
- e) any other circumstances related to the case;
- f) the legal arguments leading the Panel to reach the decision;

- g) the findings of the Panel including sanctions, remedies or any other directive considered as necessary;
- h) dissenting opinion, if any; and
- i) the date of implementing the order.

Amendment of Final Decision 43. A Panel may, within a reasonable time, amend its final decision for any of the following purposes-

- a) to correct a clerical or typographical error or error of calculation;
- b) to rectify an accidental slip or omission;
- e) to clarify an ambiguity.

Implementation of Decision 44. (1). The Director General shall implement the decision of a Panel through the Directorate for Competition.

(2) Where the decision is that a fine or an order for the compensation of a party is to be imposed, the Director General through the Directorate for Competition shall take action to secure an application for such an order before the Court.

The Imposition of Fines 45. A Panel in taking a decision to apply to the Court for an enforcement order for the imposition of fines, shall have regard to-

- a) the nature and extent of non-compliance or violation;
- b) the wrongly gain or unfair advantage derived as result of the non-compliance or violations;
- c) the degree of harassment caused to any person as a result of the non-compliance or violation;
- d) the repetitive nature of the non-compliance or violation; and
- e) the annual turnover of the enterprise found to be in contravention of the Act.

Annual Turnover 46. (1). The annual turnover referred to in section 45(e) shall be the total sales of goods or services made by the firm in-

- a) the last full business year of its participation in the infringement; or
- b) the year reflected in the last audited accounts of the firm.

(2) Where the figures made available by a firm are incomplete or not reliable, the Board of Commissioners may determine the value of the sales or services of that firm on the basis of the partial figures it has obtained and any other information which it regards as relevant and appropriate.

(3) The value of sales shall be determined before deduction of VAT and other taxes directly related to the sales.

Payment of Fines 47. All fines imposed by the Court for a contravention of the Act, shall be paid by the respondent to the Commission's receipt office which shall issue duplicate receipts thereof.

Transfer of Order 48. (1) The Commission may send any order for execution directly to a Court.

(2) When sending the order for execution the Commission shall send-

- a) a copy of the order;
- b) a certificate setting forth that satisfaction of the order has not been obtained by the Commission, or, where the order has been executed in part, the extent to which satisfaction has been obtained and what part of the order remains unsatisfied; and
- c) a copy of any order for the execution of the order; or, if no such order has been made, a certificate to that effect.

(3) The court to which the order was sent shall cause such copies and certificates to be filed without any further proof of the order for execution, or of the copies thereof, unless the court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

(4) Where such copies are filed, the order may be executed by such court or be transferred for execution to any subordinate court of competent jurisdiction.

(5) An enterprise that fails to comply with an order issued under this Part is guilty of an offence and is liable on conviction on indictment to a fine of 10 per cent of the turnover of the enterprise for the financial year preceding the date of committing of the offence.

Withdrawal of a Complaint 49. (1) Where the complainant or applicant wishes to withdraw a complaint or an application before the hearing he shall file with the Commission a written notice of withdrawal of complaint or application and serve a copy of the notice on the other parties.

(2) Notwithstanding section 49(1) the Commission may, with or without a hearing, grant or refuse an application to withdraw a complaint or an application on any terms that it considers appropriate.¹⁰

PART V: TRANSACTIONS SUBJECT TO MERGER CONTROL¹¹

Transactions Subject to Merger Control 50. (1) Any transaction (hereinafter called a "merger") that is likely to result in-

a) the acquisition of control over an enterprise, or

b) the acquisition of assets related to a relevant market or to the business of the acquiring firm, or

c) the acquisition of at least 40 per cent share of any market or such other amount of the market as the Minister
, acting in consultation with the Commission, may prescribe, or

¹⁰ The foregoing rules explaining conduct of an investigation and the decision-making process of the Directorate and the Board of Commissioners are detailed for an important reason. It has been the experience of the Consultant that new (young) competition authorities in the developing world that have relatively low financial resources to implement a law, attract suitably qualified human resource and to undertake extensive knowledge transfer and training require of its competition agency staff and judiciary require a more detailed/expansive rules framework to curb procedural mistakes that can lead to a nullification of a decision of the competition authority or the Court. It is the practice of legal practitioners in the developing world to hinder the development of competition law practice through the use of procedural hurdles and challenges to bad legal procedure (or ultra vires action on the part of the competition authority) to thwart the substantive conclusion of a case. This practice has led to failure to achieve the goals of competition law in several developing countries. Indeed, some procedural challenges owing to lack of understanding of competition law enforcement procedure in Common Law countries has led to competition authorities becoming "lame duck" institutions. See for example, the case of Jamaica in FTC v. Jamaica Stock Exchange. To curb those challenges which can be costly and to answer to the ever-present challenge of lack of financial resources to properly hire qualified persons or to train staff, the Consultant has included detailed rules to guide every step of the case initiation, investigation, and resolution/decision-making process.

¹¹ Any merger transaction that is to be effected in The Bahamas, and which is likely to have an effect on competition in The Bahamas must be notified to the Commission. The Commission is charged with review of the transaction and therefore assesses the particular features of each transaction, makes determinations about the post-transaction market predicted on the status quo ante and, reaches a prognosis about the likely state of competition in the foreseeable future, after the transaction has occurred. The practical outcome is that the Commission will subject the transaction to a transaction review process which may result in the transaction being approve, approved with conditions that can address any possible anticompetitive effects the transaction is likely to have, or prohibited.

d) a change to the structure of, or have an effect on commerce in, or a local nexus to the domestic market, or

e) a joint venture which results in an acquisition of control over a party or results in a performance of activities on a lasting basis by an autonomous enterprise, or

f) a combination of the circumstances stated in any one or more of the preceding paragraphs

is subject to merger control proceedings as provided for under Part VI of this Act.

Suspension of Transaction 51. A transaction which falls within the meaning of section 50 shall not be completed in The Bahamas unless a formal authorisation within the meaning of section 59(1) is granted by the Commission.

Acquisition of Control Defined 52. (1) For the purposes of section 50(1)(a), an acquisition of control is effected by any person over an enterprise if-

a) assets, contracts, other going concerns, or powers conferred by the products of incorporation or other document or contractual provisions regulating the enterprise are acquired by the person, directly or indirectly, through one or more subsidiaries or otherwise, or

b) the shares or securities held by the person, directly or indirectly, through one or more subsidiaries or otherwise, are attached to more than fifty per cent of the votes that may be cast to elect directors of the enterprise, or

c) the votes attached to the shares or securities held by the person are sufficient, if exercised, to elect a majority of the directors of the enterprise (or persons, however designated, who are in a position to exercise direction or other decisive influence over the activities of the enterprise) or effect a veto power and this allows the person to exercise decisive control or influence over the enterprise or to materially influence commercial policy of the enterprise.

d) the acquisition of assets does result in decisive influence over any competitive aspect of the target's business, such as effect on prices, outputs, customer access to products.

(2) For the purposes of section 50(1)(a), the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other enterprise in question shall not be deemed as acquisition of control-

- a) where the acquisition of shares or voting rights is by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be;
- b) solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a share holders' agreement or products of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired;
- c) where the acquirer, prior to acquisition, already controls fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the merger results in transfer from joint control to sole control;
- d) where the acquisition is not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organised as a separate legal entity or not;
- e) pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control; or
- f) where the acquisition is of stock-in-trade, raw materials, stores, and spares in the ordinary course of business.

Acquisition of Relevant Assets Defined 53. For the purposes of section 50(1)(b), assets related to the relevant market shall not include assets acquired solely as an investment or in the ordinary course of business, not leading to control of the target enterprise, except where the assets represent substantial business operations in a particular location or for a particular product or service of the enterprise being acquired, irrespective of whether or not such assets are organised as a separate legal entity.

Effects on Domestic Market 54. For the purposes of section 50(1)(d), the assessment of whether a merger is deemed to have an effect or change to the structure of the domestic market shall include an assessment of whether-

- a) the transaction is likely to cause a competitor to exit the relevant market;
- b) the levels of concentration in the relevant market as determined by a calculation;
- c) the countervailing power of the firms in the market is likely to be impacted owing to the merger;
- d) the merger is likely to impact on the levels of import into The Bahamas, actual or potential.

Non-Applicability to Interconnected Companies 55. For greater certainty, it is declared that this Act does not apply to transactions undertaken by interconnected enterprises, unless the acquisition results in a transfer of joint control to sole control.

Interconnected Companies

Turn-Over Thresholds May be Used by Commission 56. The Commission may, with the approval of the Minister, prescribe by notice published in the *Gazette*, the threshold of combined annual turnover or assets in The Bahamas, either in general, or in relation to specific industries, for the purpose of determining whether a transaction is subject to control within the meaning of section 50(1).

Assessment Criteria for transactions subject to merger control proceedings. 57. (1). For the purposes of this Act, a merger is subject to an assessment by the Commission of the likely effects of the transaction on the market, consisting of-

- a) a competitive effects test, to determine whether the transaction is likely to substantially prevent or lessen competition by assessing the strength of competition in the relevant market, and the probability that the enterprises in the market after the transaction, will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including-
 - i) the structure of the markets likely to be affected by the proposed transaction;
 - ii) the degree of control exercised by the enterprises concerned in the proposed merger in the market and particularly the economic and financial power of the enterprises;
 - iii) the nature and extent of vertical integration in the market;

- iv) the availability of alternatives to the services or goods provided by the enterprises concerned in the transaction;
 - v) the likely effect of the proposed transaction on consumers and the economy;
 - vi) the actual and potential level of import competition in the market;
 - vii) the ease of entry into the market, including tariff and regulatory barriers;
 - viii) the level and trends of concentration, and history of collusion, in the market;
 - ix) the degree of countervailing power in the market;
 - x) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
 - xi) the nature and extent of vertical integration in the market;
 - xii) whether the business or part of the business of a party to the transaction or proposed transaction has failed or is likely to fail; and
 - xiii) whether the transaction will result in the removal of an effective competitor; and
- b) a dominance test, to determine the extent to which the proposed transaction would be likely to result in any enterprise, including an enterprise not involved as a party in the proposed transaction, acquiring a dominant position in a market or strengthening a dominant position in a market.

(2) The Commission shall, if it appears that the merger is likely to substantially prevent or lessen competition or create a dominant position in a market or strengthen a dominant position in a market, determine whether the transaction is likely to result in any technological efficiency or other pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the transaction is prevented.

Transactions in the Public Interest 58. The Commission shall, if it appears that a merger is likely to substantially prevent or lessen competition or create a dominant position in a market or strengthen a dominant position in a market, apply a public interest test in order to determine whether the transaction can or cannot be justified on substantial public interest grounds, by assessing the effect the transaction will have on the following:

- a) the extent to which the proposed transaction would be likely to affect a particular industrial sector or region;
- b) the extent to which the proposed transaction would be likely to affect employment;
- d) the extent to which the proposed transaction would be likely to affect the ability of small enterprises to gain access to or to be competitive in any market;
- e) the extent to which the proposed transaction would be likely to affect the ability of national industries to compete in international markets.

PART VI: PROCEDURES FOR REVIEW AND CONTROL OF MERGERS

Application for Formal Authorisation of a merger. 59. (1) Where an enterprise is desirous of effecting a merger, and the enterprise and all other parties to the transaction have reached a good faith intention to conclude an agreement, or in the case of a public bid, where there has been an announcement of an intention to make such a bid, the enterprise shall apply to the Commission for a formal authorisation to effect the transaction.

(2) An application referred to in section 59(1) shall be accompanied by the information in the prescribed Form.

(3) Within 90 business days after the receipt of an application under section 59(1), or as soon as practicable after the receipt of the application, the Commission shall determine whether to grant or refuse permission and notify the applicant in writing of its decision.

(4) Where the Commission is of the opinion that the period referred to in section 52(1)(b) should be extended due to the complexity of the issues involved, it may, before the expiry of that period, notify the merging parties in writing of the extension which shall not extend the relevant period for more than sixty business days.

Informal Pre-Transaction Discussions 60. (1) Where an enterprise that is a party to a proposed merger is of the view that the transaction is likely to give rise to the results as set out under section 50(1) of the Act, the enterprise may seek from the Commission an informal view on whether the proposed transaction is likely to harm competition or is likely to have an adverse effect on the interests of consumers or the economy.

(2) The Commission upon the receipt of a petition for an informal view shall reach its decision upon the sole consideration of the effect the transaction is likely to have on competition and shall not give consideration to the possible public benefits or possible efficiency gains that may result from the transaction.

(3) A petition for an informal view on a proposed merger that is received prior to the public announcement of the transaction is to be treated confidentially and the decisions by the Commission in relation to the petition shall not be made publicly available.

(4) The Commission need not give reasons for its informal view not to oppose or to oppose a proposed merger.

(5) An informal view by the Commission not to oppose the merger does not provide merger parties with immunity or exemption under this Act and does not prevent the Commission from taking subsequent legal action.

Separate Application for Approval of merger. 61. Subject to section 62, each enterprise that is a party to a proposed merger shall separately apply for an approval of the transaction in accordance with section 59(1).

Joint Application for Approval of Transaction 62. An application for permission to file a joint notification of a controlled merger shall be made in writing to the Commission, which may-

a) grant approval for a joint application to be made, allowing a single filing by one of the enterprises to the transaction if it is reasonable and just to do so in the circumstances;

b) give appropriate directions to give effect to the requirements of the Act and in particular, specify how the enterprise filing the joint application may satisfy the information required under the prescribed Form; and

c) further permit the enterprise filing the joint application to file any document on behalf of the other enterprise party to the transaction.

Merger Filing Fee 63. The Commission may, by notice published in the Gazette, prescribe a merger filing fee, which shall be paid by the party filing the application on or before the date of filing of the application.

Notification of Unapproved transactions 64. (1) Where a person has information that a merger is being implemented without the approval of the Commission, he may notify the Commission by submitting any information concerning the transaction being implemented.

(2) On the Director General's own initiative or pursuant to section 64(1), the Director General may make such enquiries as the Director General considers necessary to be satisfied that there are reasonable grounds to believe that an unauthorised merger has been or is being implemented.

(3) An enquiry made by the Director General under section 64(2) may include-

- a) a specific request for information from any enterprise or groups of enterprises;
- b) an invitation to provide information on any specific matter, event or business agreement or transaction;
- c) an invitation to attend the office of the Director General for an interview;
- d) a request for written explanations or otherwise as required for the purposes of the issue at hand; or
- f) an inspection of a locus or site; whether accompanied by the officers of the Commission or not.

Initiation of a controlled Transaction Investigation 65. Where the Director General receives a merger approval application pursuant to section 59(1), receives a notification of an unapproved merger pursuant to section 64(1) or has reason to believe a merger is being implemented, the Director General shall cause there to be an investigation by the Directorate for Competition which shall subject the merger to an investigation and assessment.

Conduct of a Merger Investigation 66. (1) The Directorate for Competition shall, pursuant to section 65, be charged with the power to-

- a) request information and examine enterprises or witnesses;
- b) make arrangements for the issuance of a case schedule providing for the remaining stages of the case;
- c) decide on confidentiality of any information;
- d) consider exclusion of information from disclosure;
- e) request any information relevant to the subject matter of the case including economic data in writing from the enterprises that are a party to the transaction together or other enterprises that the Director General is satisfied have sufficient interest in the matter;
- f) prepare a Merger Report which shall be sent to the enterprises that are a party to the transaction together with the file of evidence the Commission uses to reach its findings in the Report;
- g) receive oral or written proposals or submissions from the enterprises that are parties, in response to the Report;
- h) discuss with the enterprises that are parties, and with the abovementioned other enterprises, their written submissions;
- i) receive and comply with requests for hearings;
- j) prepare a Final Merger Report.

(2) Where it appears, the merger is likely to raise potential concerns, the Directorate for Competition shall prepare a Final Merger Report pursuant to section 66(1)(j) which shall set out-

- a) the economic and legal arguments;
- b) the findings as proposed by the Directorate for Competition;
- c) the options for conditions, if any; and
- d) proposed remedial action that may be implemented through compliance orders or agreements by the enterprises party to the transaction.

Submission of a merger 67. (1) Pursuant to section 66(2) the findings of the Directorate for Competition are to be submitted to the Director General.

Application

for Approval (2) The findings under section 66(1)(j) and section 66(2) are to be notified to the enterprises party to the merger together with any evidence or information used to reach the findings.

(3) The enterprises party to the merger may seek an extension of the time-limit set under section 59(1)(b) but such an extension shall not exceed an additional sixty business days.

(4) The Commission shall not be obliged to take into account any written submissions received after the expiry of the time-limit set in section 67(3).

(5) The enterprises party to the merger may, in their written submission of a response, set out all facts known to them which are relevant to their defence against the findings raised by the Commission.

(6) The enterprises party to the merger may, in their written submissions, made pursuant to section 66(1)(g), make proposals with regard to the manner in which the transaction may be put into effect;

(7) The enterprises party to the merger shall attach any relevant documents as proof of the facts set out in its response.

(8) The enterprises shall provide a paper original as well as an electronic copy of their written submissions or, where they do not provide an electronic copy, two paper copies of their written submissions and of the documents attached to it.

(9) The Final Merger Report completed with a decision on authorisation prepared by the Directorate for Competition and all written submissions made by the enterprises party to the merger shall be submitted by the Director General as a determination of the matter.

Commission Action in Relation to Reviewed Mergers 68. (1) Upon the completion of its investigation under section 66(1), the Commission shall take one or other of the following actions-

a) notify the enterprises that are party to the merger of its decision to issue a formal authorisation of the merger without conditions,

i. the formal authorisation shall be issued in writing and shall set out the Commission's reasons for its decision;

b) notify the parties that the transaction is prohibited,

- i. the decision to prohibit the transaction shall be issued in writing and shall set out the Commission's reasons for its decisions;
- c) notify the parties of its decision not to issue an authorisation and seek an order before the Court to give effect to an authorisation with any of the following-
 - i) an order directed against any enterprise party to the proposed transaction or any other person not to proceed with the transaction or a part thereof, or
 - ii) an order directing the enterprises that are party, within an agreed period, to divest interests or part of their combined business or operations if the Commission is satisfied that such divestment would make the transaction less likely to result in anti-competitive effects or to affect adversely the interests of consumers or the economy, or
 - iii) an order directing any enterprise to the proposed transaction to dispose of assets or shares designated by the Commission in such a manner as the Court directs;
 - iv) the decision not to issue an authorisation shall be issued in writing and shall set out the Commission's reasons for its decision.

(2) Within ten business days of the receipt of notification of the Commission's decision to seek before the Court an order for the application of conditions, the enterprises that are party can seek to reach an agreement on a settlement order with the Commission.

(3) If the Commission and the enterprises that are party agree to a settlement order, a copy of the agreement setting out the terms agreed between the Commission and the enterprises shall be signed by the Commission and the enterprises that are party and registered with the Court.

(4) In connection with section 68(1)(c), the Commission may revoke its decision to authorise a merger if an enterprise that is a party to the transaction appears to have breached an obligation or condition that was the basis upon which the Commission's approval was granted.

(5) An enterprise that fails to comply with an order issued under section 68(1)(b) and 68(1)(c) is guilty of an offence and is liable on conviction on indictment to a fine of 10 per cent of the turnover of the enterprise for the financial year preceding the date of committing of the offence.

Definition of 69. The Commission shall consider a merger to have been implemented without the
Prior formal authorisation required under section 59(1) if-

Implementa

**tion of a
merger**

- a) there has been an exchange of competitively sensitive information for purposes other than valuation during due diligence, or other than on a need-to-know basis;
- b) there has been an actual integration of any aspect of the enterprises that are party, including, but not limited to, the integration of infrastructure, information systems, personnel, corporate identity, or marketing efforts;
- c) there has been placement of personnel from one enterprise that is party in new positions at the other enterprise party; or
- d) there has been any effort by the acquiring party to influence or control any competitive aspect of the target's business, such as setting minimum prices, limiting discounts, or restricting sales to certain customers or of certain products.

Remedying 70. (1) Where the Commission is of the opinion that enterprises have, without
Failure to obtaining an authorising order from the Commission pursuant to section 59(1), structured
File and themselves in such a way as to constitute a merger or have implemented a merger
Prior within the meaning of section 69, the Commission may impose a financial penalty in an
Implementa amount not exceeding ten percent of the preceding year's gross annual turnover in The
tion Bahamas of the enterprise or enterprises in question.

(2) In determining a penalty pursuant to section 70(1), the Commission shall take into account whether-

- a) the infringement lasted for a significant period;
- b) the infringement has resulted in anti-competitive effects on any part or substantial part of The Bahamas;
- c) the enterprise was in significant financial distress at the time of the implementation of the transaction;
- d) the enterprises have brought the infringement to the attention of the Commission in a timely manner.

(3) Where the Commission has become aware that there is a merger that is in the process of being implemented that has not received an authorising order from the Commission pursuant to section 59(1), the Commission may apply to the Court for a cease and desist order or any other interim order prohibiting the enterprises party to the transaction from implementing the transaction prior to receiving authorisation.

(4) The Commission shall require the enterprises to notify the merger for purposes of curing the prior implementation of the transaction and remedying any competition and/or public interest concerns that may have resulted from the transaction.

Proposals and Measures for Remedying a Merger 71. (1) For the purposes of section 68(1)(c), the Commission may-

a) engage in discussions with an enterprise or enterprises party to a merger or with any other enterprises or individuals with a view to identifying measures which would ameliorate any effects of the transaction on the public interest or competition in The Bahamas or any substantial part of The Bahamas;

b) accept proposals from any enterprise involved in the transaction with regard to the manner in which the transaction may be put into effect;

(2) Pursuant to section 71(1)(b) the Commission may take the proposals into account and shall state in its authorisation order that the proposals form the basis of or part of its determination of the matter under section 67(9) and is binding on the Commission and the enterprises who are party to the transaction.

Action in Relation to Abandoned merger 72. Where the enterprises that are party to a m have decided merger to abandon the transaction, they shall notify the Commission of their intent and the Commission shall-

a) satisfy itself that parties are in the same position prior to the notification of the transaction,

b) notify the parties that the Commission has ceased its investigation; and

c) notify the parties that the filing fee paid in respect of the transaction is forfeited unless, within 15 business days of the Commission's notice of forfeiture, they can show good cause to a Court why the fees are to be refunded by the Commission.

Authorisation Register 73. The Commission shall maintain, in such form as it may determine, a public register of authorisations granted.

PART VII: UNFAIR AND MISLEADING TRADE PRACTICES¹²

- Misleading Advertising** 74. (1) An enterprise shall not, in pursuance of trade and for the purpose of promoting, advertising, directly or indirectly, the supply or use of goods or services or any business interest, by any means –
- a) make representation to the public –
 - i) that is, in a material respect, false or misleading or likely to be misleading;
 - ii) in the form of a statement, warranty or guarantee of performance, efficacy, or length of life of goods or services that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;
 - (iii) in a form that purports to be a warranty or guarantee of any goods or services or a promise to replace, maintain or repair a product or any part thereof or to repeat or continue service until it has achieved a specified result, if the form of purported warranty, guarantee or promise is in a material respect, false or misleading or if there is no reasonable prospect that it will be carried out;
 - b) falsely represent to the public in the form of a statement, warranty or guarantee that services are of a particular kind, standard, quality, or quantity, or are supplied by any particular person or by any person of a particular trade, qualification, or skill;
 - c) make a representation to the public that is in a material respect, false or misleading concerning the price at which any goods or services or like goods or services have been, are or will be ordinarily supplied.

¹² This Part contains rules of unfair competition. This Part is a necessary corollary to the rules of competition law—particularly in developing countries where the Consumer Protection Laws are not in force or are insufficient. It is to be noted however, that, competition law is different from consumer protection law and though the two areas of law share a common goal, which is the promotion of consumer welfare, the focus of the two areas of law differ and have distinct objectives. Competition rules are directed at the market and are designed to regulate the way firms compete with each other in a market, with a view to promoting competition among firms and the competitive process, thereby enhancing consumer choice. Consumer protection law, however, has a more diverse range of rules which address the code of conduct of firms and the standards by which they operate, the rules of engagement between them and the consumer, and the rules of engagement between individual consumers with a view to promoting access to goods and services, a greater quality in the available choice and ensuring consumer access to reliable and undistorted information to assist the consumer in making that choice. Consumer protection law ensures the protection of the consumer's rights at the level of the individual transaction, while competition law occurs at the level of the marketplace, carrying out its agenda, not at the transactional level, but at the level of firms in the market. A good rule of thumb is this: competition law protects markets structures whereas consumer protection law protects the individual consumer or the individual competitor. It is important to understand the difference between the two areas of law and it is also important to understand why some countries use Fair Trading Act, Fair Competition Act or Competition Act. Some competition legislation are wider in ambit and protects the individual as well as market structures.

(2) For the purposes of this section and section 75, the following types of representation shall be deemed to be made to the public by and only by the enterprise who caused it to be expressed, made, or contained, that is to say, a representation that is –

- a) expressed on a product offered or displayed for sale;
- b) expressed on anything attached to, inserted in, or accompanying a product offered or displayed for sale, its wrapper or container, or anything on which the product is mounted for display or sale;
- c) expressed on a display in the place where the product is sold;
- d) made in the course of selling the product to the ultimate consumer;
- e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner made available to a member of the public.

(3) Where the enterprise referred to in subsection (2) is outside of The Bahamas, the representation shall be deemed to be made –

- a) in a case described in subsection (2) (a), (b) or (e), by the enterprise that imported the product; and
- b) in a case described in subsection (2) (c), by the enterprise that imported the display into The Bahamas,

(4) Subject to subsection (3) and this subsection, every enterprise that, for the purpose of promoting, directly or indirectly, the supply or use of any goods and services or any business interest, supplies to a wholesaler, retailer or other distributor of goods or services, any material or thing that contains a representation of a kind referred to in subsection (1) shall be deemed to have made that representation to the public.

Representations and Testimonials 75. An enterprise shall not, for the purpose of promoting, directly or indirectly, the supply or use of any goods or services or any business interest, make a representation to the public that a test as to the performance, efficacy, or length of life of the goods has been made by any enterprise or publish a testimonial with respect to the goods or services, unless it can establish that-

- a) the representation or testimonial was previously made or published by the enterprise by which the test was made or the testimonial was given, as the case may be; or
- b) before the representation or testimonial was made or published, it was approved and permission to make or publish it was given in writing by the enterprise which made the test or gave the testimonial, as the case may be, and it accords with the representation or testimonial previously made, published, or approved.

- Double Ticketing** 76. An enterprise shall not supply any product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied at the time at which it is so supplied –
- a) on the product, its wrapper or container;
 - b) on anything attached to, inserted in, or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or
 - c) on a display or advertisement at the place at which the product is purchased.
- Sales at Bargain Price and Above Advertised Price** 77. (1) For the purpose of this section, “bargain price” means a price –
- a) that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise;
 - b) so represented in an advertisement, that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the goods or services advertised or like goods or services are ordinarily sold.
- (2) An enterprise shall not advertise at a bargain price, goods, or services which it does not supply in reasonable quantities having regard to the nature of the market in which it carries on business, the nature and size of the business carried on by it and the nature of the advertisement.
- (3) Subsection (2) does not apply where the enterprise that is advertising proves that-
- a) it took reasonable steps to obtain in adequate time, a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such quantity by reason of events beyond its control that it could not reasonably have anticipated;
 - b) it obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed its reasonable expectations;
 - c) after it became unable to supply the product in accordance with the advertisement, it undertook to supply the same product or equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that it fulfilled the enterprise; and

d) it took all reasonable steps to remove all the advertisements stating that the good or service was available at a bargain price once it became aware that it would not be able to supply that good or service in reasonable quantities at that price.

(4) An enterprise that advertises goods or services for sale or rent in a market shall not during the period and in the market to which the advertisement relates, supply goods or services at the price that is higher than that advertised, unless the advertisement-

a) appears in a catalogue or other publication in which it prominently stated that the prices contained therein are subject to error if the enterprise establishes that the price is in error;

b) is immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(5) For the purposes of subsection (4), the market to which an advertisement relates shall be deemed to be the market to which it could reasonably be expected to reach, unless the advertisement defines market specifically by reference to a geographical area, store, sale by catalogue or otherwise.

Enforcement of the Provisions under Part IV 78. (1) A person that has infringed any of the provisions under this Part shall be liable [upon summary conviction] to a fine not exceeding 1 million dollars.

(2) The provisions under Part IV shall apply *mutatis mutandis* for the investigation and determination of a matter under this Part.

PART VIII: ORDERS OF COURT

Power of the Court 79. (1) A person that has suffered loss or damage or is likely to suffer loss or damage, by reason of an infringement of the provisions under Part III, Part V or Part VII may seek, as the case may warrant:

(a) an order for compensation which shall not exceed twenty per cent of the annual turnover of the enterprise or enterprises that has/have engaged in the prohibited or restrictive trade practice;

(b) an order for divestiture of shares or assets;

(c) a cease and desist order;

(d) an *ex parte* order for the entry and search of premises for the purpose of inspecting and seizing any evidence that shall be removed from the defendant's custody and held in the custody of the court;

(e) an order for the payment of a fixed penalty; or

(f) a combination of any of the orders stated in any of paragraphs (a) to (d).

(2) For greater certainty, the Court shall not issue injunctive remedies, in connection with proposed mergers.

(3) In determining the level of compensation under subsection (1)(a), the Court shall consider the following factors-

- a) the nature, duration, gravity, and extent of the infringement;
- b) the extent of damage or loss suffered by any person as a result of the infringement;
- c) the degree to which the infringing party cooperated with the Commission during the investigation;
- d) the circumstances of the infringement;
- e) whether the infringing party has previously engaged in the infringing conduct complained of or any other infringement of this Act.

Application for Enforcement of the provisions of this Act. 80. (1) Subject to the provisions of this Act, the Court may grant an order upon the application by the Commission, if it is satisfied that an enterprise has contravened any

of Commission

Orders (2) Where the circumstances warrant it, upon application by the Commission, the Court may grant a without notice order for the entry and search of premises for the purpose of inspecting and seizing any evidence that shall be removed from the defendant's custody and held in the custody of the Court.

Court Can Vary/Rescind Orders 81. Where the Commission applies to the Court for an order under section 80(1), requiring disposal of assets or dissolution of a completed or partially completed merger, the Court may provide that the order be rescinded or varied, if within a time specified, a change has effected in the market which has resulted in or is likely to result in the merger being less likely to give rise to unfair competition or adversely impact the interests of consumers or the economy.

Enterprise Application to Vary/Rescind Order 82. An order for compensation or a divestiture of shares or assets made in connection with a proposed merger may be varied or rescinded by the Court, upon application by the enterprise against whom the order was made, if the Court is satisfied that the applicant has sufficiently demonstrated that the conditions for variation or rescinding of the order are met.

Revocation of Authorisation 83. Pursuant to section 68(4) the Commission may apply to the Court for an order to revoke an authorisation of a merger with conditions issued under section 68(1)(c).

Authorisation

Appeals 84. (1) Any enterprise that is aggrieved by a finding of the Commission may, within fifteen days after the date of that finding appeal to the Court.

(2) The Court may-

- a) confirm, modify, or reverse the Commission's finding or any part thereof; or
- b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeals relates.

(3) In giving any direction under this section the Court shall advise the Commission of its reasons for doing so, and direct the reconsideration of the whole or any part of the matter that is referred for reconsideration.

(4) In reconsidering the matter, the Commission shall have regard to the Court's reasons for giving a direction under subsection (2) and the Court's direction under subsection (3).

Operation of Orders Pending Appeal 85. Where an appeal is brought against any findings of the Commission, any directions, order pending or order of the Commission that is based on such findings shall remain in force pending determination the determination of the appeal, unless the Court otherwise orders.

Third Party Action 86. (1) Except as otherwise provided in this Act, every enterprise that engages in conduct which constitutes –

- a) a contravention of any of the obligations or prohibitions imposed in Parts III, Part IV, Part V, Part VI or Part VII,
- b) aiding, abetting, counselling, or procuring the contravention of any such provision,
- c) inducing by threats, promises or otherwise, the contravention of any such provision,
- d) being knowingly concerned in or party to any such contravention, or
- e) conspiring with any other person to contravene any such provision,

is liable in damages for any loss caused to any other person by such conduct.

(2) An action under subsection (1) may be commenced at any time within three years from time to time when the cause of action arose.

PART IX: APPLICATION FOR AUTHORISATION

Grant of Authorisation 87. (1). Subject to subsection (2), any person who proposes to enter into or carry out an agreement or class of agreements under section 14(1) or section 14(4), to engage in an agreement which, in that person's opinion, is an agreement affected or prohibited by this Act, may apply to the Commission for an authorisation to do so.

(2) The Commission may, in relation to an application under subsection (1) –

(a) notwithstanding any other provision of this Act, if it is satisfied that the agreement is likely to promote the public benefit, grant an authorisation subject to such terms and conditions as it thinks fit and for such time as the Commission may specify; or

(b) refuse to grant an authorisation and in that case, shall inform the applicant in writing of the reasons for refusal.

Procedures for Applying for an Authorisation 88. (1) A person may apply for authorisation of an agreement by filing an application in the prescribed Form, which shall be accompanied by the prescribed fee under section 7(3).

(2) A person may only apply for authorisation if the aggregate market shares of the parties to the agreement for which the authorisation is sought exceed 25 per cent of the shares of the relevant market.

(3) Upon receiving an application under subsection (1), the Commission shall where-

a) the application is materially incomplete, advise the applicant of any further information required before the application may be considered; or

b) the application does not specify a specific agreement or class of agreements,

require the applicant to state more specifically the authorisation sought before the application is considered.

(4) Where the applicant-

a) does not respond to the Commission within thirty working days, the application shall be deemed to have been abandoned by the applicant, and the filing fees paid by the applicant shall be forfeited to the Commission; or

b) responds to the Commission, but does not, to the satisfaction of the Commission, meet the requirements set out in the form as issued under subsection (1), the Commission may, by issuing a new version of the prescribed form to the applicant, stipulate any further information, or clarification required before the application is considered.

- (5) Where application is deemed to have been abandoned under subsection (4)(a), the Commission may close its file on that application without making a decision to grant or refuse an authorisation under section 87(2).
- (6) Any person who supplies information makes submissions, comments, or subsequently submits further information to the Commission in the course of the same proceedings shall be required to clearly identify any material which the person considers to be confidential on the prescribed Form.
- (7) Before granting or revoking an authorisation under section 87(2), the Commission-
- a) shall publish a notice of the application for an authorisation, or of its intention to grant or revoke that authorisation;
 - b) shall give interested parties thirty working days from the date of that notice to make written representations as to why the authorisation should not be granted or revoked;
 - c) may request further information from any person who submits a representation in response to a notice published under section 90(7)(a) and may conduct an investigation into the agreement or class of agreements concerned.
- (8) The provisions on investigation under Part IV shall apply, with such modifications as the circumstances may require, to applications for authorisation under this section.
- (9) The Commission shall, by published notice, give notice of any authorisation granted, refused, or revoked under section 87(2).
- (10) Upon publishing the notice under subsection (9), the Commission shall provide written reasons for its decision.
- (11) Where the Commission grants an authorisation certificate under section 89(2), the certificate granted shall be in the prescribed Form.
- (12) Where the Commission revokes an authorisation under section 89(3), the notice of revocation shall be in the prescribed Form.

Procedures relating to Revocation of Authorisation 89. (1) Where the Commission is contemplating revoking an authorisation granted under section 87(2), the Commission shall advise, in writing, the person concerned of the intention to do so, as well as publishing the notice required under section 88(9).

(2) The Commission may request further information from-

- a) the person concerned; or
- b) any person who submits a representation in response to a notice published in terms of section 88(9).

(3) After considering any submissions or other information received in relation to the proposed revocation, the Commission shall-

- a) revoke the authorisation by issuing to the person concerned a notice of revocation in the prescribed Form, or
- b) confirm the authorisation as previously granted, in writing to that applicant;

and give written reasons for its decision, as well as publish the notice required by section 88(9).

Application Fees for Authorisation 90. Pursuant to section 7(3), the Commission may set a fee for the processing of an application for authorisation.

Decisions on Approval of Authorisations 91. Applications for authorisations shall be received by the Director General, processed, and assessed by the Directorate for Competition and shall be submitted to the Director General for final approval.

PART X: PROCEDURES FOR SETTLEMENT OF AN INFRINGEMENT¹³

Settlement of an Infringement 92. 1) The Commission may, with the approval of the Court, give to any person who has committed an infringement of this Act (or of any regulations or orders made thereunder), a notice in the prescribed Form, offering that person immunity or partial immunity from enforcement proceedings in exchange for the payment of a fixed penalty to be prescribed by the Commission and enforced by the Court.

(2) Upon the grant of immunity under subsection (1), no person to whom a notice has been given shall be subject to enforcement proceedings if the fixed penalty is paid in accordance with subsection (1) and by the date specified in that notice.

(3) Where a person is given a notice under subsection (1), enforcement proceedings shall not be taken against that person for the infringement until the expiration of 15 days following the date of the notice or such longer period as may be specified in the notice.

(4) Payment of a fixed penalty under this section shall be made by the date specified in the notice, and the Commission shall issue a certificate in that behalf, which shall be conclusive evidence of the facts stated therein.

(5) A notice under subsection (1) shall –

(a) specify the infringement alleged;

(b) give such particulars of the infringement as are necessary for giving reasonable information of the allegation;

(c) state-

¹³ Competition authorities may use their enforcement powers (to investigate, prosecute and fine) an enterprise that infringes the competition legislation. However, there is an alternative approach which allows for the negotiation of a settlement. It is like an alternative form of dispute resolution and is commonly found in all modern competition regimes. However, it is usually the case that these modern regimes (like the European Union) do not detail their settlement rules in the legislation because neither the law nor the legal system warrants such a legal/formal approach. However, the Common Law approach requires a more formal system of including rules on settlement in the primary law and the European approach should not be copied/pasted as it is not appropriate in the legal context of The Bahamas. A negotiated settlement tends to become the procedure of choice to resolve certain cases, typically cartel cases. Cartel cases are one of the easier ones and certainly one of the cheaper ones to prosecute, especially where there is a whistle-blower involved. These types of cases help the Commission to achieve greater results in fewer years as the cases are without full investigation and/or trial in jurisdictions where they are available. According to the OECD: "Negotiated settlements will work best if a competition authority establishes a reputation of being consistent and fair in settlement negotiations, and both sides understand that they must act in good faith. Procedures governing settlements should be transparent and predictable, while also allowing for certain flexibility as the value of a party's cooperation can vary from case to case. They should also provide certainty." As a result, the Consultant has included a detailed approach to achieving settlements in competition cases in The Bahamas.

(i) the period during which proceedings will not be taken in accordance with subsection (3);

(ii) the amount of the fixed penalty, the authorised officer to whom and the address at which the fixed penalty shall be paid.

(6) If any proceedings are brought against any person for an infringement under this Act, or any regulation or order made thereunder, it shall be a defence if the person proves that the infringement with which he is charged has been granted immunity under this section.

(7) If the Commission withdraws a notice issued under subsection (1), after payment of the fixed penalty, the amount shall be refunded, and all liability discharged.

(8) The Commission may, by published notice, set a time limit within which persons may make an application for the settlement of an infringement.

(9) An application for the settlement of an infringement may be made by completing and submitting the prescribed Form to the Commission within the time limit prescribed by the Commission under subsection (8).

(10) The Commission shall not be obliged to take into account an application under subsection (9) which is received after the expiry of the time limit set by the Commission under subsection (8).

(11) Parties who apply to settle an infringement shall be informed by the Commission of:

a) the legal case against them;

b) the evidence it will or would have outlined in the Case Report;

c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the offence; and;

d) the range of commitments and enterprises they will have to undertake to qualify for a grant of immunity;

d) potential remedies.

(12) The information in subsection (11) shall be held confidential, except where the Commission has given a prior explicit exemption for disclosure.

(13) Before the Commission sets a time limit for the enterprises to make their submissions, the enterprises concerned shall be entitled to have the information in subsection (11) disclosed to them in a timely manner.

(14) The Commission shall, by notice, set a time limit within which the enterprises must make their submissions, which shall be in writing and include-

- a) a commitment to follow the procedures governing the grant of immunity;
- b) an outline of the commitments they have consented to under the terms of the grant of immunity;
- c) acknowledge that their infringement is an offence under the Act as well as their liability;
- d) an agreement to all the terms and conditions governing the grant of immunity

(15) When the Commission is in receipt of the enterprise's submissions and the conditions for the grant of immunity have been undertaken, the Board shall issue a decision determining the grant of immunity and shall apply to the Court for an order enforcing the grant of immunity.

(16) The Commission may decide at any time during the procedures to settle the infringement, to discontinue proceedings altogether in a specific case or with respect to one or more of the enterprises involved, if it considers that procedural efficiencies are not likely to be achieved.

Orders Imposed by Board of Commissioners 93. Where the Board proposes to give a direction to impose an order or penalty under this Part against an enterprise, it shall do so in accordance with the relevant provisions for remedying conduct as set out under this Act.

Imposition of Financial Penalties by the Board of Commissioners 94. (1) The Board, in making a decision to impose a fine, shall have regard to-

- a) the nature and extent of non-compliance or violation;
- b) the duration of the conduct;
- c) the wrongly gain or unfair advantage derived as result of the non-compliance or violations;
- d) the degree of harassment caused to any person as a result of the non-compliance or violation;
- e) the repetitive nature of the non-compliance or violation; and

f) the annual turnover of the enterprise found to be in breach of the Act.

(2) The annual turnover referred to in section 94(1)(f) shall be the total sales of goods or services made by the enterprise in-

a) the last full business year of its participation in the infringement; or

b) the year reflected in the last audited accounts of the enterprise.

(3) Where the figures made available by an enterprise are incomplete or not reliable, the Board may determine the value of the sales or services of that enterprise on the basis of the partial figures it has obtained and any other information which it regards as relevant and appropriate.

(4) The value of sales shall be determined before deduction of VAT and other taxes directly related to the sales.

Aggravation and Mitigation of Fines 95. (1) In determining the level of fines that shall be set pursuant to a settlement the Commission shall in its discretion consider whether-

a) there are aggravating factors warranting an increase in the amount of the fine otherwise applicable; or

b) there are mitigating factors warranting can decrease in the amount of the fine otherwise applicable.

(2) An aggravating factor under subsection (1)(a) includes, but is not limited to:

a) repeat offending;

b) ring leading;

c) obstruction of an investigation;

(3) A mitigating factor under subsection (1)(b) includes:

a) limited role in the infringing conduct;

b) conduct encouraged by legislation;

c) the level of cooperation of the infringing enterprise with the Commission prior to and during the investigation;

(4) The Commission may publish in a notice the terms and conditions upon which leniency is applied in the calculation of a fine.

PART XI: APPLICATION FOR ISSUANCE OF ADVISORY OPINIONS

Application for Advisory Opinion 96. 96(1) Any person may, in accordance with this section, apply to the Commission in the prescribed form and manner, including the submission of supporting documents and accompanied by the prescribed fee, for a binding written advisory opinion regarding the application of one or more provisions of this Act.

(2) An application for an advisory opinion under subsection (1) shall be submitted to the Directorate for Competition for determination by the Director General, and shall contain –

- a) the name of the applicant;
- b) the business address of the applicant;
- c) a brief narrative of the effect of the business conduct;
- d) the signature of any authorised representative of the enterprise;
- e) such other particulars as are relevant to the proposed business conduct; and
- f) any other information that the Commission may consider necessary.

(3) An enterprise may where it wishes to propose a course of action to the Commission to address any concern that has arisen, or is likely to arise during an investigation, apply to the Commission for an advisory opinion.

(4) An application to undertake a course of action under subsection (3) shall contain-

- a) the name of the applicant;
- b) the business address of the applicant;
- c) a succinct narrative of the alleged contraventions of the Act;
- d) the signature of any authorised representative of the enterprise;
- e) such other particulars as are relevant to the enterprise; and
- f) any other information that the Commission may deem necessary.

(5) Where, at any time after receipt of an application under subsections (1) and (3), the Commission is satisfied that the matter raised in the application is directly and substantially similar to a previous application, it may consolidate two or more similar applications for consideration.

PART XII: OTHER INVESTIGATIONS, STUDIES, AND INQUIRIES¹⁴

Studies and Market Inquiries 97. (1) There is established a Market Studies and Research Division of the Commission.

(2) The Market Studies and Research Division shall be chaired by a Chairman of the Committee for Market Studies and Research appointed from among the Board of Commissioners and shall be comprised of staff of the Commission and such other persons of character and integrity, and to be qualified as having had extensive and relevant professional expertise in trade, competition law, finance, economics, accounting, business management or science.

(3) The types of investigation under this Part may relate to-

- a) impediments to competition which may exist in any economic sector; or
- b) the policies, procedures, and programmes of regulatory bodies so as to assess their effect on competition.

(4) The investigations under this Part may be ordered by-

- a) the Commission; or
- b) the Minister; or

¹⁴ Sector and market studies are not the same as the enforcement procedure which is intended to prosecute anticompetitive conduct. Instead, they enable the competition authority to conduct enquiries into the status of competition on the market even where there is no suspicion of anticompetitive conduct. The Commission can therefore take a proactive and not just reactive role to competition enforcement. This means that the Commission through its market study initiatives will seek out ways in which to better secure adherence to the rules of competition by the business community (and not just execute enforcement action when a complaint is filed). The rules of procedure for these sector studies may differ from the rules to conduct an investigation of infringing conduct.

Initiation of the Study 98. (1) The Directorate for Competition shall keep a record of all ideas and proposals for new inquiries.

(2) The ideas and proposals may originate from complaints sent to employees of the Commission or from the Commissioners.

(3) The Director General shall provide the Chairman of the Committee for Market Studies and Research with a brief assessment of all issues and proposals appearing to have a value for purposes of study including-

- a) potential benefits of the study;
- b) possible cost of the study; and
- c) possible duration of the study.

(4) The Chairman of the Committee for Market Studies and Research shall, in consultation with the Director General make recommendations to the Commission, on the studies that are most valuable having regard to the criteria set out in the strategy paper made under this Act.

(5) The Commission may decide on what studies to initiate, taking into consideration-

- a) any expectations of the study likely to be proposed by the Minister or other regulatory body;
- b) the existing work load of the Commission; or
- c) the current resource position.

(6) After the study has been authorised by the Commission, the Chairman of the Committee for Market Studies and Research shall draw up detailed Terms of Reference for approval by the Committee for Market Studies and Research.

(7) On approval by the Committee for Market Studies and Research under section 100(6), the Committee for Market Studies and Research shall appoint a team from among its members to carry out the study and shall make use of external specialists where appropriate.

(8) The members of the team referred to in section 100(7) shall be able to handle economic and legal issues that are likely to arise including the economic issues outside the field of competition law and policy.

Initiation by the Minister 99. (1) Where a market study is initiated by the Minister, the Minister in advance, may consult the Commission about the possible subject-matter and scope of the study.

(2) The Director General shall direct the Chairman of the Committee for Market Studies and Research to determine the Commission's views on the issue and convey them to the Ministry for directions.

(3) Where the Minister has given directions to the Commission, the Chairman of the Committee for Market Studies and Research and, with the approval from the Director General, shall draw up the Terms of Reference based.

(4) On approval by the Committee for Market Studies and Research, the Chairman of the Committee for Market Studies and Research shall appoint a team from among its members to carry out the study and shall make use of external specialists where appropriate.

Rules of Procedure for Conducting Studies and Inquiries 100. Where a market study requires production of documentary evidence or the summoning of persons for the purpose of giving evidence the provisions of section 21, section 22, section 23 and section 24 shall apply *mutatis mutandis* to the investigations conducted under this Part.

Public Inquiry for Collection of Data and Views 101. (1) The Committee for Market Studies and Research shall issue by notification published in the Gazette, a nationwide newspaper and in such other manner as it may determine to the effect that an inquiry pursuant to this section has been constituted.

(2) The inquiry under this section shall be carried out involving investigation using an explicit methodological framework to be prescribed by the Commission.

(3) The Terms of Reference of the inquiry may require a team to consider certain impediments to competition and examine their effects on competition and any other economic benefits.

(4) The data and views that have been sought at this point shall therefore need to be sufficient to provide the basis for writing the final report and hence enough to support eventual conclusions.

(5) The methods used at this stage of an inquiry shall be a combination of questionnaires and meetings.

(6) An investigatory framework shall be worked out to determine as far as possible what evidence to seek and how each part of that evidence is to be used in the ultimate analysis.

(7) The questionnaires shall cover the whole range of evidence that is needed.

(8) When designing the questionnaires, it shall be ensured that all main areas contributing to the planned analysis are included.

(9) A plan of operations shall be drawn up to set out the work processes to be undertaken on a periodic basis and to integrate the work on questionnaires with the arrangement of meetings.

Evaluating Effects on Competition 102. (1) The study team carrying out a market study under this Part, in the light of data collected, shall-

- a) take into account any modifications decided in the review;
- b) revise the findings; and
- c) draw up a plan of operations for further study.

(2) In this Part, the study team shall-

- a) identify and evaluate effects on competition together with any other economic or technical effects arising from the behaviour or arrangements under scrutiny;
- b) consider what shall be the effect of changes designed to eliminate or reduce any adverse effects on competition that had been identified; attempt to carry out some analysis of the effects of those changes in addition to collecting a range of views;
- c) seek the views of experts in the relevant field as well as those of the interested parties; and
- d) seek the views of the relevant government departments.

Final Report 103. (1) The study team shall discuss the nature and contents of the final report to be produced which shall cover-

- a) the effects on competition arising from the behaviour or arrangements under scrutiny;
- b) any other economic or technical effects of that behaviour or those arrangements;
- c) changes that might be made to eliminate or reduce the adverse effects on competition;

- d) the implications of those changes; and
- e) the views of experts, interested parties and government departments on those changes and their possible implications.

(2) The Chairman of the Committee for Market Studies and Research shall consider the report and then send it to the Commission with recommendations about the conclusions to be drawn from the report and any further investigation that the Commissioners might themselves undertake.

(3) The Commission shall then consider-

- a) the conclusions that it wishes to draw about the competition effects;
- b) the conclusions that it wishes to draw about other economic and technical effects;
- c) an assessment of overall impact;
- d) the range of possible changes that it wishes to explore; and
- e) the preliminary thinking on the likely impact of such changes.

(4) Where the Commission wishes to explore a wider range of possible changes than has been covered in the team's report or to go further in any other way, the Commission shall instruct the relevant head of the team to carry out further investigation that is required.

(5) The Commission shall determine what meetings it wishes to hold with a view to ensure it has the opportunity to explore the key issues and that interested parties have been able to express their views direct to the Commission.

(6) Where any further investigation required by the Commission has been carried out and the round of meetings with interested parties completed, the Commission shall meet to discuss conclusions and recommendations.

(7) Where the study was initiated by a regulatory body, the Commission shall meet representatives of the regulatory body to discuss conclusions and recommendations in order to minimise any areas of disagreement between the two bodies.

(8) With the assistance of the head of the study team, the Chairman of the Committee of Market Studies and Research and the Commission shall set out a final report, providing-

- a) the necessary facts and reasoning;

- b) the conclusions they have reached on the economic study, and if relevant, technical impact of the behaviour or arrangements under scrutiny; and
 - c) any recommendations that they may wish to make.
- (9) The Chairman of the Committee for Market Studies and Research shall-
- a) publish the report; and
 - b) ensure that the requirements regarding confidentiality of material have been complied with, provided that where a matter is contentious, it shall be referred to the Chairman who shall decide on behalf of the Commission what to be excluded from the report on these grounds.
- (10) Where the study was initiated by the Minister, the report shall be made available to the Minister within the period of time allowed for the study by him.
- (11) The handing over of the report by the Commission to the Minister shall also allow a reasonable period of time before the intended date of publication.
- (12) Where the study was initiated by a regulatory body, the report shall be made available to that body within a reasonable period of time before publication.

PART XIV: PUBLICATIONS

- Form of Notices Issued by the Commission**
104. (1) Where the Commission is required to issue a notice to a party under any provision of the Act, the notice shall contain-
- a) the name of any person directly affected by the notice;
 - b) the file number assigned by the Commission to the relevant matter;
 - c) the provision of the Act under which the notice is required;
 - d) a brief and concise description of the nature of the relevant matter;
 - e) where the notice invites submissions, the last date on which submissions may be received;
 - f) where the notice reports a decision-

- i) a brief and concise description of the nature of relevant decision;
 - ii) a statement indicating whether reasons for the decision have been published, and if so, how a copy of those reasons may be obtained;
 - iii) a statement of any right of review of, or appeal from that decision, including the period during which a review or appeal may be lodged.; and
- (2) the name, address, and contact numbers of the person in the Commission responsible for publishing the notice.

Publication of Decision 105. (1) The Commission shall publish every decision which it makes pursuant to this Act.

(2) A copy of the published decision shall be placed in the Public Register.

(3) Before publication of any report on a case, the Commission shall ensure that the requirements and procedures regarding confidentiality of the material have been complied with.

(4) The information declared as confidential in the decisions shall be separated from the ones to be published and shall be stored at the place of keeping confidential information at the Commission's office.

(5) Where a matter is contentious, it shall be referred to the Board of Commissioners who shall decide on behalf of the Commission what shall be excluded from the report.

(6) The report under this section shall contain-

- a) the names of the parties;
- b) the key facts and arguments of the case;
- c) the particular reasoning behind each of the decision;
- d) the terms of any compliance orders or agreements; and amount of fine, if any.

(7) In any case where adverse findings have been reached, publication should only take place after the decisions of the Board of Commissioners have been implemented.

- Public Register** 106. (1) There shall be a Public Register of the Commission, which shall be available for inspection by the public at all times during working hours.
- (2) An officer within the Commission shall be responsible to maintain the Public Register.
- (3) The materials to be maintained in the Public Register shall be obtained from all divisions of the Commission and shall be regularly updated.
- (4) The Public Register shall contain copies of-
- a) all formal decisions made in respect of infringement committed under section the Act; decisions to grant or refuse to grant authorisations under the Act and decisions to make or refuse to make an order under the Act;
 - b) the reasons for granting or refusing authorisations or orders referred to under paragraph (a);
 - c) such other decisions and information as the Commission may determine from time to time;
 - d) significant reports and studies;
 - e) subsidiary instruments in the form of orders or Rules of procedure made by the Commission;
 - f) adopted code of conduct or amendment to a code of conduct;
 - g) any other information as the Commission may determine from time to time.

PART XV: GENERAL

- Limitation of Time** 107. (1) In setting time limits under this Act the Commission shall-
- a) have regard both to the time required for the preparation of the submission and to the urgency of the case; and
 - b) take account of the working days as well as public holidays.
- (2) Where the Commission considers appropriate and upon reasonable request being made to it before the expiry of the original time-limit, it may extend time-limits.
- Guidance Notes, Notices and Forms** 108. The Commission may make Guidance Notes, Notices and Forms for purposes of providing guidance or directions, as the case may be, for simplified explanations or proper implementation of this Act.
- Power to Prohibit Disclosure of Information, Documents and Evidence** 109. (1) The Commission may prohibit the publication or communication of any information furnished or obtained, documents produced, obtained, or tendered, or given to the Commission in connection with the Commission's operations.
- (2). A person who publishes or communicates any information, documents or evidence, the publication of which is prohibited under section 113(1) is guilty of an offence and liable on summary conviction to a fine not exceeding one million dollars or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.
- Confidentiality** 110. (1) The Commission and every person concerned or employed in the administration of this Act shall regard as secret and confidential, all documents, information or matters disclosed in the administration of this Act except those disclosures which the Commission considered necessary in the discharge of its functions.
- (2) It shall be an offence for any person in the service of the Commission to disclose to any other person who is not in the service of the Commission, any trade secret of any enterprise which may come to his or her knowledge in the course of discharging his or her duties under this Act.
- (3) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding one million dollars and to imprisonment for a period not exceeding six months.

Transitional

111. The Commission may if necessary, make regulations, to bring this Act into conformity with-

- a) the Revised Treaty or with accepted commercial practice within the CARICOM;
- b) other regulations established under a Treaty that has been incorporated into the laws of the Bahamas.

Regulations and Procedures 112. The Commission may, with the approval of the Minister, make regulations relating to any matter referred to in this Act.

Not

Provided For

SCHEDULE ONE

Section	Purpose of Form	Form Number	Conditions
	File a Complaint		
	Confidentiality Claims		
	Application for Hearing		
	Third Party Application for Hearing		
	Commission Summon to Hearing Form		
	Application for Settlement of an Infringement		
	Application for Merger Authorisations		
	Application for Authorisation of an Agreement		
	Confidentiality Claims		
	Authorisation Certificate		
	Revocation of Authorisation		
	Refusal of Authorisation		
	Notice of Revocation of Authorisation		
	Notice Re Application for Authorisation of Merger		
Copies of the above and other forms are available on the Commission's website			

References

- Richard Whish, David Bailey “Competition Law” (OUP Oxford, 2015, 8th Edition)
- Dr. Gunnar Niels, Dr. Helen Jenkins, James Kavanagh “Economics for Competition Lawyers” (OUP Oxford, 2016, 2nd Edition)
- “The United Nations Set of Principles and Rules on Competition” (UNCTAD, TD/RBP/CONF/10/Rev.2), available at: <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>
- “Competition Policy, Industrial Policy and National Champions” (OECD, DAF/COMP/GF(2009)9), available at: <http://www.oecd.org/daf/competition/44548025.pdf>
- Hovenkamp, Herbert J. “Distributive Justice and Consumer Welfare in Antitrust” (August 3, 2011). Available at SSRN: <http://ssrn.com/abstract=1873463>
- Cseres, Kati “The Controversies of the Consumer Welfare Standard”. Competition Law Review, Vol. 3, No. 2, pp. 121-173, 2006. Available at SSRN: <http://ssrn.com/abstract=1015292>
- “Market Definition” (OECD, DAF/COMP(2012)19), available at: <http://www.oecd.org/daf/competition/Marketdefinition2012.pdf>
- Kaplow, Louis “Market Definition” (May 15, 2013). Forthcoming in The Oxford Manual of International Antitrust Economics (Roger D. Blair & D. Daniel Sokol, ed., 2013). Available at SSRN: <http://ssrn.com/abstract=2265304>
- Re Market Definition/Market Power: Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co Ltd [1989] HCA 6; (1989) 167 CLR 177, available at: <https://jade.io/article/67535>
- Re Market Power: R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/901/index.do>
- Re SSNIP test: Australian Competition and Consumer Commission (ACCC) v. Australian Medical Association Western Australia Branch Inc [2003] FCA 686; (2003) 199 ALR 423, available at: <https://jade.io/article/107314>
- Kaplow, Louis “Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments” (May 1, 2011). Harvard Law and Economics Discussion Paper No. 692. Available at SSRN: <http://ssrn.com/abstract=1873431>

- ICN Report on Merger Guidelines. Chapter 2 “Market Definition” (2004), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc562.pdf>
- “Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws” (ICN Unilateral Conduct Working Group), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>
- “Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies” (ICN, 2007), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>
- “Monopsony and Buyer Power” (OECD, DAF/COMP(2008)38), available at: <http://www.oecd.org/daf/competition/44445750.pdf>
- “Barriers to Entry” (OECD, DAF/COMP(2005)42), available at: <http://www.oecd.org/daf/competition/abuse/36344429.pdf>
- “Glossary of Industrial Organisation, Economics and Competition Law” (OECD, 1993), available at: <https://www.oecd.org/regreform/sectors/2376087.pdf>
- “Glossary of Terms Used in Competition Related Matters”, available at: http://ec.europa.eu/translation/spanish/documents/glossary_competition_archived_en.pdf
- “Competition Policy and the Informal Economy” (OECD, DAF/COMP/GF(2009)10), available at: <http://www.oecd.org/daf/competition/44547855.pdf>
- *Case 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, [1973] CMLR 199, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CJ0006&from=EN>
- Jones, Alison “The Boundaries of an Undertaking in EU Competition Law” (2012). *European Competition Journal*, 8(2), pp. 301-331, 2012. Available at SSRN: <http://ssrn.com/abstract=2131740>
- *Case 27/76 United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN>

- Re Link Between Dominance and Abuse: Canada (Commissioner of Competition) v. Canada Pipe Co. (F.C.A.), 2006 FCA 233, [2007] 2 F.C.R. 3, available at: <http://reports.fja.gc.ca/eng/2007/2006fca233.html>
- Re Anti-Competitive Behaviour v. Competition on the Merits: Boral Ltd v. ACCC (2003) [2003] HCA 5; 215 CLR 374, available at <https://jade.io/article/68421>
- “Abuse of Dominance and Monopolisation” (OECD, OCDE/GD(96)131), available at: <http://www.oecd.org/daf/competition/abuse/2379408.pdf>
- Geradin, Damien and Petit, Nicolas and Walker, Mike and Hofer, Paul and Louis, Frédéric “The Concept of Dominance in EC Competition Law” (July 2005). Available at SSRN: <http://ssrn.com/abstract=770144>
- Wils, Wouter P. J. “The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance” (September 19, 2014). World Competition: Law and Economics Review, Vol. 37, No. 4, 2014, pp.405-434. Available at SSRN: <http://ssrn.com/abstract=2498407>
- “Unilateral Conduct Workbook Chapter 3: Assessment of Dominance” (ICN, 2011), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf>
- Jones, Alison “Analysis of Agreements Under U.S. And EC Antitrust Law - Convergence or Divergence?” (2006). Antitrust Bulliten, Vol. 51, No. 4, p. 691, Winter 2006. Available at SSRN: <http://ssrn.com/abstract=1932209>
- *Argos Ltd v. Office of Fair Trading; JJB Sports plc v. Office of Fair Trading* [2006] EWCA Civ 1318, [2006] 42 LS Gaz R 32, available at: http://www.catribunal.org.uk/files/Jdg_CoA_1014Argos_Little_JJB191006.pdf

- Case C-8/08 *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, [2009] 5 CMLR 1701, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-8/08>
- “Crisis Cartels” (OECD, DAF/COMP/GF(2011)11), available at: <http://www.oecd.org/daf/competition/cartels/48948847.pdf>
- Shaffer, Gregory and Nesbitt, Nathaniel H. and Waller, Spencer Weber “Criminalizing Cartels: A Global Trend?” (July 2, 2013). Chapter in *Research Manual on Comparative Competition Law*, eds. John Duns, Arlen Duke, and Brendan Sweeney (Edgar Elgar, 2015); *Sedona Conference Journal*, Vol. 12, 2011; *Minnesota Legal Studies Research Paper No. 11-26*. Available at SSRN: <http://ssrn.com/abstract=2288871>
- OECD Recommendation of the Council on Merger Review (C(2005)34), available at: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>
- “Cross-border Merger Control: Challenges for Developing and Emerging Economies”, (OECD, DAF/COMP/GF(2011) 13), available at: <http://www.oecd.org/daf/competition/mergers/50114086.pdf>
- “Public Interest Considerations in Merger Control” (DAF/COMP/WP3(2016)3), available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En)
- “Local Nexus and Jurisdictional Thresholds in Merger Control” (2016, DAF/COMP/WP3(2016)4), available at:

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En)

- Re Failure to Notify: Competition Commission v. WBHO Construction (Pty) Ltd and Another (69/AM/Oct10) [2010] ZACT 77 (10 November 2010), available at: <http://www.saflii.org/za/cases/ZACT/2010/77.html>

- Re Public Interest: Minister of Economic Development and Others v. Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v. Wal-Mart Stores Inc. (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012), available at: <http://www.saflii.org/za/cases/ZACAC/2012/6.html>