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**FAIR TRADING COMMISSION**

*Ensuring a competitive marketplace*

**Investigation into the Allegation of  
Predatory Pricing on the Part of  
Tank Weld Metals Limited**

**Pursuant to  
Sections 19-21 of the Fair Competition Act  
Staff Report**

***June 10, 2011***

**Cases no. 6529-09**

***PUBLIC VERSION***

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## EXECUTIVE SUMMARY

### BACKGROUND

ARC Systems Limited's ('ARC') complaint is that Tank Weld Metals Limited ('TWM') is dominant in the market for rebar (i.e. reinforcing steel bars) and has been retailing rebar below cost and, as a result, other suppliers in the market are on the brink of being eliminated from the market as they cannot compete. ARC claims that rebar ('steel') acquired by TWM at an average price of \$76,000 per ton are being sold at an average price of \$49,000 per ton.

### COMPETITION CONCERN

ARC is challenging the alleged practice of TWM of retailing steel below costs. Retailing below costs (RBC) may harm or promote competition. RBC harms competition when it is part of a broader strategy described as predatory pricing. Under predatory pricing, RBC will induce the exit of other suppliers which are unable to absorb the associated loss for a sustained period of time. When rival suppliers exit, the incumbent will exercise market power by, among other things, raising its price above costs to recoup its earlier losses. Predatory pricing concerns competition authorities because it (i) harms consumers in the long-run, despite the fact that in the short-run consumers benefit from low prices; and (ii) adversely affects the competitive environment.

RBC is harmful to competition, therefore, only when it allows the incumbent to relax competitive constraints and thereby raise prices above competitive level for a sustained period of time.

The Informant's allegations describe predatory conduct which is examinable under the abuse of dominance provisions of the Fair Competition Act (FCA).

Further to its investigatory powers contained in section 5(1)(a) and (d) of the FCA, and further to the allegations and before it, the Staff launched an investigation pursuant to sections 19 – 21 of the FCA to determine whether the claims of an abuse of dominance could be substantiated.

### RESULTS OF ECONOMIC ANALYSIS

- Steel is the relevant product market for the purpose of assessing the likely competitive effects of the challenged conduct, as there are no close substitutes for steel.
- Jamaica is the relevant geographic market for the purposes of assessing the likely competitive effects of the challenged conduct.
- TWM consistently maintained a market share of over 74 percent during the period January 2006 through June 2009.
- The steel market is characterized by minimal impediments to re-entry as it would be relatively easy for TWM and ARC to re-enter the market should either one exit. This means that re-entry is likely to be effective in mitigating if not averting attempts by either participant to exercise market power if the other participant exits the market.

- During the period August 2008 – March 2009, TWM retailed steel at a price below its acquisition costs but above the replacement costs, which is determined to be the competitive benchmark price.
- The challenged conduct is unlikely to harm final consumers in the relevant market given that the competitive environment provides adequate incentives for participants to offer consumers with competitive prices.

### **CONCLUSION OF LEGAL ANALYSIS**

- The market definition has identified the product and geographic markets and clearly establishes jurisdiction of the FTC in accordance with the FCA.
- Observed low impediments to re-entry refute the allegation that TWM is dominant in the relevant market despite the fact that TWM have a market share of 74%.
- Even if TWM were to be considered dominant, the economic evidence does not indicate an abuse of dominance, in accordance with the law, given that TWM pricing strategy is consistent with a competitively organized market.
- Based on the above, there is insufficient evidence to support allegations of a breach of sections 19 – 21 of the FCA.

### **FINAL RECOMMENDATION**

The Staff recommends that the matter be closed on the basis that there is no evidence of a breach of the FCA.

**1.0 THE PARTIES**                   ARC Systems Limited, Informant  
  Tank Weld Metals Limited, Respondent

## **2.0 INTRODUCTION**

### **2.1 *Allegations***

1. ARC Systems Limited, a registered company with offices located at 14 Bell Road, Kingston 11, (referred to as 'the Informant') submitted a formal complaint to the Fair Trading Commission (FTC) on April 1, 2009 against Tank Weld Metals Limited (TWM). TWM (referred to as 'the Respondent') is a company whose registered office is located at 27 Seaward Drive, Kingston 11. The company's principal activities include building construction; civil engineering; and the importation and distribution of structural steel, steel-related products and hardware supplies.
2. The allegations are that the Respondent has been engaging in anti-competitive activity in breach of the Fair Competition Act (FCA); specifically, in the sale and distribution of rebar. A rebar, or reinforcing steel bar, is an "ordinary" steel bar, and is commonly used in reinforced concrete and masonry structures. The Informant alleges that the Respondent, a dominant player in the market, has been engaging in predatory conduct.
3. The Informant complained that, since November 2008, it observed that the Respondent has been setting its prices for rebars far below cost price and, as a result, other suppliers in the market are on the 'brink' of being eliminated from the market as they are unable to compete. The Informant claimed that since it consistently purchases its supplies in the international markets and pays the standard Freight on Board (F.O.B.) and Shipping costs, it has knowledge that rebars bought at an average of \$76,000 per ton are now being sold by the Respondent at an average of \$49,000 per ton. The Informant surmises that if the Respondent is allowed to continue this behaviour, while in the short run it may appear that consumers are benefitting from low prices, in the long run after competition has been reduced, consumers will be faced with higher prices, reduced quality of service, and fewer options. Additionally, it surmises that, as a consequence of this behaviour, prospective entrants would be discouraged from entering the market, the market share of other suppliers would be drastically reduced; and some suppliers would be eliminated from the market.

## **3.0 LEGAL ANALYSIS**

### **3.1 *Application of the Fair Competition Act - Theory of Case***

4. The Informant's allegations assume that the Respondent is a dominant player in the relevant market and has abused its dominance by impeding the maintenance or development of effective competition in the relevant market. Based on these allegations and the information available to the staff of the FTC, an investigation was launched in exercise of its statutory powers contained in section 5(1)(a) and (d) of the FCA:

5(1) The functions of the Commission shall be –

- a. to carry out, on its own initiative or at the request of any person such investigation or inquiries in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;
  - b. to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise'
5. Further to these powers and based on the allegations and information available to it, the staff decided to examine the matter to see whether there was any evidence to support an allegation of breaches of sections 19, 20(1)(a)(b) and (c), and 21 of the FCA.
6. The Staff proceeded with its investigations pursuant to sections 19, 20(1) (b) (c) and (d), and 21, which establish the offence of abuse of a dominant position.
7. This offence is a 'rule of reason' offence the proof of which relies on findings of fact and law. These findings are provable primarily on the basis of economic assessment; the conclusion of which must show that there is, has been or is likely to be the substantial lessening of competition in the relevant market. Economic assessment must be conducted to determine whether the following three major preliminary elements of the offence are satisfied:
  - a. the relevant enterprise is dominant in an appropriately defined market;
  - b. the enterprise has abused its dominant position;
  - c. the abuse had, is having, or is likely to have the effect of lessening competition in the market.
8. In order to establish that there is an actionable breach of the section relevant, the three elements stated above must be provable to the satisfaction of the Court. Provided that they can be proved, the Staff must subsequently consider:
  - (a) whether the Respondent's practices resulted in superior competitive performance;
  - (b) whether the Respondent's practice falls within the defenses available under section 20(2).

#### **4.0 METHODOLOGY – THE LAW AND LEGAL STANDARDS**

##### **4.1 *Definition of Dominance***

9. According to section 19 of the FCA '*...an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from competitors or potential competitors.*'

10. The European case of *Re Continental Can Company Inc.*<sup>1</sup> has been relied on by Commonwealth countries such as New Zealand and Australia for the test of dominance. The FTC relies on the principles therein. That case established that where as a result of market share, or market share combined with technical knowledge, raw materials or capital, an enterprise has the power to control production or distribution for a significant part of the relevant product(s), it is dominant. According to the principle established by that case, the minimum indicator is that the enterprise be strong enough to ensure an overall independence of behaviour.
11. In assessing dominance, the FTC must therefore consider market definition<sup>2</sup> and market share. Other factors that must be considered are entry barriers, market concentration and relative market shares of competitors.<sup>3</sup> The FTC has formulated guidelines based on those applied by agencies in other Commonwealth jurisdictions such as the United Kingdom and the European Union. The guidelines establish dominance at a 50% market-share, along with high entry barriers.

#### **4.2. Market Definition**

12. Market definition is the essential first step in confirming jurisdiction and delineating the boundaries within which an assessment of competition is relevant. Under Section 2(3) of the Act:

*'Every reference...to the term "market" is reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.'*

13. In addition to the above definition, which encompasses the product and geographical aspects of the market, the FTC relies on economic analysis in identifying the boundaries of the relevant market.

#### **4.3 Abuse of Dominance**

14. Section 20(1)(a), (b) and (c) of the Act sets out particular instances in which an enterprise will be deemed to have *'...impeded the maintenance or development of effective competition in a market.'*

15. The Section provides, in relevant part:

*20(1) 'An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular...if it –*

- (a) restricts the entry of any person into that or any other market;*
- (b) prevents or deters any person from engaging in competitive conduct in that or any other market,*
- (c) eliminates or removes any person from that or any other market...'*

16. These are the sections which would be applied on the basis of the Informant's allegations.

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<sup>1</sup> [1972] CMLR D11 at pg. D27

<sup>2</sup> ICN Report on Merger Guidelines – Chapter 2 – April 2004

<sup>3</sup> *Re News Ltd. – Independent Newspapers Ltd.* (1987) 1 NZBLC (Com) 104, 051 at p 105, 055; (1986) 6 NZAR 47 at p. 50, Decision No. 164 of the Commerce Commission, 9 May 1986, para. 9/

#### 4.4 **Lessening of Competition**

17. According to Section 21 of the FCA, the abuse of a dominant position must either have had, is having, or is likely to have the effect of lessening competition in a market. The Commonwealth Courts have given these phrases the following meanings. The term ‘had’ relates to an effect which already took place at the time of analysis and the term ‘is having’ relates to existing facts. In the case of ***Tillman’s Butcheries Pty. Ltd. v. Australasian Meat Industry Employees’ Union***<sup>4</sup> the Court held that the phrase ‘likely to have’ has several shades of meaning including ‘more probable than not’, ‘more than a 50% chance’ or in other contexts ‘some possibility’ meaning that there is a real chance or possibility regardless of whether it is less or more than 50%. It was also established that the phrase refers to ‘at or about when the agreement was made’ and allows any reasonable inference to be drawn.
18. In respect of the term ‘substantial’ the cases show that its definition can vary so that it means ‘considerable’ or ‘big’ on the one hand and ‘not nominal or minimal’ on the other. In some instances, therefore, it is used in a relative sense and at other times it is used to indicate an absolute size or quantity.
19. In the Australian case of ***Dandy Power Equipment Pty. Ltd. v. Mercury Marine Pty. Ltd.***<sup>5</sup> it was established that, in order to apply the concept of ‘substantially lessening competition’ one must:
  - a. assess the nature and extent of the market (i.e. look at the relevant significant portion of the market);
  - b. ask how and to what extent there would have been competition but for the conduct;
  - c. look at the way the market operates and the nature and extent of the contemplated lessening (i.e. assess what is left and determine whether what has been lost, in relation to what would have been, is seen to be a substantial lessening of competition).
20. If the extent of competition in the market which has been lost is seen as substantial, then the requirement is satisfied.
21. In the Australian case of ***ASX Operations Pty. Ltd. v. Port Data Australia Pty Ltd.***<sup>6</sup> the Court said that in examining the concept:

*‘...one looks not so much at the position of particular competitors as to the state or condition constituting the market or markets in question actually or potentially...It is also to be borne in mind that, whilst actual competition must exist and be assessed in the context of a market, a market can exist, if there is potential for close competition even though none in fact exists or dealings in it are temporarily dormant or suspended.’*
22. The standard outlined above in the ***Dandy Power*** case is referred to as the ‘but for’ test; and has been applied more recently in other Commonwealth jurisdictions such as Canada.<sup>7</sup>

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<sup>4</sup> (1979) 42 FLR 331; (1979) ATPR 40 - 138

<sup>5</sup> (1982) ATPR 40 – 315; (1982) 64 FLR 238

<sup>6</sup> No. 1 - 1990



23. Pursuant to Section 21(2) of the FCA, in assessing this element the FTC must consider whether the practice is a result of superior competitive performance.

## **5.0 ECONOMIC ANALYSIS**

### **5.1 Assessment of Market Power/ Dominance**

24. In economics, *market power* refers to the ability of a supplier to profitably charge a price higher than that which would prevail if the market in which the supplier participates was competitively organised. In less competitive markets, suppliers exercise a greater degree of market power. The legal assessment of the dominance of a given supplier, as described in section 4, is equivalent to the economic assessment of market power.<sup>8</sup>
25. To assess market power, we evaluate whether and the extent to which the Respondent's conduct is likely to be constrained by current rival suppliers. In carrying out this assessment, we first identify the market(s) in which the Respondent participates and those which would likely be affected by the challenged conduct. The market(s) is(are) referred to as the relevant market(s). To assess whether and the extent to which Respondent is likely to be constrained by current rivals, we use measures of *market concentration*.

### **5.1 The Relevant Market**

26. A relevant market for economic analysis can be defined as a product (or group of products) and a geographic region in which it is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, that was the only present and future producer or seller of the product in that area, likely would impose at least a small, but significant and non-transitory increase in price, assuming the terms of sale of all other products are held constant.

### **5.2 Product Market: Steel**

There is no close substitute for steel as there is a relatively large gap in the substitutability between steel and others products which could be used to reinforce concrete structures; and concrete is a staple input into modern construction. The distributor's demand for the product is derived from the almost indispensable role of concrete in enhancing the durability of modern construction projects. The primary reason for this is that steel has a coefficient of expansion almost equal to concrete: this feature of steel ensures that a concrete structure reinforced with steel will have minimal stress.

### **5.3 Geographic Market: Jamaica**

28. Based on the data reviewed, it is reasonable to examine the challenged conduct in a market limited to the boundaries of Jamaica.
29. Although there is evidence that distributors (i.e. the primary customers of TWM and ARC) source steel on the world market, the volume of steel they sourced is too small (7.6 percent),

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<sup>7</sup> Canada (Commission of Competition) v Canada Pipe Co. 2006 FCA 233 at para. 37 O 38; Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd (1992) 40 C.P.R. (3d) 289 at para. 42

<sup>8</sup> See Steven C. Salop "The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium," *Antitrust Law Journal*, Volume 68 (2000), pp. 187-202.

relative to the volume sourced by TWM and ARC, to refute our claim that Jamaica is a distinct geographic market for steel.

30. The economic evidence demonstrates that a relevant market is steel (in wholesale quantities) supplied in Jamaica.

#### **5.4 Market Concentration**

31. The relevant market is supplied by two entities which source steel from the world market (although at least some of their customers also have the ability to source directly from the world market). The customers of these suppliers are predominantly distributors comprising large hardware stores. The Herfindahl-Hirschman Index, which uses the market shares of market participants, is the most common measure of market concentration. Markets in which the index exceeds 2,500 points are considered to be highly concentrated.
32. All steel products sold in Jamaica are imported. Importers require permits from the Bureau of Standards Jamaica (BSJ) for each shipment of steel imported. Since January 2006, the BSJ has issued permits to thirteen entities; but not all of them supplied the market as at least one imported the steel for private use. TWM and ARC are the only significant suppliers of steel.
33. The data show that some customers (i.e. distributors) have the capacity to bypass suppliers and source steel directly from the world market. Presumably they do so whenever the world market offers steel under terms and conditions (such as price, credit facility, etc.) which are more attractive than those offered in the local market.
34. Specifically, during the period January 2006 through July 2009, distributors accounted for ██████ tons (5.3 percent) of the steel imported. Of this amount, a total of ██████ tons were imported during the period in which local prices were continually rising (January through August 2008). Since the sharp decline in price in September 2008, distributors imported only ██████ tons.
35. TWM has consistently been the larger supplier of steel, accounting for approximately ██████ percent of the steel imported compared to the ██████ percent imported by ARC. The other importers accounted for the remaining 5.3 percent of steel imported. Accordingly, the market has a concentration index in excess of 5,926 points, way above the prescribed benchmark of 2,500 points for highly concentrated markets.
36. We conclude, therefore, that the relevant market is highly concentrated with only two significant suppliers.

#### **5.5 Effective entry to avert entry or reverse the exercise of market power is likely**

##### **Analytic Framework**

37. If entry is effective, it may avert or reverse sustained price increases above the competitive level. Entry is considered to be effective if it (i) is likely to occur; (ii) occurs in a timely manner (within two years); and (iii) occurs on a scale which is sufficiently large to render any exercise of market power unprofitable. Entry could occur from either new suppliers establishing themselves in the market or the expansion of existing suppliers.

**Impediments to Entry**

- 38. The main impediment is likely to be the financial requirements to import, warehouse and distribute steel.
- 39. Financial Impediments. The main costs incurred in supplying steel are attributable to acquiring the steel on the world market, warehousing and distributing across Jamaica. Warehouse space could be rented on a monthly basis in Jamaica for approximately US\$4 per square foot and as at June 2009, steel was being sold on the world market for around US\$605 per ton. If we assume that approximately 30,000 square feet are needed to store 1,000 tons of steel, then a supplier would need a capital outlay of about US\$1,812,500 to supply 2,500 tons of steel - but considerably less if he could secure a line of credit facility from the steel manufacturers. By way of comparison, TWM and ARC respectively supply an average [redacted] tons and [redacted] tons monthly.
- 40. In what follows, we assess the likely effectiveness of entry based on telling responses of market participants to historical developments in the market. The data are summarised in Table 1 .

**Table 1** Response of Distributors (customers) to increasing prices

Time Period	TWM's average monthly gross margin (%)*	Distributors**	
		Number	Market Share (%)
Period I (Apr. 2006 – Dec. 2006)	[redacted]	1	0.3
Period II (Jan. 2007 – Aug. 2008)	[redacted]	11	7.6
Period III (Sep. 2008 – Jun. 2009)	[redacted]	2	6.2

Sources: TWM and BSJ.

Note: \* Gross margin is calculated as the difference between selling price and acquisition cost as a percentage of the price.

\*\* Distributors refer to businesses other than TWM and ARC which import steel.

**Timeliness of Entry**

- 41. Timely entry most often results in a timely restoration of competition. When entry is prolonged, the anticompetitive effects of the Respondent's conduct may be prolonged as well. For entry to have a sufficiently disciplining effect, it is generally accepted that it should occur within two years. Consequently, assessment of entry usually examines the extent to which entry is likely to occur within two years of the alleged anticompetitive conduct.
- 42. Once the requisite financing has been secured, it takes about six to twelve weeks to import steel to Jamaica. In our review, we seek to identify periods in which the market would have offered the greatest incentives for entry. The table shows that during Period II, incentives to enter the market were probably greater than in any other period since 2006. This as the average monthly margins earned by TWM was greatest during this period.

43. To complement the information shown in Table 1, in Figure 1 we present data on the monthly margins earned by TWM and ARC.

[Deleted **Figure 1** Gross Margin for TWM and ARC]

44. The relatively high number of entities importing steel during Period II, relative to Periods I and III, is consistent with the hypothesis that this period provided the greatest incentives for entry into the market. Specifically, eleven entities other than TWM and ARC imported steel, compared to one which imported in the prior period and the two entities which imported in the subsequent period. Further, eight entities entered within the first four months of Period II.
45. This suggests that it is relatively easy to enter the market in a timely manner.

#### **Sufficiency of Entry**

46. Table 1 shows that although eleven entities imported steel during Period II, they accounted for only 7.6 percent of the steel imported. The importation of such small quantities suggests that distributors sought to satisfy their own demand for steel and avoid the relatively high price of steel on the local market; rather than to supply the wider market.
47. Based on the information above, new entry is unlikely to be sufficient to constrain the prices to customers in the relevant market.

#### **History of Entry**

48. TWM entered the market in 1988, approximately twelve years prior to ARC's entry. The information we have reviewed indicates that between 1988 and August 2009, approximately

fifteen entities have entered the market with seven or eight entities subsequently exiting [Interview with TWM, August 14, 2009].

#### **Prospects for Future Entry/ Re-entry**

49. Past examples of entry, or unsuccessful attempts to enter the market, can provide insight as to conditions which face future entrants. While a history of past entry provides useful information about the likelihood of effective entry, it is not conclusive in the sense that there might be technological, legal, structural or other changes which could affect whether, and the pace at which, entry takes place in the future relative to how it took place in the past.
50. One such change is the number of incumbent suppliers. Economists have recognised that in some markets, it is possible for only two suppliers to profitably operate. These are referred to as *natural duopolies*. In such markets, all other things held constant, the incentives for new entry would be greater when there is only one incumbent supplier relative to when there are two suppliers. Accordingly, if either supplier should exit, the likelihood of effective new entry would be considerably greater than what it has been in the past.
51. An important consideration for a successful entry would be the cost associated with warehousing and distributing steel. Both TWM and ARC import, warehouse and distribute multiple commodities (such as cement, steel and lumber) through their respective distribution network facilities. This means that if either should exit the steel market, but maintain its distribution network, each would have an established distribution network in the event they attempted to re-enter the steel market. In this regard, the re-entry of either incumbent supplier is likely to be more effective than new entry has been in averting prices sustained above competitive levels.

## **5.6 Analysis of competitive effects**

### **Analytic Framework**

52. The main objective of antitrust analysis is to identify conduct which is likely to injure competition. Its purpose therefore is to protect competition and not necessarily competitors. To demonstrate that competition is likely to be injured, proof of injury to both competitors and consumers is required.<sup>9</sup> Injury to competitors requires proof that the challenged conduct is likely to unduly induce the exit of current rivals; prevent the entry of potential rivals; or raise rivals' costs. Examining the effect of the challenged conduct on an equally efficient rival, and not necessarily on existing rivals, is consistent with the objective. Injury to consumers requires proof that the challenged conduct allowed the Respondent(s) to raise or maintain price above the competitive level. Further the competitive level should be interpreted as the price which would have prevailed in the absence of the challenged conduct.
53. If an equally efficient rival (i.e. one which has a similar cost structure as the Respondent) would not become less competitive as a result of the Respondent's conduct, the conduct is unlikely to be described as being injurious to competition.

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<sup>9</sup> This framework for analyzing competitive effects is outlined by Steven C. Salop in "The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium," *Antitrust Law Journal*, Volume 68 (2000), pp. 187-202.

54. The Staff's conclusion is that TWM's conduct is unlikely to injure competition since consumers are unlikely to be harmed. Based on the information reviewed, we have determined that TWM has consistently priced its steel in line with the price at which it is sold on the world market; that is changes in world prices are reflected in a reasonable time in the local market. We now describe the method used to analyse the competitive effects of the challenged conduct.

### **Introduction**

55. Economists generally prefer competition as a means of organizing markets because it provides incentives for businesses to operate efficiently and to meet their customers' demand for availability, quality, quantity and variety. These incentives enhance economic performance. Substantial lessening of competition can lead to inefficiencies which lead to a waste of society's scarce productive resources; and it can harm consumers directly by increasing prices or reducing innovation, quality or variety relative to competitive levels. As a result, consumers' choices may be distorted and fewer consumer demands can be met with the available labour, capital and natural resources.
56. Anticompetitive effects are classified in two broad categories: unilateral anticompetitive effects and coordinated interaction anticompetitive effects.
57. Coordinated interaction anticompetitive effects are harm to consumers and competitors that at least two independent suppliers can profitably effect by coordinating their conduct. Unilateral anticompetitive effects are harm to consumers and competitors that a supplier can profitably effect on its own without coordination with other suppliers. There are different types of potential unilateral anticompetitive effects, depending in part upon whether products in the market are very similar to each other or whether they are differentiated.
58. In a market like the steel market at the time of the challenged conduct, i.e. one characterised by impediments to new entry and few suppliers of perfectly substitutable products, a potential source of harm of the challenged conduct is that the exit of rival supplier(s) would lead to prices which would be considerably higher than they would be in the absence of the exit.
59. As previously mentioned, the Staff recognize that injury to rivals, without more, cannot be used to infer consumer or competitive harm since both procompetitive and anticompetitive conduct could result in injury to rivals. An assessment of the anticompetitive effects of a conduct, therefore, is invariably supplemented with an assessment of consumer harm.

### **Historical Price Trends**

60. TWM's conduct is being challenged based on a theory that since August 2008, it set its price below the competitive level to induce its rival(s) to exit the market; subsequent to which it expects to increase its prices above the competitive level. The pricing trends of TWM and ARC are described below in Figure 2.

[Deleted **Figure 2** Price Trends for TWM and ARC]

61. Figure 2 covers the period January 2006 through June 2009. We have divided the period into three sub-periods coinciding with what appears to be distinct patterns of competitive interaction between TWM and its biggest rival. Competition between TWM and ARC appears to have been less intense (as proxied by price differences) during the period January 2007 through August 2008 compared to the other two sub-periods.
62. The first pattern, which spans 2006, reflects a period in which there was a general upward trend in prices, even as the difference in prices remained relatively low. Monthly difference in prices averaged US\$13.31 per ton over the period. The largest price difference was observed in January 2006 when TWM's price was [REDACTED] lower than ARC's price. The smallest price difference was observed in June 2006 when TWM's price was [REDACTED] higher than the price of its main rival. It is noted that in five of the twelve months during the period, TWM's price was, on average, [REDACTED] lower than its main rival.
63. The second pattern, which covers the period January 2007 through August 2008, reflects a period in which the difference in prices was higher relative to the preceding year. Monthly difference in prices averaged US\$83.56 per ton over the period. The largest price difference was observed in May 2008 when TWM's price was [REDACTED] lower than ARC's price. The smallest price difference was observed in June 2008 when TWM's price was [REDACTED] higher than its main rival. Further, for sixteen of the twenty

months in the period, TWM's price was, on average, [REDACTED] lower than its main rival.

64. The third pattern, which covers the period September 2008 through June 2009, reflects a period in which there was a general downward trend in prices, while maintaining relatively low difference in prices. Monthly difference in prices averaged US\$26.84 per ton over the period. The largest price difference was observed in April 2009 when TWM's price was [REDACTED] lower than its main rival. The smallest price difference was observed in October 2008 when TWM's price was [REDACTED] higher than ARC's price. Further, for five of the ten months in the period, TWM's price was, on average, [REDACTED] lower than its main rival.

#### **Harm to Competitors**

65. To assess the competitive effects of TWM's conduct, we assess the likely effect of pricing its product below competitive levels. The starting point of the analysis, therefore, is identifying the most appropriate measure to benchmark competitive conduct.
66. There is a challenge in identifying the benchmark price in markets such as the steel market where there is a lag between the time suppliers place an order (and thereby commit to purchase at the existing price) and the time that the order is delivered. The lag, which lasts about six to twelve weeks, means that during a period of instability in the world steel market, there could be a substantial difference in the price of steel when the order was placed (acquisition cost) and the price to replace the steel once an order has been delivered and sold (replacement cost).
67. We review historical data to determine which measure of cost most effectively explains movements in the price of steel in Jamaica prior to the challenged conduct. Data on the price, acquisition cost and replacement cost of steel are presented in Figure 3.



[ Deleted **Figure 3** Replacement Cost explains Price better than Acquisition Cost Does.]

68. Replacement Cost as the Competitive Benchmark. The figure shows that prior to August 2008, the replacement cost tracks the price more accurately than the acquisition cost does. During the eight-month period ending August 2008, the price of steel (for both the Respondent and its main rival) was consistently above the acquisition cost. Contrastingly, the price of steel was basically in line with replacement cost.
69. The data therefore confirms during a period in which there is no allegation that the Respondent was engaged in anticompetitive conduct, the replacement cost does a better job than acquisition costs in explaining variation in prices. Accordingly, the Staff accepts that replacement cost is the more appropriate competitive benchmark during the period in which the alleged anticompetitive conduct occurred. Based on Figure 3, the Staff concludes that the Respondents' prices were not below the competitive benchmark.

#### **Harm to Consumers**

70. The Staff's conclusion is that the challenged conduct is unlikely to injure consumers of steel in Jamaica. Further, this conclusion does not depend on whether replacement cost or acquisition cost is used as the competitive benchmark of price.
71. The assessment of consumer harm is integrally tied to the conduct being challenged. In the matter at hand, TWM is alleged to be pricing below the competitive benchmark. It is our opinion that the most appropriate competitive benchmark for the price of steel in Jamaica is the replacement cost. Using this benchmark, we conclude that TWM prices were in line with

the benchmark and therefore consumers neither benefited nor were harmed by TWM's conduct.

72. If instead we use acquisition cost as the competitive benchmark, however, we conclude that consumers have benefited considerably as a result of TWM's conduct. Specifically, we estimate that TWM's conduct resulted in consumers paying at least US\$723.05 per ton less than they otherwise would have paid. Based on the volume of steel supplied by TWM, consumers have saved on average at least US\$4,219,620 per month between September 2008 and June 2009; or approximately US\$42,196,200 for the entire period.
73. The main threat to consumers' welfare is the potential for the challenged conduct to lead to a price increase in the future and thereby offset the benefits enjoyed to date. Such a scenario could occur only if the challenged conduct ultimately weakens competition from existing and potential rivals.
74. Probable effect on potential (future) rivals: The Respondent's conduct is unlikely to weaken competition from potential rivals since the adverse effect, if any, arises from the sale of "expensive" steel.
75. Probable effect on existing rivals: The Respondent's conduct is likely to lead to considerable losses for each supplier who sold "expensive" steel; that is, steel acquired during Period II (see Table I) in which the world price of steel was increasing. Our analysis indicates that suppliers would incur losses of at least US\$525.19 for each ton of the expensive steel sold to the market.
76. This means that a rival supplier which had in its inventory, say, six thousand tons of expensive steel would have incurred losses amounting to US\$3,151,140 while another supplier with inventory of fifteen thousand tons would have incurred losses of US\$7,877,850.
77. The ultimate effect on rival suppliers, therefore, will depend on the supplier's ability to absorb/finance the losses.
78. Even if TWM's conduct leads to the exit of ARC, it would still be unlikely that TWM could raise prices above the competitive benchmark for any sustained period of time since, for reasons identified earlier in the report, re-entry by ARC is likely to frustrate attempts by TWM to exercise market power.

## **6.0 CONCLUSIONS BASED ON APPLICATION OF LAW TO ECONOMIC EVIDENCE**

### **6.1 Dominance**

79. This element of the offence, which is the essential first step, has not been established. There is no, or no sufficient evidence to support an allegation that the Respondent is dominant in the relevant market.
80. In order to establish dominance, as has been outlined above, the test of dominance must have been applied and satisfied to determine whether an enterprise is without effective constraints (has an overall independence of behaviour). In applying the test the main elements to be considered are market share, entry barriers, market concentration, and the relative market share of competitors. The economic analysis establishes a market share of ■■■ in addition to

minimal barriers to re-entry. While there is evidence to suggest that there are barriers to entry, considering all the facts together, there is insufficient economic evidence to support the legal requirements to establish dominance.

81. The establishment of dominance is crucial and is the foundation of establishing an offence. If dominance is not established, then it can be concluded prima facie that there is no breach. However, for the sake of analysis and completeness, the other elements of the offence have been examined.

## **6.2 Market Definition**

82. The market definition provided by the economic analysis has identified the product and geographic markets and clearly establishes jurisdiction of the FTC in accordance with the provisions of the FCA.
83. The evidence establishes that the relevant market is located in Jamaica as required by section 2(3) of the FCA and has considered substitutability in accordance with fact and established economic principles.

## **6.3 Abuse of Dominance**

84. The economic evidence does not indicate an abuse of dominance in accordance with the law.
85. In order to show that there has been an abuse of dominance, dominance must first be established. Dominance has not been established. However, if dominance were established, the evidence would have to show that an enterprise, as a result of the Respondent's alleged conduct, actually: restricted entry into the market; prevented or deterred an enterprise from engaging in competitive conduct; or eliminated/removed the enterprise from the market.
86. While the economic analysis indicates that the steel market is one characterized by impediments to new entry there is nothing to support the conclusion that this was caused by or can be linked to the Respondent's alleged conduct. There is no evidence to indicate that the Informant has exited or is likely to be eliminated from the market as a result of the Respondent's alleged conduct. In fact, there is no evidence to support the allegations of the Respondent's conduct.

## **6.4 Lessening of Competition**

87. In law this element would not apply as it is the third tier to be considered only when the first two have been established. The first two have not been established in this instance; therefore this element of the offence would not become operative.
88. Section 21(1) requires the FTC to first make a finding, determination or, at least, arrive at a conclusion (whether formal or informal) in respect of (a) dominance; and (b) the abuse of that dominance. The conclusion must be that there is dominance and that there has been an abuse. The evidence does not support the conclusion that there is dominance or that there has been an abuse. Accordingly, there is no legal basis on which to consider this element of the offence.
89. Applying, however, the approach taken above for completeness, if the first two elements were established, the economic evidence indicates that the Respondent's pricing strategy is unlikely to lead to a substantial lessening of competition in the market for steel in Jamaica.

## **7.0 CONCLUSION**

90. Based on all of the above, it is concluded that there is insufficient evidence to support the allegations of a breach of sections 19 – 21 of the FCA. As the crucial elements previously listed have not been proven, the remaining issue of whether the defenses under section 20(2) would apply need not be considered.

## **8.0 RECOMMENDATION**

91. The Staff recommends that no enforcement action be taken and the investigation be closed on the basis that there is no evidence of a breach of the Fair Competition Act.