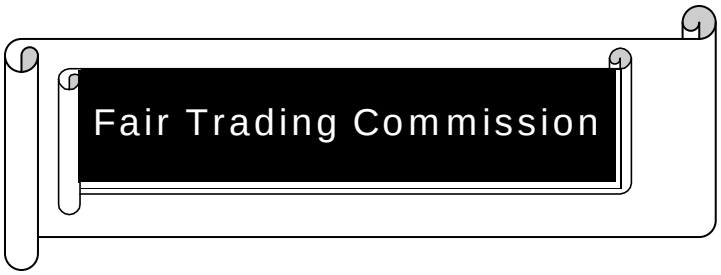

Comments of Ministry of Tourism's document entitled "Establishing a Pension Scheme for the Tourism Industry"

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The following represents comments on the documents submitted by Mr. Wesley Vanriel, Senior Director, Strategic Planning and Evaluation at the Ministry of Tourism by way of emailed dated September 14, 2009.

We conclude the following:

1. The conduct of the Tourism industry or the government regarding the partnership project is not open to scrutiny under the FCA;

2. Suits may be brought against the selected firms if they breach provisions of the FCA;

3. Selected firms must compete across sectors of the tourism industry for the provision of pension services;

4. No definitive conclusion is made regarding a likely breach of the FCA for resulting contracts between the selected firms and sectors of the tourism industry absent definitive answers to the questions posed regarding the method of selection.

ANALYSIS

Paragraph 8 of the 'Background Document' establishing a pension scheme for the Tourism Industry states that:

> *This invitation is not a request for proposals in relation to the procurement of any services, and will not necessarily result in the offer of a contract. It is merely intended to identify suitable partners for the Government in the promotion of pension services in the tourism industry.*

This caveat implicates section 54 of the FCA which states that:

> *Subject to any provision to the contrary in or under this or any Act, this Act binds the Crown*

This provision has not been the subject of interpretation in our local courts. The FTC has, however, adopted an interpretation of the provision that requires that the entity properly classifiable as the Crown be engaged in business or trade with respect to the particular activity or conduct being examined. This approach comports with that obtaining in other jurisdictions, although the text of those provisions is not necessarily identical with section 54 of the FCA. For example, section 2(a) of Australia's Trade Practices Act (TPA) provides that the TPA binds the Crown to the extent that it carries on a business or is engaged in commercial activity. By contrast, section 54 of the FCA does not mention trade, business or commercial activity as activities that the Crown must be engaged in for the section to apply to it.

Australian courts have however applied section 2(a) of the TPA as applying to commercial activity engaged in by the government.[1] This interpretation is adopted by the FTC because of the similarity of the provisions and, more importantly, this interpretation is consistent with the ruling of the Court of Appeal in *Jamaica Stock Exchange v. The Fair Trading Commission*[2] that conduct authorized by statute that would otherwise be anticompetitive cannot be challenged under the FCA for having that effect.[3] This means that where the government is carrying out a governmental function or activity or engages in the market as a regulator in accordance with statutory direction, its conduct in this regard is shielded from the scrutiny of the FCA.

[1] See, for example, *Fasold v. Roberts* (1997) 70 FCR 489.
[2] *Jamaica Stock Exchange v. Fair Trading Commission*, Civil Appeal No. 92/97.
[3] Ibid. p12.

Paragraph 8 of the Background Document indicates that the government is not engaged in providing a pension plan service nor is it partnering with pension plan service providers in a joint venture to provide such services as a participant in the market for such services.

Accordingly, the government in its partnership scheme with pension service providers is not engaged in commercial activity and its conduct, namely the partnering with selected pension service providers, is not cognizable under section 54 of the FCA as an activity in violation of the FCA.

However, this interpretation does not bar suits against those chosen pension service providers who may violate provisions of the FCA following an agreement with the hotel industry participants for the provision of such services. For example, agreements may have provisions that substantially lessen competition in a market in violation of section 17 of the FCA or the conduct of pension service providers may amount to an abuse of dominance in a market in violation of sections 20-21 of the FCA.

As an illustration it is worth quoting the text of section 17 of the FCA which provides as follows:

(1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that-

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets technical development or investment;

(c) share markets or sources of supply;

(d) affect tenders to be submitted in response to a request for bids;

(e) apply dissimilar conditions to equivalent transactions with other trading entities, thereby placing them at a competitive disadvantage;

(f) make 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,

being provisions which have or are likely to have the effect referred to in subsection (1).

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry of which has been authorized under Part V or which the Commission is satisfied-

(a) contributes to-

(i) the improvement of production or distribution of goods and services; or

(ii) the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

The method by which the initial firms were chosen for participation in the project could give rise to subsequent claims of a breach of the FCA to the extent that the contracts that may be concluded between the chosen firms and tourism industry participants may result in competing firms being excluded from the tourism industry market with respect to the provision of pension services to that market.

The method used consisted of a sample of firms approved by the Financial Services Commission (FSC), a further selection from the sample based on those who submitted proposals, and a final selection based on the eligibility criteria. The cover letter does not say whether the sample of 12 institutions licensed by the FSC represent the only institutions fitting the eligibility criteria (that

is, as regards licensing by the FSC) justifying their inclusion in the sample; whether a sample was necessary because of the significant number of eligible firms; and, if so, the statistical validity of the sample.

If the use of the sample method is done pursuant to statutory authority or if the limited selection is done pursuant to statutory authority, there are no implications for breach of the FCA with regard to the conduct of the Ministry of Tourism.

The selected firms may be in breach of the FCA to the extent that resulting agreements have the effect of substantially lessening competition in the tourism market for the provision of pension services. This seems a likely conclusion if the method of selecting the firms excluded competitors for the provision of such services when these competitors have met the licensing requirements stipulated by the FSC.

Additionally, in order to avoid breaching section 17 (c) of the FCA it is important to emphasize that the selected firms compete across the various sectors of the tourism industry identified, that is, **accommodation, ground transport, air transport, craft, travel trade, valet services, and other services**. This means none of the selected firms should agree amongst themselves to enter into specific agreements with identified sectors to the exclusion of others as a *quid pro quo* for similar treatment from the other selected firms. That is, there should no agreement to divide the market.

Absent a definitive answer to the questions raised regarding the method of selection, no conclusion is made regarding whether there is likely to be a breach of section 17 of the FCA by the selected firms when contracts are eventually concluded between tourism industry participants and the selected firms for the provision of the pension services.

There is however a role for competition advocacy in the selection process employed for pension plan service providers. It is important that the selection criteria are made clear and transparent and do not exclude competitors from a market or be administered in a manner that is likely to exclude competitors.