



**Assessment of Exclusive Distribution Agreement: Dunn's Electrical & Hardware
Limited against Hilti North America, Hilti Latin America and Delta Supply Company
Limited**

Case Number: 8139-20

Prepared by:
Michelle T. Phillips, Legal Officer
FAIR TRADING COMMISSION

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FACTUAL SYNOPSIS

By letter dated November 26, 2019, Dunn's Electrical & Hardware Limited ("**Dunn's**"), wrote to the FTC requesting an Opinion in relation to a purported agreement between Hilti North America ("**Hilti NA**") and/or Hilti Latin America ("**Hilti LA**") and Dunn's.

Hilti NA sells products including cordless tools, fasteners, construction chemicals and power tools. Hilti NA and Hilti LA are collectively referred to in this opinion as Hilti.

Dunn's purchased goods from Hilti NA with the understanding that the goods would be shipped to Dunn's for resale in Jamaica. Dunn's was also advised that to become an official authorized distributor of Hilti's goods that they would need to speak with Hilti LA (Caribbean division).

On November 20, 2019, Dunn's received a letter from Hilti LA advising that Delta Supply Co. Ltd. ("**Delta**") was appointed as its exclusive distributor in Jamaica. The letter also asked Dunn's to cease and desist all actions that would constitute unauthorized use of Hilti's name or trademarks and unauthorized distribution of Hilti products.

Dunn's sought an opinion in relation to whether the foregoing conduct amounts to a breach of section 17 (agreements which contain provisions with the purpose or effect of substantially lessening competition) or any other section of the Fair Competition Act ("**FCA**").

ISSUES

1. Whether Hilti LA's conduct in appointing Delta as its exclusive distributor is anticompetitive and in breach of the FCA.
2. Whether Hilti LA's conduct in requesting Dunn's to refrain from using the Hilti name and/or trademark and/or to stop distributing Hilti's products could amount to a breach of the FCA.

LAW AND ANALYSIS

Exclusive distribution is where an organization grants exclusive rights on its goods or services to another organization for example the right to exclusive territory.¹ In exclusive distribution agreements the supplier agrees to sell its products to only one distributor for resale in a particular territory.² The distributor is also usually limited in relation to the geographic scope of the territory in which it can sell.

It is important to note at the outset that section 3(c) of the FCA states that *“Nothing in this Act shall apply to the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark.”* Section 3(e) further stipulates that the FCA does not apply to any act done to give effect to a provision of an agreement referred to in paragraph (c).

Additionally section 20 of the FCA which speaks to abuse of a position of dominance provides at subsection (2)(b) that *“An enterprise shall not be treated as abusing a dominant position by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.”*

In the present case Hilti LA has appointed Delta as its exclusive distributor in Jamaica. The foregoing provisions make it clear that agreements such as exclusive distribution agreements which relate to the use, licence or assignment of rights in relation to a trademark will not fall afoul of the FCA. A supplier is therefore free to choose the distributor or retailer of its choice as the exclusive distributor in relation to its product and/or trademarks for a particular territory or region and neither party will be found to be in contravention of the FCA. Additionally, the supplier (Hilti) and/or retailer (Delta) are entitled to take action to enforce their rights pursuant to the agreement giving Delta the exclusive right as relates to the mark without breaching the FCA. Furthermore, based on section 20(2)(b) above even if Hilti and/or Delta were found to be in a dominant position and to be abusing its position of dominance it would not be so considered by virtue of the fact that they are exercising their rights pursuant to a trademark.

¹ LexisNavigator.

² European Commission Notice (EC) SEC(2010) 411 on Guidelines on Vertical Restraints, para 151.

Based on the information provided, it does not appear as if Hilti LA had appointed Dunn's as an authorized or exclusive distributor. If the contrary is the case, this would involve contractual arrangements outside the purview of the FCA and the FTC.

The current actions of Hilti LA in appointing Delta as its exclusive distributor in Jamaica and in asking Dunn's to refrain from selling Hilti's products or using its name or trademark are therefore outside of the ambit of the FCA. As such neither the agreement between Hilti LA and Delta nor the actions of these parties in relation to enforcing same contravene the provisions of the FCA.

CONCLUSION

Agreements in relation to exclusive use of trademarks or other intellectual property fall outside of the remit of the FCA and are not prohibited by the said Act.