



Opinion on a restrictive provision in Fuel Supply Agreement Submitted to Petrojam Limited

David Miller, Executive Director
April 29, 2014

By letter dated April 15, 2014, Petrojam Limited sought the Fair Trading Commission's opinion on certain sections of a Fuel Supply Agreement. Petrojam Limited submitted an abstract of the Agreement and enquired whether the Agreement contravenes the Fair Competition Act (FCA). It is noted that the Staff of the FTC was not privy to the Agreement. Therefore the opinion that was provided was limited to an examination of the provisions mentioned in the abstract.

It is our understanding that prior to the Agreement, Petrojam and the contracting party were the sole suppliers of bunker fuel in the Kingston Harbour. The Agreement resulted in the contracting party being the only supplier of bunker fuel in the Kingston Harbour.

The Staff considered the contents of the abstract with respect to Sections 17 and 18 of the Fair Competition Act (FCA), 1993. The relevant background and provisions provided are below:

Petrojam entered into an agreement which contains the following provisions:

1. *"Petrojam will immediately discontinue all its bunker sales in Kingston Harbour including via its Tug/ barge unit., or via tank trucks" (" the restriction");*
2. The governing law of the agreement is English Law;
3. Petrojam had the means to supply bunker fuels itself, and prior to entering the agreement both Petrojam and the contracting party supplied bunker fuels in Kingston Harbour;
4. Upon entering the agreement, Petrojam discontinued sales in keeping with the agreement with the result that the only supplier of bunker fuels in Kingston Harbour was the contracting party;
5. New entrants came into the bunker fuel market and requested that we supply them with fuel.
6. There is no legal impediment to the importation of bunker fuel. However, it may be more advantageous to purchase the fuel from Petrojam;

These provisions were examined in the context of sections 17 and 18 of the FCA.

Section 18 of the FCA provides as follows:

1. *For the purposes of this Act, a provision of an agreement is an exclusionary provision if:*
 - (a) *the agreement is entered into or arrived at between persons of whom any two or more are in competition with each other; and*
 - (b) *the effect of the provision is to prevent, restrict or limit the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons either generally or in particular circumstances or in particular conditions, by all or any of the parties to the agreement or, if a party is a company, by an interconnected company.*
2. *For the purposes of subsection (1), a person is in competition with another person if that person or any interconnected company is, or is likely to be or, but for the relevant provision, would be or would be likely to be, in competition with the other person or with an interconnected company, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.*
3. *No person shall give effect to an exclusionary provision of an agreement.*

Section 18 of the FCA requires that for a provision to be exclusionary, there must be an agreement between persons in competition with each other. In addition, section 18 forbids agreements which remove a competitor from the market. Under section 18 of the FCA, there is no requirement for competitive effects of an agreement to be determined. Given that Petrojam, but for the agreement, would be supplying the downstream market for bunker fuel, the agreement could constitute a breach of section 18 of the FCA as an agreement with an exclusionary provision, that is, excluding a competitor (Petrojam) from a relevant market.

Section 17 of the FCA provides as follows:

17. (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 parties, 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 into 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.

Section 17 of the FCA provides for a competitive analysis to be done to establish if an agreement has or is likely to have anti-competitive effects, but also provides for an examination of an agreement to determine if it has an anti-competitive purpose.

Without addressing the issue of competitive effects, it is important to note that section 17 of the FCA forbids an agreement that has a provision which has the effect of removing a competitor from a relevant market.¹

Conclusion on whether Agreement is likely to contravene the FCA: The provisions examined as part of the subject agreement are likely to be in breach of sections 17 and 18 of the FCA.

The issue was also reviewed within the context of an assessment of the competitive effects of the Agreement: to determine whether and the extent to which it could adversely affect competition in the market for bunker fuel sold in the Kingston Harbour. The agreement would be considered to have the effect of substantially lessening competition in the market if it resulted in (i) Harm to actual or potential competing suppliers (rivals) to this market; and (ii) Harm to customers in the market.

1. Agreement is likely to Harm Potential Rivals

¹Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* (hereinafter "BIDS"), [2008] ECR I-8637.

Harm to rivals can be demonstrated with evidence that (i) the challenged conduct (i.e. the exclusive supply agreement) excludes rival suppliers from the market or (ii) the challenged conduct raises rivals' costs.

Prior to the agreement, Petrojam competed with the contracting party in the market. The agreement, therefore, prevented an actual rival (Petrojam) from competing in the market. Further, to the extent that "...it may be more advantageous to purchase the fuel from Petrojam...", the challenged conduct also harms potential rivals by preventing new entrants from accessing the most advantageous source of fuel and thereby raise their costs, notwithstanding that there are no legal impediments for new entrants to import bunker fuel.²

Conclusion: The Fuel Supply Agreement is likely to harm rivals by (i) excluding Petrojam from supplying the market; and (ii) raising the costs for new entrants to supply the market.

2. Agreement is likely to Harm Customers

Ships travelling through or nearby the Kingston Harbour are the primary customers in this market. Harm to customers arising from the challenged conduct can be demonstrated with evidence that a supplier has acquired, maintained or extended his ability to maintain prices above what it otherwise would have been for a sustained period.

The contracting party likely gained market power over the price of bunker fuel, by creating a less competitive market structure in which the bunker fuel is sold. In particular, it can be readily shown that the price of bunker fuel in a market with one supplier will be higher than the price in a market with more than one supplier, all other things held constant.

Conclusion: The Fuel Supply Agreement is likely to harm customers by raising the price of bunker fuel sold to customers.

Overall Conclusion on Assessment of Competitive Effects: The Fuel Supply Agreement is likely to have the effect of substantially lessening competition in the market for bunker fuel.

We remain available to discuss the issues contained in this opinion.

Yours truly,
FAIR TRADING COMMISSION

David Miller
EXECUTIVE DIRECTOR

² Letter to FTC, item number 8.