



**Fair Trade 101: T&T Competition Policy Explained**  
**Trinidad & Tobago Chamber of Industry and Commerce**  
**September 22, 2020**

Ms. Michelle Phillips, Legal Officer of the Jamaica Fair Trading Commission, participated as a panelist in the Webinar entitled “Fair Trade 101: T&T Competition Policy Explained”.<sup>1</sup> The objective of the Webinar was “to best inform members of the operationalization of the competition policy provisions and how they impact businesses, experts from the legal and business fraternity”.<sup>2</sup> It was hosted by the Trinidad & Tobago Chamber of Industry and Commerce.

Following are Ms. Phillips’ speaking notes on the discussion:

**Opening: Overview of the Fair Trading Commission (FTC) & the Fair Competition Act (FCA)**

- How many years has the FCA been enforced in Jamaica?
- How is it working?
- Things in T&T not in Jamaican Act.

**Response:**

The Fair Competition Act (FCA Jamaica) was promulgated in 1993 so it has been in force now for 27 years. Its mandate is to provide for the maintenance and encouragement of competition in the conduct of trade in Jamaica.

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<sup>1</sup> Other panelists were Ms. Fanta Punch, Partner – Dispute & Risk Management Department at M. Hamel-Smith & Co.; Mr. Patricio Torres, Head of Market at Nestle, Anglo-Dutch Caribbean; Dr. Ronald Ramkissoon, Chairman of the Trinidad & Tobago Fair Trading Commission; and Mr. Bevan Narinesingh, Executive Director of the Trinidad & Tobago Fair Trading Commission.

<sup>2</sup>Letter of invitation dated September 3, 2020, from the Trinidad & Tobago Chamber of Industry and Commerce.

The Fair Trading Commission (FTC) is the body corporate established pursuant to the FCA to inter alia carry out investigations in relation to the conduct of business in Jamaica; investigate any person adversely affected by the Act, make information on the FCA available to the public for the guidance of businesses and consumers and to conduct studies and publish reports regarding matters affecting consumer interests. It is a statutory body falling within the Ministry of Industry, Investment & Commerce portfolio. It consists of a minimum of 3 and maximum of 5 Commissioners and is headed by a Chairman. The Executive Director is an ex-officio Commissioner.

Some provisions absent from the Jamaican Act that are present in the Fair Trading Act of Trinidad & Tobago (T&T Act) include specific merger provisions (included ats.13-16 of the T&T Act) that provide among other things, the definition of a merger and the types of mergers or thresholds to be met before necessitating the permission of the T&T FTC, before merging. Our (the FCA Jamaica) section 17, an agreement whose provision(s) have the purpose effect or likely effect of substantially lessening competition in a market, has been held to be wide enough to encompass mergers. Although our s.17 is arguably wider in scope, it is opined that specific merger provisions would be extremely useful. At present there is no prerequisite for merging companies or a company acquiring another to notify the FTC. Thus the FTC usually learns of a merger after it is consummated through the media or by a third party source. Finding out about the agreement pre-merger would allow the FTC to guide entities and also save both the entities and the FTC time and costs, because if the FTC finds that a merger is anticompetitive or that provisions need to be modified, hence conditionalities imposed, the FTC has the power to intervene after the transaction has been fully completed.

Sections in the Jamaican Act not present in the T&T Act, include Sections on misleading advertising, double ticketing, sale above advertised price and sale at a bargain price of goods or services that the seller does not supply in reasonable quantities. All of these are consumer focused/consumer protection/welfare

provisions, and are not strictly competition based whereas the T&T Act is really more competition focused. In Jamaica the FTC and the Consumer Affairs Commission (CAC) will soon be merging into one new Commission that will have responsibility for both consumer protection and competition matters. Additionally the Jamaican Act has specific provisions in relation to cartel activity such as price fixing and bid rigging.

**Question to Miss Phillips during the panel discussion:**

**1. Question:** Like Trinidad & Tobago, certain sectors are excluded from the Jamaica FTC, what are these sectors?

**Response:**

Unlike the T&T Fair Trading Act which excludes companies falling within the remit of the Telecommunications Authority Act and banks and non-bank financial institutions under the Securities Act, no sectors are specifically excluded by the FCA. In fact in *Fair Trading Commission v. Digicel Jamaica Ltd & Anor* [2017] UKPC 28 in determining whether section 17 of the FCA was wide enough to allow the FTC to intervene in mergers in the telecommunications market the PC found that “*the provisions of Part III of the FCA are in wholly general terms....There is no provision of the FCA excluding any particular sectoral market from the Commission’s power of intervention...*”(2017] UKPC 28 at paragraph 12). It was also held that the FTC has jurisdiction “to intervene in the telecommunications market in the same way as in any other.” (2017] UKPC 28 para 24)

The FCA does provide that the Minister may exempt certain industries from the operation of the Act and he has exercised this discretion in the past, for example in relation to the Jamaica Public Service Company that is the main supplier of electricity in Jamaica.

### **Questions prepared for:**

**1. Question:** Jamaica was the first in the region to establish its Fair Trade Commission. Why did Jamaica decide to develop and implement competition law and what has been the result/lessons learnt?

### **Response:**

Prior to 1993 when the FCA Jamaica came into force there was a lot of government regulation in relation to several sectors wherein the Government of Jamaica (GOJ) operated almost carte blanche. The allocation of goods and services produced and the quantities produced were largely determined by the government. The trend in the 1990s and onward was to rely on the market to set prices and determine the allocation of resources. In keeping with this trend the GOJ undertook a number of structural adjustments aimed at removing barriers to entry that they had created. This included the removal of price controls and the deregulation of certain industries, for example, tourism, banking and transportation, and subjecting government enterprises to greater commercial pressure. The FCA was enacted to ensure (1.) that these policies and the benefits of deregulation were achieved as well as (2.) to combat possible anticompetitive practices that might occur due to the deregulation, for example price fixing, because there were no longer price controls.

The objectives of the FCA are to provide for competition rivalry in markets and secure economic efficiency in trade and commerce; to open markets and guard against undue concentration of economic power; to promote consumer welfare and protect consumer interest, and promote investment in the economy.

Some of the lessons learnt are that although the FCA (Jamaica) was enacted in 1993 we have seen that there is much room for improvement. Some examples are the lack of specific merger provisions as stated before, the need for guidelines on what constitutes dominance; an increase in fines so that same are a deterrent; the inclusion of leniency and anonymity provisions and provisions giving the Commission the authority to enter into cross border cooperation agreements.

There are proposed amendments to the Act but the process has not commenced been completed.

We have also seen and been able to improve on what works, for example improving on our investigation techniques and the interplay between this unique area of the law and economics. Additionally, over the years the FTC has seen an increasing number of competitors making complaints to the FTC to have issues determined which shows a growing awareness in the Jamaican business society about Competition Law and policy, consumer rights and the FTC's role.

**2. Question:** Can you provide some examples where the Commission has conducted investigations in relation to the conduct of business in Jamaica to determine if any enterprise is engaging in practices that are in contravention of the Act? What are the takeaways from some of those cases for businesses?

**Response:** Some examples include:

1. **Digicel's complaint against Lime's marketing campaign.** This complaint was in the telecommunications industry and involved Lime's entire marketing campaign. In 2013 Lime launched a side by side marketing campaign claiming to offer reduced or lower prices than Digicel. Digicel complained to the FTC that this was unfair and was misleading. The finding of the FTC was that some of the advertisements breached s.37 of the FCA dealing with misleading advertising. This is a strict liability offence involving representations made to the public in the pursuance of trade that are false or misleading in a material respect and were made for the purpose of directly or indirectly promoting the supply of goods or services. The solution proposed by the FTC was a Consent Agreement.
2. **Lisbeth Mills (Informant) in Crichton v. FTC** [2017] JMCA Civ 6. This complaint was in the used motor vehicle industry. The Respondent sold the Informant a used vehicle that was purported to be a newer year than represented (the vehicle was sold as 2007 model but it was in fact, a 2005 model). The complaint was examined under section 37 of the FCA being

misleading advertising. The matter was pursued through the Courts and a penalty imposed on Crichton for breach of the FCA.

3. **Customs brokerage services:** where a courier service provider approached the FTC for an opinion regarding the implementation of a 'broker turnover fee' on the transfer of customers' packages to third parties that provide competing services. The FTC's findings were that the provider would be abusing its position of dominance by the implementation of the fee as it was likely to restrict entry or expansion in the market for customs brokerage services in Jamaica. The imposition of the fee was thus likely to have the effect of substantially lessening competition in that market in Jamaica. The FTC therefore recommended that the fee not be implemented.

#### **Take Aways:**

In the examples given we can see the FTC fulfilling its objective of ensuring that businesses operate competitively and do not use any anticompetitive means to secure an advantage in the market. The FTC is often portrayed or viewed as the body that tells businesses what they can and can't do, but in the Digicel case we see that businesses can actually invoke competition law to respond to marketing strategies of a competitor and ask the FTC to review this conduct to see if it harms consumers and competitors. Similarly in the customs brokerage services case we see that companies can rely on the FTC to provide guidance and opinions in relation to conduct or contemplated conduct. Finally, in the Crichton case, although s.37 is consumer focused and a consumer filed the complaint the FTC is also ensuring that businesses do not operate in an anticompetitive manner. Businesses therefore need to be aware of the provisions of the Act and if in doubt of any conduct seek the opinion of the FTC before engaging in same or they could be found in breach of the FCA and be fined accordingly. The Crichton case serves as a warning to other companies that may not be so careful in their representations concerning the sale of goods or services to the public.