

ROLE AND FUNCTIONS OF THE FAIR TRADING COMMISSION

DunnCox's Continuing Legal Education Seminar

Dr. Delroy S. Beckford

Senior Legal Counsel

FAIR TRADING COMMISSION



January 22, 2009

MISSION STATEMENT

“provide for the maintenance and encouragement of competition in the conduct of trade, business, and the supply of services in Jamaica, with a view to providing consumers with competitive prices and product choices”

CONSUMER RELATED MATTERS AND COMPETITION MATTERS

- The FTC is concerned with consumer related matters and those involving issues of competition.
- Its primary concern is with respect to cases in which competition is affected or likely to be affected in a relevant market.
- Consumer matters that were largely within its purview at its inception in 1993 have now been transferred to the Consumer Affairs Commission (CAC) which is governed by the Consumer Protection Act.

CONSUMER MATTERS

- Misleading advertising (s. 37 FCA)
- Double ticketing i.e. supplying goods at the higher of two prices advertised, displayed or as contained on the article for sale (s. 39 FCA)
- Failure to supply goods at a bargain price as advertised i.e. not supplying goods at less than the ordinary price for such goods (s. 40 FCA)

Consumer matters contd.

- Sale above advertised price (s. 41 FCA)
- Tied selling (s. 33 FCA) i.e. conditioning the supply of a good or service on the customer
 - acquiring any other article from the supplier or his nominee
 - refraining from using or distributing, in conjunction with the tied article, another article that is not of a brand or manufacture designated by the supplier or his nominee; and where the supplier
 - induces the customer to meet any of the above conditions in exchange for more favourable terms of sale for the tied good

Per se and Rule of Reason violations

The distinction between *per se* and **rule of reason** violations is somewhat arbitrary in that every claim with respect to a breach of a provision involves some analysis of a particular legal standard. However, the working definition used here refers to *per se* violation as those breaches for which no defence is available.

***Per se* and Rule of Reason violations contd.**

- Per se violations include (a) double ticketing (b) sale above advertised price, and (c) tied selling.
- Rule of reason violations include sale above bargain price.
- Misleading advertising has not traditionally been cast in any of the above classifications, but may conveniently be included in the *per se* violations category in light of the *SBH-Holdings (The Fair Trading Commission v. SBH Holdings Ltd, Supreme Court Civil Appeal No. 92/2002)* decision from the Court of Appeal.

OFFENCES AGAINST COMPETITION

Offences against competition are set out in section 34 of the FCA as:

- (a) influencing prices at which goods are supplied whether by agreement, threat or promise.
- (b) refusing to supply goods or otherwise discriminate against any other person engaged in business.
- (c) refuse to supply goods or to otherwise discriminate against any other person engaged in business because of the low pricing policy of that person.

Offences against competition contd.

- Section 34 does not apply where the person attempting to influence the conduct of another person and that other person are interconnected companies or principal and agent.
- The use of the term ‘offences’ is a misnomer since they are not offences in the context of criminal law, i.e., they are not classifiable as either misdemeanors or felonies.
- These are not the only prohibitions against competition in the FCA.

COMPETITION MATTERS

These include:

- Section 17 agreements i.e. that is agreements that have provisions that substantially lessen competition or are likely to lessen competition substantially in a relevant market
- Section 18 agreements i.e. agreements to restrict the supply of a good or service
- Abuse of dominance (s. 19-21 FCA)

FUNCTIONS AND POWERS OF FTC RE COMPETITION MATTERS

Section 5 of the FCA sets out the functions of the FTC as:

- (a) carrying out investigations, on its own initiative or at the request of any person, to determine whether any enterprise is engaging in business practices in contravention of the FCA.
- (b) carry out investigations as may be required by the Minister in connection with the FCA.
- (c) to investigate on its own initiative or at the request of any person adversely affected and take action it considers necessary with respect to abuse of a dominant position by any enterprise.

Functions and powers contd.

- The FTC's powers are set out in several provisions. These include s. 7, 21, etc.
- They include the power to summon and examine witnesses, to call for and examine documents in connection with an investigation, and to direct an enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse of dominance in a relevant market.

WHAT POWERS REMAIN IN LIGHT OF THE *STOCK EXCHANGE DECISION* ?

- The Court of Appeal in the *Stock Exchange (Jamaica Stock Exchange v. Fair Trading Commission*, Supreme Court Civil Appeal No.92/97) decision held that the merger of investigative and adjudicative functions is a breach of section 20(2) of the Constitution and barred the FTC from conducting further investigations in that case. The Court recommended a separation of functions e.g. a special Tribunal or a Court for the conduct of hearings.

What powers remain contd.

- The FTC has not interpreted the decision to affect its function to investigate, but rather its power to conduct hearings and to give binding directives to correct conduct by an enterprise that is anti-competitive.
- The FTC continues to investigate anti-competitive conduct by enterprises with its reliance on the court to make a finding of whether conduct amounts to a breach of the FCA that would require the specific remedies provided in the FCA. E.g. injunctive relief, and/or penalty of up to 5 million \$J for enterprises found in breach of the FCA.

ABUSE OF DOMINANCE

- Sections 19-20 of the FCA concern claims regarding abuse of dominance.
- The sections require a finding of dominance, and abuse of that dominance.
- A further finding that the abuse has had or is having the effect of lessening competition substantially in a market.

DEFINITION OF DOMINANCE

Section 19 of the FCA states:

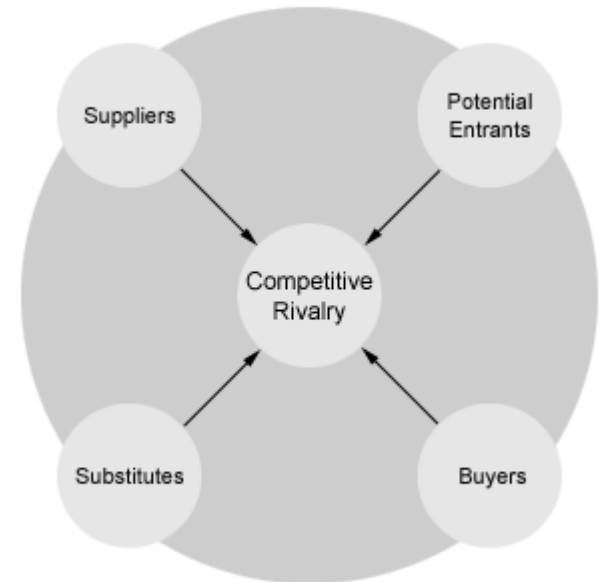
“ For the purposes of this Act an enterprise holds a dominant position if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors”.

TESTS USED TO IDENTIFY RELEVANT MARKET

- The *SSNIP* test is used to establish the relevant market. This refers to the *Small But Significant Non-Transitory Increase In Price* methodology.
- Market share data used to establish dominance in the relevant market identified.
- Percentage of market share used depends on the circumstances e.g. the number of players in the market, and the economic strength of the players in the market.

STATE OF COMPETITION IN THE MARKET

- Having identified the relevant market, the next step is to determine the state of competition in that market.
- Three factors are normally looked at:
 - (a) intra-market rivalry
 - (b) buyer or supplier power in the market
 - (c) the state of entry in the market



DEFINITION OF ABUSE OF DOMINANCE

Section 20 of the FCA states:

“An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the foregoing, 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;
- d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
- e) limits the production of goods or services to the prejudice of consumers;
- f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements”.

DEFENCE TO ABUSE OF DOMINANCE

- Section 20(2) of the FCA provides that an enterprise shall not be treated as abusing a dominant position if:
 - (a) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (b) consumers are allowed a fair share of the resulting benefit.
 - (b) the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

ABUSE OF DOMINANCE

Revised Treaty of Chaguaramas

- Articles 178 and 179 of the Revised Treaty permit a claim for abuse of dominance with respect to conduct affecting the operation of the Single Market.
- Domestic competition authorities may be required to conduct preliminary investigations regarding conduct that affects the Single Market. Article 170(3) of the Revised Treaty.

ABUSE OF DOMINANCE GATS AGREEMENT

- Article VIII of General Agreement on Trade in Services provides a remedy against a monopoly abusing its power.
- This arises in cases where MFN commitments are made (Article VIII:1), and also in cases where commitments other than Article II commitments are made. (Article VIII:2).

THANK YOU



FAIR TRADING COMMISSION

52-60 GRENADA CRESCENT
KINGSTON 5

TELEPHONE: 960.0120-4

FACSIMILE: 960.0763

EMAIL: ftc@cwjamaica.com

WEBSITE: jftc.com