



ROLE AND FUNCTIONS OF THE FAIR TRADING COMMISSION

Presented to:

the Management & Staff of
Nestle (Jamaica) Ltd.

Presented by:

Kevin Harriott
Competition Bureau Chief
FAIR TRADING COMMISSION

Kingston, Jamaica
March 19, 2010

PART I

Institutions of Competition Law
Enforcement in CARICOM

Regional Institutional Framework

- Regional Competition Authority
 - Community Competition Commission (CCC)
 - Revised Treaty of Chaguaramas (RTC), 1989
 - Authority established in 2008
- National Competition Authorities
 - Jamaica (Fair Trading Commission)
 - Fair Competition Act, 1993
 - Authority established in 1993
 - Barbados (Fair Trading Commission)
 - Fair Competition Act, 2003
 - Authority established in 2001

The Institutional Framework (cont'd)

- National Competition Authorities
 - Trinidad & Tobago
 - Legislation passed in 2006
 - Authority yet to be established
- Consumer Welfare Authority
 - Jamaica
 - Consumer Protection Act, 2005

RELATIONSHIP BETWEEN NATIONAL and REGIONAL COMPETITION AUTHORITIES

- The CCC may request a national authority to conduct a preliminary investigation of alleged anti-competitive conduct within the Community. Article 176 (1) of the RTC.
- This may require amendment to domestic law to give effect to a request by an external body for the conduct of an investigation.

PART II

Competition Law Enforcement in JAMAICA

Jamaica FTC- 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 Welfare is central to the mission of the Commission

Commission & Staff

- Commission (5, appointed by Minister)

Staff

- Executive Director (1, appointed by Commission)
- Manager (3)
- Lawyer (2)
- Economist (2)
- Research Officer (2)
- Complaint Officer (1)
- Accountant (1)
- Support Staff (7)

FUNCTIONS AND POWERS

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 JSE 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 (cont'd)

- 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

Main Tools of the Trade

- Competition law enforcement
 - Monitor conduct by private and public commercial enterprises
- Competition Advocacy
 - Monitor conduct by Government/
Public Bodies
 - Jamaica Dairy Development Board Act, 2006, price-setting
- Public Education
 - Make the public aware of the benefits of competition

Competition Law Enforcement

- The Fair Competition Act (FCA), 1993
 - Prohibits anticompetitive conduct (which harms consumers indirectly)
 - Prohibits deceptive conduct (which harms consumers directly)
 - Allows for exemptions
 - Two standards of proof
 - Imposes fines of up to J\$1 million for individuals
 - Imposes fines of up to J\$5 million for businesses

Fair Competition Act

–Deceptive Conduct

- misleading representation (Sections 37,38)
- double ticketing (Section 39)
- sale at a bargain price (Section 40)
- sale above advertised price (Section 41)

Deceptive Conduct

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

Deceptive Conduct (cont'd)

- Sale above advertised price
- 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

Fair Competition Act

- Anticompetitive Conduct
 - collusive agreements (S. 17,18)
 - abuse of dominance (S. 19-21)

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”.

EXAMPLES 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-

- restricts the entry of any person into that or any other market;
- prevents or deters any person from engaging in competitive conduct in that or any other market;
- eliminates or removes any person from that or any other market;

EXAMPLES OF ABUSE OF DOMINANCE (cont'd)

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...

- directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
- limits the production of goods or services to the prejudice of consumers;
- 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”.

Two Standards of Proof

- per se violation: - conduct for which no defence is available.
- Rule of reason violation: - conduct which is considered a breach only if it leads to a substantial lessening of competition

Standards of Proof (cont'd)

- Per se violations include (a) double ticketing (b) sale above advertised price, and (c) tied selling.
- 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.

PART III

Assessing Competitive Effects

Economic Analysis

- Define the relevant market
- Assess market power (competitive constraints)
- Assess anticompetitive effects

Defining Relevant Market

- The **SSNIP** test is used to establish the relevant market.
- Developed by US competition authorities in 1992
- The Test identifies the set of products which competes with the product under investigation
- Market definition based on substitutes in demand.

Assessing Market Power

- Having identified the relevant market, the next step is to assess the state of competition in that market.
- Three factors are normally looked at:
 - restraints from existing rivals (concentration)
 - restraints from future rivals (entry barriers)
 - restraints from customers (buyer power)

Assessing Anticompetitive Effects

- After establishing dominance, the next step is to assess the competitive effect.
- To demonstrate anticompetitive effect, we need to show that the challenged conduct will:
 - Harm an equally efficient rival; AND
 - Harm consumers (price, quality, choice, etc.)

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.

PART IV

- General Issues in the Groceries Sector

General Issues in the Groceries Sector

- Misleading Advertising (consumers)
 - unverified claims v. puffery
- Vertical Restraints (customers)
 - Sales
 - Exclusive territories; exclusive dealing; full-line forcing; loyalty rebates.
 - Procurement
 - Bid-rigging
 - Prices and payments
 - marketing expenses; (minimum) resale price maintenance.
 - Promotions
 - Funding; Shelf space allocations; Product positioning.

General Issues in the Groceries Sector (cont'd)

- Collusion (rivals)

THANK YOU



FAIR TRADING COMMISSION

52-60 GRENADA CRESCENT
KINGSTON 5

TELEPHONE: 960.0120-4

FACSIMILE: 960.0763

EMAIL: ftc@cwjamaica.com

WEBSITE: www.jftc.gov.jm