Fair Trading Commission

The Fair Competition Act:

A General Guide

Fair Trading Commission
52 Grenada Crescent
Kingston 5
Tel: (876) 960 1020 – 4; Fax: (876) 960 0763
Email: ftc@cwjamaica.com
Website: http://www.jftc.com

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1. Introduction

1.1 Competition lies at the heart of any successful market economy and is crucial to the protection of consumers' interests and the efficient allocation of resources. It is a process whereby firms constantly try to gain an advantage over their rivals and win more business by offering more attractive terms to customers or by developing better products or more effective ways of meeting their requirements. Competition has several dimensions such as the quality of product, price, branding and marketing. Price is only one factor, albeit in many markets the most important. Fair and widespread competition encourages the development of new or improved products or processes and, in the long run, enhances economic growth and living standards.

1.2 The Fair Competition Act (FCA) was established in 1993 to ensure that the benefits of the competition process in Jamaica are unhindered by anti-competitive activity. The objectives of the Act are to:

- Encourage competition in the conduct of trade and business in Jamaica;
- Ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy;
- Provide consumers with better products and services, a wide range of choices at the best possible prices.

1.3 To achieve these objectives, the Act contains two broad categories of prohibitions – those dealing with anti-competitive behaviour and those dealing with consumer protection (see sections 5 and 6 below).

2. Jurisdiction

2.1 The Act applies to all persons and businesses operating in Jamaica with, some exceptions. The following are some of the groupings that fall outside of the Act:—

- activities of trade unions involved in collective bargaining;
- activities required under international treaties;
- agreements relating to the use of any copyright, patents or trademarks;
- agreements or practices that have been authorized by the FTC;
- activities by professional associations intended to develop standards of competence necessary for the protection of the public; and
- activities that are declared exempt by the Minister, subject to affirmative resolution.

3. The Fair Trading Commission

3.1 In order to achieve its objectives, the Act established the Fair Trading Commission (FTC). The FTC is the administrative body responsible for implementing the FCA. The FTC consists of up to five Commissioners, who are appointed by the Minister of Industry, Commerce and Technology, and staff who are headed by the Executive Director. The staff consists of lawyers, economists, research officers, complaints officers and administrative and support staff.

4. The powers of the FTC

4.1 The FTC has the power to carry out 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. Such investigations may be self-initiated by the FTC or be carried out following a complaint. All investigations are carried out by the staff of the FTC.

4.2 The FTC has the power to obtain any information that it considers necessary for the purposes of the investigation. Where necessary, an authorized officer of the FTC may, with a warrant, enter and search any premises. The officer may remove any documents from the premises. Copies of documents removed may be made and the original must be returned within seven days.

4.3 In addition, the Commissioners have the power to summon and examine witnesses; to call for and examine documents; and to administer oaths. Where they find that an arrangement has contravened Sections 17, 20 or 33 of the Act, they may prohibit the arrangement. For prohibitions under Sections 20 and 33, they may also direct the enterprise concerned to take steps that are necessary to overcome any anti-competitive effects resulting from the arrangement.

4.4 The FTC can also take to Court any business or individual who has been found guilty of anti-competitive practice and has failed to take corrective measures, after being instructed by the Commissioners.

5. Prohibitions on anti-competitive arrangements

5.1 Prohibitions on anti-competitive behaviour come primarily under Sections 17 and Section 20 of the FCA.

5.2 Section 17 prohibits "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". The Act gives examples of the types of agreements that may be prohibited under Section 17. These include agreements that contain provisions that allow enterprises to—

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- affect tenders to be submitted in response to a request for bids;

- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- 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,

5.3 The Act also prohibits the abuse of dominant position. According to the Section 20 of the Act, "an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market". A dominant enterprise may be found to be abusing its position 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;
- directly or indirectly imposes unfair purchase or selling prices or other anti-competitive practices;
- limits 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.

5.4 Section 33 of the Act also prohibits exclusive dealing or market restriction when engaged in by a major supplier of goods in a market or when it is widespread in a market such that it is likely to:

- impede entry into or expansion of an enterprise in the market;
- impede introduction of goods into or expansion of sales of goods in the market; or
- have any other exclusionary effect in the market.

5.5 Other anti-competitive practices that are prohibited under the Act are:

- Resale price maintenance (Sections 22, 23, 25 and 27)
- Tied selling (Section 33)
- Price fixing (Section 34)
- Collusion and cartels (Sections 18 and 35)
- Bid rigging (Section 36)

5.6 Further explanation on the prohibitions on anti-competitive practices may be found in *The Fair Competition Act: Guide to Anti-competitive Practices*.

6. Consumer affairs protection

6.1 In addition to anti-competitive arrangements, the FCA also speaks to certain consumer protection matters. In particular, the Act proscribes:

- Misleading advertising;
- Non-fulfillment of promises, warranties, guarantees and other obligations made to the customer;
- Sale above advertised price; and
- Bait-and-switch tactics by merchants who advertise a sale even though they do not have reasonable quantities of the goods advertised. When customers come to the shop, they are informed that the good is unavailable and attempts are made to persuade them to purchase a similar but more expensive good.

6.2 Further explanation on the consumer matters that fall within the FCA may be found in our *Guide to Consumer Protection*.

7. Exemptions

7.1 The Act provides for exemptions from prohibition of agreements that satisfy certain criteria. These exemptions are specific to practices that fall under Sections 17, 20 and 33 only. An agreement would not be prohibited under Section 17 if it—

- Contributes to the improvement or production or distribution of goods and services; or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- Imposes on the enterprise concerned only such restrictions as are indispensable to the attainment of the aforementioned objectives; or
- Does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

7.2 Similar exemption criteria apply to practices that fall under Section 20 and that may otherwise be considered as an abuse of dominance. In addition, an enterprise would also not be treated as abusing a dominant position if it is shown that it is enforcing its right under any copyright, patent, registered design or trade mark.

7.3 Finally, exclusive dealing and market restriction would not be prohibited under Section 33 of it is engaged in only for a reasonable period of time to facilitate entry of a new supplier or of new goods into a market.

7.4 Further explanation on exemptions may be found in *The Fair Competition Act: Guide to Anti-competitive Practices*.

8. Remedies and penalties

8.1 Any person who obstructs an investigation by the FTC; refuses to give evidence; gives false information; destroys documents required by the FTC; or fails to comply with a requirement of the FTC under this Act is liable to a fine or imprisonment for terms ranging from two to five years. Further, any person or who, having been required to appear before the FTC, refuses or fails to appear and give evidence; to take an oath; or refuse to answer any question will also be liable to such penalties.

8.2 Where the FTC finds that an agreement or practice has substantially reduced competition or constitutes an abuse of dominant position such that Sections 17, 20 or 33 has been contravened, the FTC may prohibit the practice or agreement.

8.3 Where the person or enterprise fails to correct an practice that is in breach of the Act, the Act provides for the FTC as well as business and private individuals who have been injured by the practice to take action in the Supreme Court against that person or enterprise. In such instances the Court may impose a pecuniary penalty of up to $1 million in the case of an individual and $5 million in the case of a person other than an individual (for example, a business). The Court may also grant an injunction restraining the offending party from engaging in the practice.

8.4 Any person who engages in any conduct that is in contravention of the Act is liable in damages for losses suffered by any other person because of the conduct.

9. Private Right of Action

9.1 The Act provides for the private right of action. Any business enterprise or individual who has been the victim of an anti-competitive practice or any other practice prohibited under the Act may take legal action in the Jamaican courts against the offending party.

10. Confidentiality and disclosure of information

10.1 In the course of its investigations, the FTC may obtain from any party any information that it considers relevant to the investigations. Information acquired will be used for the purpose of investigations under the FCA or for the enforcement of the FCA only.

10.2 Often, some of the information requested is commercially sensitive. The FTC treats all commercially sensitive as confidential. The FTC may, however, publish general information or surveys that do not contain commercially sensitive information.

11. Investigation procedures

11.1 Figures 1 and 2 respectively show the procedures that the FTC applies when investigating complaints about anti-competitive practices and matters relating to consumer affairs protection.

Figure 1: Investigation procedures into anti-competitive practices

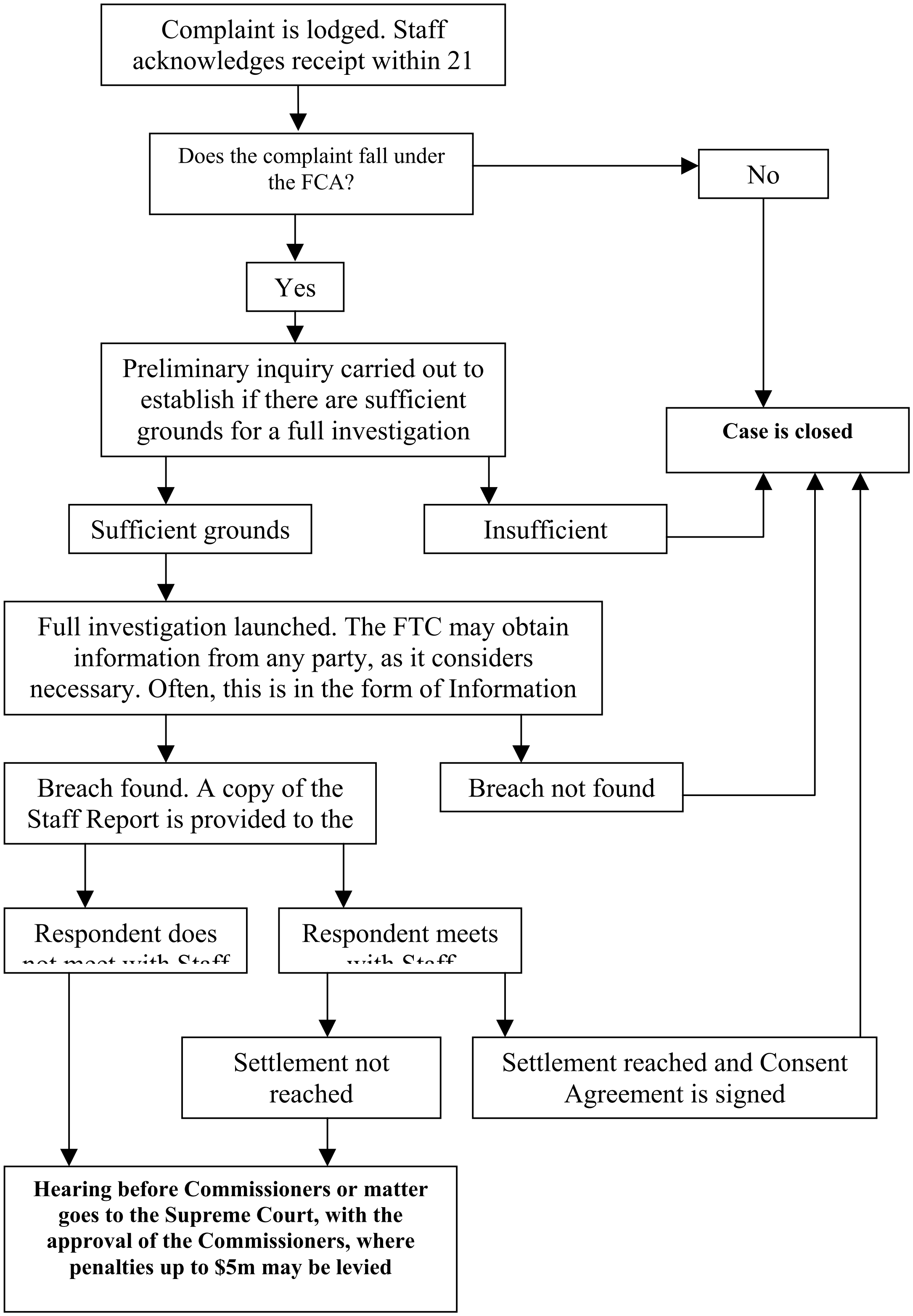
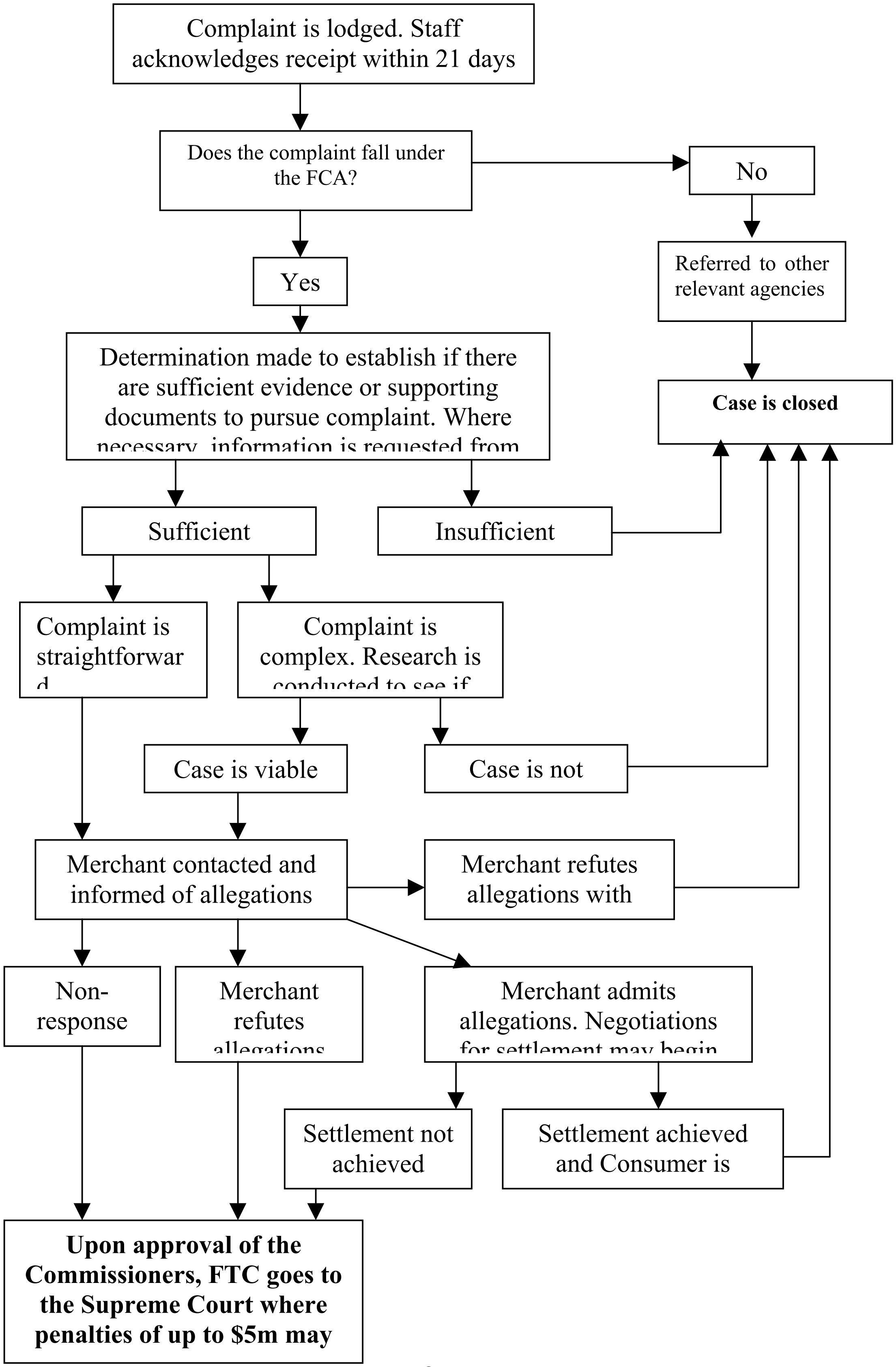


Figure 2: Investigation procedures into consumer affairs protection



12. How to make a complaint

12.1 If you believe you have sufficient grounds on which to make a complaint regarding a contravention of the FCA, then submit a written complaint to:

Executive Director

Fair Trading Commission

52 Grenada Crescent

Kingston 5

Tel: 960 1020 – 4; Fax: 960 0763

Email: ftc@cwjamaica.com

Website: http://www.jftc.com

12.2 For further guidance on how to make a complaint, please refer to *Guide to Anti-competitive Practices*, if your complaint is about anti-competitive practices, or *Guide to Consumer Protection*, if your complaint is about consumer matters.