Fair Trading Commission

The Fair Competition Act:

A Guide to Anti-competitive Practices

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1. Introduction

1.1 The Fair Competition Act (FCA) was established in 1993. 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.

1.2 To achieve these objectives, the FCA contains two broad categories of prohibitions – those dealing with anti-competitive behaviour and those dealing with consumer protection. The Fair Trading Commission (FTC) is the administrative body responsible for implementing the FCA.

1.3 This booklet explains the meaning of anti-competitive practices. An explanation of matters relating to consumer affairs under the FCA may be found in the *The Fair Competition Act: Guide to Consumer Protection*. For general information about the FCA, please see *The Fair Competition Act: A General Guide.*

1.4 Broadly speaking, there are two types of prohibitions on anti-competitive arrangements under the FCA. In the first category, there must be evidence that an arrangement has, or is likely to have, a negative effect on competition, before it is considered as a breach of the FCA. These types of prohibitions are commonly known as “rule of reason” prohibitions. Prohibitions under Section 17, 20 and 33 of the FCA fall within this category. In the second category are “per se” prohibitions, where the mere existence of the specified practice would be a breach of the FCA. Prohibitions under Sections 18, 25, 27, 33, 35 and 26 fall within this category.

1.5 The following sections of the FCA proscribe anti-competitive arrangements:

- Section 17—which prohibits agreements that substantially lessen competition;
- Section 18— which prohibits agreements with exclusionary provisions;
- Sections 20 and 21—which prohibit the abuse of a dominant position;
- Sections 22 and 23—which prohibit collective resale price maintenance;
- Sections 25 and 27—which prohibit minimum resale price maintenance;
- Section 33—which prohibits exclusive dealing, market restriction and tied selling;
- Section 34—which prohibits price-fixing;
- Section 35—which prohibits conspiracy (cartels); and
- Section 36—which prohibits bid rigging and collusive tendering.

1.6 Note that, for the purposes of the Act, the term “agreement" includes any agreement, arrangement or understanding whether formal or informal, implicit or explicit, oral or written, or whether or not it is legally enforceable. A "gentlemen's understanding" is also an agreement.

2. Agreements that substantially lessen competition

2.1 Section 17 of the FCA "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."

2.2 As set out in Section 17(2), this includes, but is not limited to, agreements which contain provisions that:—

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- lead to the sharing of 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,

2.3 According to subsection 17(3) and subject to the exemption criteria of subsection 17(4), no person shall give effect to any provision of an agreement which has the purpose or effect of substantially lessening competition; and no such provision is enforceable.

"Substantial lessening of competition"

2.4 As set out in the Act, only agreements that have, or are likely to have the effect of substantial lessening of competition will be prohibited under Section 17.

2.5 An agreement is not likely to have substantial anti-competitive effects if the parties effecting the agreement do not exercise market power (see *Assessment of Market Power* in Section 6 below). The FTC therefore takes the view that an agreement will generally not have the effect of substantially lessening competition if the parties' combined share of the relevant market does not exceed 25 percent, although there are circumstances in which this might not be the case.[1]

2.6 There are certain "hard core" restrictions that are capable of substantially lessening competition even when the combined market share is less than 25 percent. Examples of such arrangements include those that directly or indirectly

[1] The 25 percent guideline threshold is consistent with that applied by competition agencies in other jurisdictions such as the United Kingdom and the European Union.

fix prices or market shares or those that impose minimum resale prices. Some of these arrangements are, however, also caught under other Sections of the FCA (see Section 5 below). Further, an agreement that is one of a network of similar agreements which have a cumulative effect on the market in question may also substantially lessen competition even if the parties' combined market share is less than 25 percent.

2.7 The converse is also true, i.e., it is not necessarily the case that an agreement substantially lessens competition, where the parties' combined market share is more than 25 percent. In all cases, other factors will be taken into consideration in assessing whether the agreement is likely to substantially lessen competition: the content of the agreement; the extent of the market covered by the agreement; the structure of the market or markets affected by the agreement; entry conditions; and "buyer power".

2.8 In other words, each agreement has to be assessed on a case-by-case basis to determine its likely effect on competition.

Exemptions

2.9 Not all agreements that fall under Section 17(1) are prohibited by the Act. As set out in subsection 17(4), the prohibition does not apply to any agreement or category of agreements which the FTC is satisfied -

(a) contributes to –

- the improvement of 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;

(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.

The agreement contributes to improving production or distribution or promoting technical or economic progress …

2.10 Examples of improvements in production or distribution include lower costs from changes in the methods of production or distribution or economies of scale; product quality improvements; increases in the range of goods or services provided.

2.11 Examples of the promotion of technical or economic progress include efficiency improvements from scale economies and specialization, increased research and development and enhanced speed of innovation and technical progress.

… while allowing consumers a fair share of the resulting benefits…

2.12 Consumers, in this context, refers not only to end-users of the goods or services, but also to customers of the parties to the agreement at all levels of the supply chain. If, for example, an improvement is seen as benefiting only the shareholders of the parties to the agreement, this condition would not be satisfied. Consumers must benefit. The benefits may be enjoyed immediately or may be manifested in the foreseeable future.

… restrictions as are indispensable to the attainment of the objectives…

2.13 In addition to demonstrating the benefits to the agreement, any restrictions imposed must also be necessary and not more restrictive than necessary for the attainment of the benefits. In other words, the agreement should contain the least restrictive means of achieving the benefits.

… or no possibility of eliminating competition in respect of a substantial part of the goods or services concerned

2.14 This condition will be assessed in the overall context of the effect of the agreement on effective competition in the relevant market(s).

3. Abuse of Dominant Position

3.1 An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market. As set out in Section 20(1) of the FCA, this includes, but is not limited to, practices and arrangements that:—

- restrict the entry of any person into that or any other market;
- prevent or deter any person from engaging in competitive conduct in that or any other market;
- eliminate or remove any person from that or any other market;
- directly or indirectly impose unfair purchase or selling prices or other uncompetitive practices;
- limit production of goods or services to the prejudice of consumers;
- make 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.

3.2 The following conducts are examples of potentially abusive behaviour – exclusive dealing, excessive pricing, price discrimination, predation, refusal to supply and restricting access to essential facilities (see Section 8 below for more details).

Definition of dominance

3.3 As defined in Section 19 of the FCA, "an enterprise holds a dominant position in a market 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."

3.4 Holding a dominant position is not, in itself a breach of the FCA. It is the abuse of this position that constitutes a breach. An assessment must therefore to be made to determine whether or not an enterprise, if found to be dominant, is exercising its dominant position in a way that adversely affects competition.

Assessment of dominance

3.5 The standard test of whether a firm is dominant is whether it has the power to behave to an appreciable extent independently of consumers, its competitors and customers, in terms of pricing and other decisions. In assessing the existence of a dominant position, the FTC will consider both market share and entry conditions (see *Assessment of Market Power* in Section 6 below).

3.6 As a guideline, the FTC will generally consider an enterprise to be dominant if it has a 50 percent market share.[2] This threshold is a guideline only. It does not mean that all firms with more than 50 percent market share will necessarily be considered dominant. Conversely, firms with less than 50 percent market share may sometimes be dominant. In the assessment, other factors will be taken into account. The market share of competitors operating in the same market will, for example, be considered. In other words, each case will be assessed on its particular merits.

Exemptions

3.7 Not all practices that fall under Section 20(1) are treated as an abuse of a dominant position. As set out in subsection 20(2), an enterprise shall not be treated as abusing a dominant position if it is shown that:—

- its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and
- consumers were allowed a fair share of the resulting benefit.

3.8 Under Section 20(2)(b) of the Act, arrangements that are designed only for the purpose of enforcing of intellectual property rights such as copyright, patent, registered design or trade mark would not be considered abuse of dominance.

… exclusively directed…

3.9 This means that, in addition to demonstrating the benefits to the practice, any restrictions imposed must be necessary, and not more restrictive than necessary, for the attainment of the benefits. In other words, the agreement should contain the least restrictive means of achieving the benefits.

… to improving the production or distribution of goods or to promoting technical or economic progress …

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[2] The 50 percent guideline threshold is similar to that applied by competition agencies in other jurisdictions such as the United Kingdom and the European Union.

3.10 Examples of improvements in production or distribution include lower costs from changes in the methods of production or distribution or economies of scale; product quality improvements; increases in the range of goods or services provided.

3.11 Examples of the promotion of technical or economic progress include efficiency improvements from scale economies and specialization, increased research and development and enhanced speed of innovation and technical progress.

… consumers were allowed a fair share of the resulting benefit.

3.12 Consumers, in this context, refer not only to end-users of the goods or services, but also to customers of the parties to the agreement at all levels of the supply chain. If, for example, an improvement is seen as benefiting only the shareholders of the parties to the agreement, this condition would not be satisfied. Consumers must benefit. The benefits may be enjoyed immediately or may lie in the foreseeable future.

4. Exclusive dealing and market restriction

4.1 "Exclusive dealing" generally refers to an agreement, between a supplier or manufacturer and its customer—wholesaler or retailer—whereby the customer is restrained from dealing with any of the supplier's competitors. Exclusive dealing may be direct or indirect: any condition that leads to the same exclusive outcome would be considered as exclusive dealing.

4.2 "Market restriction" refers to the practice whereby a supplier of goods, as a condition of supplying the goods to a customer, requires that the customer sell the goods in question only in a defined market. A penalty is imposed upon the customer if he sells the good outside the defined market.

4.3 Section 33(3) prohibits exclusive dealing or market restriction, when:

- it is engaged in by a major supplier of goods in a market or is widespread in a market; and
- it is likely to –

(a) impede entry into or expansion of an enterprise in the market;

(b) impede introduction of goods into or expansion of sales of goods in the market; or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially.

Under such circumstances, the FTC may prohibit that supplier from continuing to engage in market restriction or exclusive dealing.

Substantial lessening of competition

4.4 An agreement is not likely to have substantial anti-competitive effects if the parties effecting the agreement do not exercise market power (see *Assessment of Market Power* in Section 6 below). The FTC therefore takes the view that any exclusive dealing or market restriction arrangement is generally not likely to lessen competition substantially if an enterprise's share of the relevant market does not exceed 25 percent, although there are circumstances in which this is not the case. Where the practice is widespread, such that the arrangement is one of a network of similar arrangements which have a cumulative effect on the market in question, it may also substantially lessen competition even if the individual enterprise's market share is less than 25 percent.

4.5 The converse is also true, i.e., it is not the case that exclusive dealing or market restriction will necessarily lessen competition substantially, where the market share of the entity(ies) involved is more than 25 percent. In all cases, other factors will be taken into consideration in assessing an agreement's impact on competition. Each arrangement has to be assessed on its own merit.

Exemptions

4.6 As set out in Subsection 33(4) of the FCA, exclusive dealing or market restriction will not be prohibited when "it is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of goods into a market or of new goods into a market."

4.7 Section 33 also does not apply in respect of exclusive dealing or market restriction between or among interconnected companies. For the purposes of the FCA, any two companies are considered to be interconnected, if one of them is a company of which the other is a subsidiary of if both of them are subsidiaries of the same company.

5. Per se prohibitions under the FCA

5.1 The prohibitions detailed in Sections 2 - 4 above are "rule of reason" prohibitions, in that they require evidence of the effect of, or likely effect of, lessening competition. Hence, agreements or practices must be assessed on a case-by-case basis, taking into account the specific market conditions.

5.2 In addition to these "rule of reason" prohibitions, the Act provides for certain "per se" prohibitions that do not require evidence of the effect of, or likely effect of, lessening competition. The mere fact that the practice is being carried out is sufficient for an enterprise to be in breach of the Act. The "per se" prohibitions are as follows:

- Exclusionary agreements entered into by two or more enterprises in competition with each other. Exclusionary agreements are those that restrict the supply of goods to, or purchase of goods from, any person, by the parties to the agreement.[3]

- Collective resale price maintenance;[4]
- Individual minimum resale price maintenance;[5]
- Tied selling;[6]
- Price-fixing;[7]
- Conspiracy and cartels;[8] and
- Bid rigging and collusive dealing.[9]

6. Assessment of market power

6.1 The ability of an enterprise to effect a substantial lessening of competition depends to a large extent on its market power. Market power describes a situation whereby the constraints which would usually ensure that an enterprise behaves in a competitive manner, are not working effectively. As a consequence, the enterprise would, for example, be able to charge excessively high prices, supply goods of lower quality and/or restrict output to a lower level than would be supplied in a competitive environment. For convenience, we shall refer to market power as the ability to charge high prices only, although other outcomes are just as possible.

6.2 When assessing whether market power exists and its extent, the Staff of the FTC will consider evidence of any constraints that might prevent an undertaking from persistently either directly or indirectly raising prices above competitive levels; and the effectiveness of such constraints.

6.3 Examples of constraints on an enterprise's market power include:

- Under-cutting by existing competitors, of any enterprise that increases prices above competitive levels. One measure of existing competition is market shares.
- The ability of potential competitors to enter the market and gain market share at the expense of any incumbent which charged excessively high prices. Where the evidence suggests that entry barriers are low, potential competition should ensure that prices would not remain above competitive levels for long periods of time.

Market shares and market power

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[3] See Section 18 of the FCA.
[4] See Sections 22 and 23 of the FCA.
[5] See Sections 25 and 27 of the FCA.
[6] See Section 33 of the FCA.
[7] See Section 34 of the FCA.
[8] See Section 35 of the FCA.
[9] See Section 36 of the FCA.

6.4 In general, market power is more likely to exist if an enterprise has a persistently high market share. Similarly, market power is less likely to exist if an enterprise has a persistently low market share. “High” and “low” in both these cases refer to absolute thresholds as well as thresholds relative to other competitors. Consider, an example where Enterprise A has 50 percent market share. In one scenario, none of the other competitors has more than 5 percent market share each. It is highly likely that Enterprise A would have market power. If, however, there was only one other competitor in the market that has the remaining 50 percent of the market, the market power of Enterprise A is likely to be lower.

6.5 As a general guideline, the FTC considers that an agreement will generally not have the effect of substantially lessening competition if the parties’ combined share of the relevant market does not exceed 25 percent, although there are circumstances in which this is not the case. Further, the FTC will generally consider an enterprise to be dominant if it has a 50 percent market share.

Entry barriers

6.6 An enterprise with a persistently high market share may not necessarily hold market power if entry into the market is easy and it is constrained by the threat of potential entry. Entry barriers are therefore important in the assessment of market power. The lower the entry barriers, the more likely it is that potential competition will prevent enterprises within the market from exercising market power.

6.7 An entry barrier may be defined as a cost that must be borne by an enterprise entering a market, that does not need to be borne by an incumbent already operating in the market. Entry barriers can be classified into three broad categories:

- *Absolute advantages*—which arise when an incumbent owns or has access to important assets or resources that are not accessible to the potential entrant. Regulation that limits entry and intellectual property rights, for example, may provide the incumbent with absolute advantages;
- *Strategic advantages*—which arise when an undertaking gains an advantage from being in the market first. This is also known as a “first-mover advantage”. Strategic advantages could arise, for example, due to high sunk costs, economies of scale and informational constraints, where an incumbent may have more information on the existing costs of production than an entrant has; and this, in conjunction with sunk costs, may constitute a barrier to entry.[10]

[10] Sunk costs refer to the investments that have to be made to enable production of a good or service. These costs are incurred even before a single unit of good or service is produced. An example of sunk costs can be found in telecommunications where the cable network has to be put in place – at a high cost – before any voice or data transmission can be made.

- *Exclusionary behaviour*—by the incumbent such as vertical restraints, predatory behaviour and refusal to supply may also create barriers to entry (this is a non-exhaustive list of exclusionary behaviour).

6.8 Note that cost advantages derived solely from the efficiency of the incumbent will not be considered as a barrier to entry.

7. Relevant market definition

7.1 The assessment of the impact of an agreement on competition in a market necessitates the definition of the relevant market.

7.2 The idea of a market is familiar. A market in which an enterprise operates will include other enterprises which the enterprise considers as its competitors; and products that are substitutes for each other.

7.3 The boundaries of a market are, however, not always obvious. Does a manufacturer of orange juice compete in the market for orange juice drinks, the market for juice, the market for non-carbonated soft drinks, the market for all soft drinks including carbonated drinks, the market for all beverages including alcoholic beverages, or some other set of products? It is obvious that the market share of that manufacturer could vary significantly depending on where the boundaries of the market are drawn.

7.4 Defining the relevant market involves identifying the products, which are the closest substitutes for the products at the centre of the investigation. In essence, the following question is posed: if an enterprise supplying the products sets prices above competitive levels, would consumers still buy its products, or would they switch to other products? In particular, would so many switch that the enterprise would find it unprofitable to raise prices above competitive levels? If so, than the products to which the consumers would switch would be included in the relevant market for the product at the centre of the investigation.

7.5 In other words, the relevant product market defines the product boundaries within which competition meaningfully exists, and includes only those products that are “reasonably interchangeable” by consumers for the same purpose.

7.6 One common way of defining the market is to apply the conceptual framework of a hypothetical monopolist. This framework assumes an undertaking that was the only supplier of the products (or group of products) to be at the center of the investigation and asks the question if it could maximize its profits by consistently charging higher prices than it would if it faced competition.[11]

7.7 The question posed is, can the hypothetical monopolist increase prices above competitive levels? If consumers will switch to substitutes such that the hypothetical monopolist *cannot* effect any such price increase, then these

[11] The SSNIP concept is applied by the EU Competition Commission, the Office of Fair Trading in the UK as well as the Department of Justice and the Federal Trade Commission in the US.

substitutes will be added to the market definition. The alternative products do not need to be perfect substitutes, but alternatives that would fill a role similar to that filled by the goods in question, and to which consumers would switch in the event of a price increase.

The test is repeated and wider circles of substitutes added to the market definition until the hypothetical monopolist can set a price above competitive levels. This implies that there is limited substitutability between goods included in the market definition and those excluded. At this point, the boundaries of the relevant market are drawn.

7.8 A market definition would normally have two dimensions – a product and a geographic area. While the product market is defined by determining the substitute products to which customers would switch in the event of a price increase, the question posed in defining the geographic market is whether a price increase would cause customers to switch to suppliers in neighbouring areas. The geographic market could the whole of Jamaica, a region within Jamaica or wider than Jamaica.

7.9 The issue in market definition is usually to determine the products and neighbouring areas to which *consumers* might switch. Demand-side substitution factors therefore often form the basis of market definition. However, in some cases suppliers can also substitute *into* the market. If prices rise, businesses that are not currently supplying a particular product might switch some of their existing facilities to supplying that product (or close substitutes) at short notice. Such supply-side substitution factors will prevent enterprises from charging monopoly prices.[12]

8. Examples of anti-competitive practices

Exclusive Dealing

8.1 Exclusive dealing generally refers to the agreement, written or otherwise, between a supplier or manufacturer and its customer—wholesaler or retailer—whereby the customer is restrained from dealing with any of the supplier's competitors. Exclusive deals raise competition concerns as they may foreclose

[12] An example of supply substitution may be found in the paper industry. Although low quality paper is often not considered to be a substitute for high quality paper, from a consumer's point of view, the different grades of paper are almost perfect substitutes from the producer's point of view. This is because the production methods are identical across all grades of paper where only the input (pulp) has to be changed in order to change the output from low to high quality paper. In this example, even though there is no demand substitutability, a rise in the price of high quality paper is likely to see paper manufacturers switching from low quality paper towards producing more high quality material. In other words, a similar product should be included in the same relevant market as the product in question as long as either demand or supply substitution applies.

the market to competitors and new entrants. These agreements may be prohibited under Section 17, Section 20 and Section 33 of the FCA.

8.2 The term "exclusive dealing" includes not only express agreements but also arrangements that indirectly lead to the same exclusionary effect on competitors. If, for example, a supplier offers discounts based on the *proportion* of the wholesalers' sales that come from that supplier (these are commonly known as fidelity or loyalty discounts), the wholesaler may have no incentive to source from other suppliers. This could lead to a *de facto* exclusive arrangement that forecloses the market to competitors.

8.3 Under certain circumstances, however, exclusive arrangements may have pro-competitive effects in that they may promote non-price competition and improvement in quality of service. Exclusive arrangements could, for example, be necessary to eliminate free-rider problems. Free-riding may occur where one distributor benefits from the promotional efforts of another distributor. This reduces the incentives for the distributor to invest in promotional activities. Exclusive arrangements can help to overcome this free-riding problem and lead to pro-competitive benefits by retaining the incentives to invest. Another example where exclusive dealing may be beneficial is where a supplier must undertake highly specific capital investments to meet the needs of a particular customer. If the equipment cannot be used for any other purpose, then the supplier may be justified to require exclusivity from the customer. Without the exclusivity the supplier bears the risk of having a made a useless investment if the customer switches to another supplier. In the absence of exclusivity, the investment may not be undertaken.

8.4 In such cases where the arrangement leads to pro-competitive benefits so that it contributes to the improvement of production or distribution of goods and services or the promotion of technical and economic progress, the arrangement may not be prohibited under the FCA. Temporary exclusive arrangements may also be permitted under Section 33 of the FCA to allow a new entrant to penetrate the market.

Price discrimination

8.5 Price discrimination may be prohibited under Sections 17 and 20 of the FCA. It involves applying different conditions, normally different prices, to equivalent transactions. It can take two forms:

- The charging of different prices to different customers, or categories of customers, for the same product where the differences in prices do not reflect the quantity, quality or any other characteristics of the items supplied; or
- The charging of the same price to different customers, or categories of customers, even though the costs of supplying the product were very different. A policy of uniform delivered prices throughout the country could be discriminatory if, for example, differences in transport costs were significant.

8.6 Where there are objective, economic reasons for an undertaking charging different prices to different customers, however, price discrimination would not be considered anti-competitive or an abuse of dominance. An example would be where there were different transport costs. Price discrimination may also be objectively justified in industries where there are large fixed costs and low marginal costs, i.e., the cost of supplying each additional unit of output is very small compared to the initial investment to set up the business. In such markets, undertakings may never be able to recover their fixed costs if all customers where charged an identical price. It may therefore be more efficient to set higher prices to customers with a higher willingness to pay. In general, price discrimination in such industries may be considered to lead to higher levels of output than an undertaking could achieve by charging every customer the same price. It would therefore fulfil the criteria set out in Sections 17(4) and 20(2) of the FCA and not be considered anti-competitive.

Tied selling

8.7 Tied selling is the practice by which a supplier obliges its customers to obtain goods or services from it or its affiliates, as a condition for obtaining another good or service that is, by its nature and according to commercial usage, distinct from and unrelated to the first good or service. This type of practice may be prohibited under Sections 17, 20 and 33 of the FCA. An example of tied selling is the situation in which a bank, as a condition for getting a loan, makes it compulsory for a customer to purchase other products such as investment services from the bank. Manufacturers of certain electronic goods may also require consumers to purchase peripheral equipment or services in order to keep their warranty for a certain product valid, i.e., the product must not be used along with other products apart from the manufacturer's. Such practices may amount to tied selling. Note that tied selling could be achieved through direct or indirect means. Direct tied selling occurs where the supplier imposes an explicit obligation on the customer to purchase both unrelated products and refuses to supply the products separately. Indirect methods of tied selling include tactics such as offering a substantial discount for the joint purchase of the unrelated products such that the customer has no incentive to purchase the products separately.

Abuse of a Dominant Position in a Market

8.8 Under the FCA an enterprise is deemed to be dominant in a market 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. Being dominant is, in itself, not a breach of the FCA, but when an enterprise abuses its dominant position, it breaches Section 20 of the FCA. Examples of abusive behavior include restricting the entry of any business or person into a market; imposing unfair buying or selling prices; and granting of preferential treatment to some business partners or clients over others.

Excessive Pricing

8.9 Perhaps the most obvious form of abuse of dominant position is where the undertaking concerned charges excessively high selling prices or extracts excessively low buying prices. An “excessive price”, in this instance, may be defined as a price that has no reasonable relation to the economic value of a product or service. Prices in a particular market can be regarded as excessive if they allow the dominant firm to sustain profits that are appreciably higher than it could expect to earn in a competitive market. A determination of excessively high selling prices, for example, would take into consideration both operating and capital expenditure, including an allowance for a reasonable rate of return to investors, shareholders and lenders of the business. Other factors that may be taken into account in an assessment of excessive pricing would be the prices of similar competing products or the price at which the same product is being sold in another market, for example, the export market as compared to the domestic market.

Predatory Pricing

8.10 Predatory pricing occurs where a dominant firm temporarily charges particularly low prices in an attempt to eliminate existing competitors. The predator will incur temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits. Such behaviour may offer consumers advantages in the short run but will be disadvantageous in the end, as it will ultimately reduce competition. As such, it is prohibited under Section 20 of the FCA.

8.11 Dominant firms can also engage in predation in order to discipline competitors who have undertaken to challenge the market power of the dominant firm. The intent of disciplinary actions is to convince the target of the actions to cease a particular practice rather than to eliminate or exclude the competitor from the market. The net result on competition can be the same as elimination of a rival, if the disciplining results in the elimination of the competitive threat of the target.

8.12 Predatory pricing necessarily involves the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is characterized by high barriers to entry. Without such barriers, any post-predation price increase by the dominant firm would simply attract entry so that the dominant firm would not be able to raise prices and recoup the costs of predation.

8.13 It is difficult to distinguish predatory pricing from competitive pricing since both, at least initially, involve lower prices. Predatory pricing is often described as selling at a price below some measure of cost. A price below marginal or average variable cost provides a sufficient condition for concluding that there is predatory behaviour. It is not, however, a necessary condition. A firm can engage in predation without dropping prices below average variable or marginal cost, particularly if it already has in place excess capacity. Hence, where price is found to be above marginal and variable cost but below average total cost and the alleged predator is dominant, predation is ruled to be a feasible strategy.

Refusal to supply

8.14 This is the practice whereby a supplier refuses to supply goods to a dealer. Activities that amount to refusal to supply without reasonable justifications may be prohibited under Section 17 and Section 20 of the FCA.

8.15 A supplier may refuse to supply for various reasons, for example to control the retail prices at which its products are sold or to protect its downstream markets. A situation may arise in which a supplier recommends resale prices to its dealers and refuses to supply those dealers who do not resell at these prices. A dominant enterprise that controls an essential resource or facility may also attempt to protect its downstream business by refusing to supply the resource to competing downstream enterprises. A dominant telecommunications carrier, for example, may, in the absence of competition law, favour its own internet service business by refusing to allow wholesale access to its network to competing internet providers. Anti-competitive effects may also arise when a supplier refuses to supply to a dealer unless the dealer agrees to an exclusive arrangement.

Restricting access to essential facilities

8.16 An essential facility may be defined as a facility or infrastructure, without access to which competitors cannot provide services to their customers. An essential facility may exist either at the manufacturing (upstream) or distribution (downstream) level. Examples of essential facilities include transport infrastructure (e.g., rail, port or airport), pipelines/wire for the supply of water, gas, electricity or telecommunications services and technical information.

8.17 The problem arises when one firm is active in both upstream and downstream activities – it is vertically integrated – and refuses to grant other firms who wish to provide either upstream or downstream services only, access to the "facility". The refusal to supply may be anti-competitive if it prevents third party firms from entering the market and consequently has the effect of lessening competition. A dominant firm which controls access to an essential facility may be abusing its dominant position if it refuses access to the facility without reasonable justification or grants access only on discriminatory terms such that its competitors in the related market are disadvantaged. This would be a breach of Section 20 of the FCA.

8.18 An assessment of the "essential facilities" argument must carefully identify whether a facility is indeed essential. It must be established that access to the facility is indeed necessary for third party firms. If there are viable alternatives to that facility or if it can be easily replicated, then it would not be considered essential. The mere fact that a competitor is disadvantaged by not having access to the facility is not sufficient. Any assessment must consider the static (short run) implications of compulsory access to a facility against the dynamic (long run) effects on firms' incentives to invest and innovate.

Discounts

8.19 The offering of discounts to certain customers is generally a form of price competition that is encouraged. Under certain circumstances, however, discounts can be anti-competitive, for example, if they lead to prices being set at predatory levels or are conditional on customers buying all or a large proportion of their goods from the dominant undertaking (fidelity or loyalty discounts); or where they are conditional upon the purchase of tied products (tying or bundling). If these conditions apply, the discount may be a breach of Section 17 or Section 20 of the FCA.

Resale price maintenance

8.20 Collective resale price maintenance is prohibited under Sections 17, 22, 23 and 24 of the FCA. Resale price maintenance by individual enterprises is prohibited under sections 17, 20, 25 and 27 of the FCA. Under Sections 22, 23, 24, 25 and 27, resale price maintenance is a per se breach of the Act. This means that the fact that RPM is practised is sufficient evidence that a breach has occurred and there is no need to assess and prove the negative impact on competition.

8.21 There are many ways in which prices can be fixed. It may involve fixing the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. The prohibitions extend to agreements that affect the price to be charged only indirectly. Indirect means of resale price maintenance include discounts or allowances, transport charges, payments for additional services, the terms of guarantees or credit terms. While resale price maintenance is a practice that is often associated with suppliers, it is also unlawful for dealers to collectively agree to withhold orders from suppliers who refuse to impose minimum resale prices on (other) dealers.

Agreements to share markets

8.22 Agreements to share markets may be, for example, by territory, type or size of customer. Such an agreement is likely to have an appreciable effect on competition and would be prohibited under Section 17 of the FCA. The agreement need not be explicit; discount and other incentive structure that lead to market dis-aggregation would also be prohibited. If the agreement is found to be part of a cartel, then it is also prohibited under Section 35 of the FCA.

8.23 There can be agreements, however, which have the effect of sharing the market to some degree but where that effect is no more than a consequence of the main object of the agreement. Parties may agree, for example, each to specialize in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such an agreement is caught by the Section 17 prohibition where there is, or is likely to be, an appreciable effect on competition. If, however, there are technical efficiencies arising out of the agreement such that the criteria under Section 17(4) are met, the agreement may not be prohibited. There are, however, no exemptions for cartel agreements under Section 35.

Bid-rigging and collusive tendering

8.24 Agreements between bidders for a job or commodities contract, to arrange the bids before they are submitted, or for some bidders to refrain from bidding would be considered as bid-rigging and are prohibited under Sections 17 and 36 of the FCA.

Cartels

8.25 Any agreement that allows two or more potential competitors to share markets, fix prices, limit production or facilities for transporting, storing or dealing in goods and services constitutes a cartel (conspiracy) and is prohibited under Section 35 of the FCA. In effect, a cartel is any arrangement that allows competitors to behave as if they were a single enterprise instead of competitors. Cartelization is considered one of the most serious offences under competition law.

Information-sharing agreements

8.26 Generally, the more information made publicly available to market participants, the more effective competition is likely to be. In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may benefit from the sharing of information, for example, on new technologies or market opportunities.

8.27 The exchange of information may however lead to a lessening of competition where it serves to remove any uncertainties in the market and therefore eliminate any competition between undertakings. In such cases, the exchange of information is prohibited under Section 17 of the FCA. It does not matter that the information could have been obtained from other sources. Whether or not the information exchange has an appreciable effect on competition will depend on the circumstances of each individual case; the market characteristics, the type of information and the way in which it is exchanged. As a general rule, information-sharing is more likely to have a significant effect on competition the smaller the number of enterprises operating in the market, the more frequent the exchange and the more current, sensitive and confidential the nature of the information that is exchanged. If the information exchange is part of a cartel agreement, it would also fall under Section 35 of the FCA.

Market Restriction

8.28 Market restriction refers to the practice by which a supplier, as a condition of supplying goods to a customer, requires that customer to supply these or any other goods, for example, in a prescribed market only. This practice leads to a restriction of intra-brand (same brand) competition and is prohibited under Section 17, Section 20 and Section 33 of the FCA. An example of a situation in which market restriction may occur is where a supplier offers dealership contracts only in defined areas so that each dealer has control over particular areas and as such does not compete with other dealers. In effect each dealer acquires a monopoly status in its defined area.

Market restriction may, however, be permitted under Section 33 of the FCA if it is found to be temporary and/or it is practised between interconnected companies.

Joint buying or selling

8.29 An agreement between buyers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them. An example of the type of agreement which might be made between purchasers is an agreement as to those with whom they will deal. Such an arrangement may be caught by Section 17 of the FCA if it has or is likely to have the effect of substantially lessening competition.

8.30 The same issues potentially arise in agreements between sellers, in particular, where sellers agree to boycott certain customers. This type of agreement may lead to a significant lessening of competition.

9. How to make a complaint

9.1 If you believe you have sufficient grounds on which to make a complaint, 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

9.2 The following information will be required:

- Your full name, address and telephone details. If this application is being made on behalf of an organization, you should also include the name of the organization and your position in it.

- A brief description of the practice that is deemed anti-competitive.
- If possible, the relevant breach should be stated and the relevant Section of the Fair Competition Act identified.
- All documents that are relevant to your complaint.
- Names and addresses of the individuals/companies/organizations directly affected by the agreement or practice.
- As complete a list as possible of all the other parties likely to be affected by the agreement or practice.
- A detailed description of the market to which the agreement or practice for which the breach relates, by reference to product, geographic boundaries or function, as appropriate. If more than one market is affected, please describe each market to the best of your knowledge and indicate your market share(s) and the shares of other market participants presently operating in each market affected. In particular, please analyze the level of competition in the market(s) affected and give details of any barriers to entry in relation to the market(s) for the product(s) or service(s). Further, consider how the agreement or practice would influence effective competition in the specified market(s).