



## **The Fair Trading Commission's approach to Abuse of Dominance cases**

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### **1. Introduction**

- 1.1 The Jamaican competition legislation, the Fair Competition Act 1993 (the FCA), prohibits the abuse of dominance if it is found that such abuse had, is having or is likely to have the effect of lessening competition substantially in a market.
- 1.2 The Fair Trading Commission (the Commission), the administrative body of the FCA, is empowered to issue the necessary directives to the offending enterprise to overcome the effects of abuse in the market concerned. The Commission therefore has the power to implement corrective measures for such abuse.
- 1.3 Sections 19 – 21 of the FCA address the abuse of a dominant position or monopolisation.
- 1.4 Section 19 of the FCA identifies an enterprise as occupying 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.
- 1.5 Section 20, which contains a non-exhaustive list of abusive activities, provides as follows—

20—(1) An enterprise abuses a dominant provision if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of 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 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.

(2) An enterprise shall not be treated as abusing a dominant position—

(a) if it is shown that—

(i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and

(ii) consumers were allowed a fair share of the resulting benefit;

(b) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

1.6 Section 21, which addresses the action to be taken by the Commission in respect to a finding of abuse of dominance, states

21.—(1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse had, is having or is likely to

have the effect of lessening competition substantially in a market, the Commission shall—

- (a) notify the enterprise of its finding; and
- (b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.

(2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.

(3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.

1.7 This paper will present the general approach of the Staff of the Commission (the Staff) in investigating allegations of abuse of dominance.

## **2. Methodology of investigation**

2.1 Allegations of the abuse of a dominant position are investigated using a four-step approach, which involves (1) definition of the relevant market; (2) assessment of market power; (3) assessment of anti-competitive effects; and (4) assessment of pro-competitive benefits. After these four steps are carried out a recommendation is made as to what the offending party should do, which is usually to discontinue the activities which are found to be anti-competitive.

## **3. Definition of the relevant market**

3.1 Defining the relevant market is a crucial first step in investigations relating to the abuse of dominance. It is fundamental in the determination of whether a position of dominance or any abuse exists. A determination of dominance is impossible without defining the relevant market, as an enterprise may be found to be dominant only in respect to a market. At this stage of the investigation all the

- relevant competitors of the enterprise which is the subject of the investigation are identified. With this information the market shares of the alleged dominant firm and its competitors may be calculated and entry barriers assessed.
- 3.2 The relevant market is defined in terms of the product market and the geographic market, by having regard to both demand-side and supply-side factors. In the definition of the product market, consideration is given to the degree of substitutability between the good supplied by the enterprise in question and those supplied by other suppliers. If such substitutability is found to be strong, then all those goods are considered to be in the same market and their suppliers are considered to be competitors.
- 3.3 While it is acknowledged that this process of defining relevant markets is primarily a quantitative exercise, the Staff has adopted a qualitative approach. Specifically, the Staff looks at the use and characteristics of the product and any other qualitative type information in defining the market. This is due mostly to the lack of data. For example, in defining the relevant market involving an alleged dominant beer producer, from the demand-side, factors such as the alcoholic content were relied on in excluding other beverages from the relevant market, while on the supply-side, the raw material used in the production of beer was considered.

#### **4. Assessment of market power**

- 4.1 After the relevant market has been defined, it is then ascertained whether the enterprise in question holds a dominant position therein. In assessing dominance, market shares and entry barriers are examined.
- 4.2 The calculation of market shares is not always a straightforward process. Market shares calculation will vary according to the case involved and information available. The Staff normally uses the method of comparing the relevant producers' sales (either by value or quantity) or their level of production. Productive capacity is not used in calculating market shares as it is the actual sales which is used in such calculation. In a case undertaken by the Staff involving

lotteries operators, after defining the product to be games of chance (lotteries) and ascertaining the operators of such games, the market share was calculated based on projected revenue from the sale of lottery tickets and not past revenues. This is because one lottery operator had recently started operations and there were no comparable sales figures for that operator. In the case referred to earlier involving the beer market, the calculation of market shares was restricted to the quantity of beers produced and sold locally and the quantity imported. The enterprise in the case argued that the relevant market should be extended to include all alcoholic beverages and in such a case a litre of beer is not equal to a litre of rum. In fact, it was argued that 4 litres of beer should be equated to 1 litre of rum for this purpose.

- 4.3 Using market share in the determination of dominance requires the examination of market share over more than one period, as whatever threshold is adopted, it is the consistent market share above this threshold which is relevant. The Staff generally calculates market shares for at least two periods.
- 4.4 The question of threshold is fundamental. How high should the market share of an enterprise be for that enterprise to be labelled dominant? There are no formal decisions by the Courts of Jamaica or by the Commission on matters relating to abuse of dominance. The Staff however in its analyses has drawn from the findings of other jurisdictions and has adopted a threshold for dominance of 40-50% of the relevant market. It has regard however, to the structure of the industry and also to the market shares of the alleged dominant firm's nearest competitor. In a duopoly, a higher threshold of 70-80% is generally adopted.
- 4.5 Market share is just one element in the determination of dominance or market power. It is not simply a firm's market share that the Staff uses in the determination as to whether or not a firm is dominant; it also considers other factors indicating dominance such as the existence of barriers to entry and general conduct. It is recognised that an enterprise may have a large market share but be unable to make excessive profits in an industry where there are no or very low barriers to entry or exist. In assessing barriers to entry, the Staff gives

consideration to legal barriers, and sunk cost. In two cases investigated, it was found that there are legal barriers to entry. These cases relate to the lottery market and the market of subscriber TV. In both cases, an operator must obtain a license from the Government before starting operations.

- 4.6 The conduct of the firm is also used in determining whether or not that firm is dominant. The activities, which at times give rise to an investigation, may themselves be examined in arriving at the conclusion that the alleged dominant firm is in fact dominant. Activities such as fidelity rebates and predatory pricing are generally viewed as supporting a finding of dominance as these activities may prevent potential competitors from entering the market and so act as a barrier to entry.
- 4.7 In the determination of market power, the Staff tends not to focus on all the characteristics of the other market players. As indicated before, market shares calculations are based on actual sales or production and not productive capacity. Currently in Jamaica there are three companies providing mobile phone services, the incumbent, Cable and Wireless (C&W) and two fairly new operators, Digicel and Centennial. Assuming all three operators are the only operators in the relevant market and entry barriers are high, should C&W have (say) 60% of all mobile phone subscription and the other two operators share 40% of the market, does that mean C&W is dominant?
- 4.8 In sum the approach of the Staff in the assessment of dominance or market power is the calculation of market shares, based on actual sales and an assessment of barriers to entry.

## **5. Assessment of anti-competitive effects**

- 5.1 If, based on market share and entry barriers, market power or dominance is established, then the practices in question are assessed to determine if they are anti-competitive. In accordance with Section 20(1) of the FCA a determination must be made as to whether the practice of the dominant enterprise “impedes the maintenance or development of effective competition in a market”.

- 5.2 Firms always want to try to win more business whether by attracting new consumers into the market or by ‘stealing’ away their competitors’ customers by offering more attractive terms of sale or better quality products. It is often quite difficult to differentiate between competitive rivalry between firms which is desirable, and abusive behaviour which is prohibited. The question therefore is what makes a practice anti-competitive. A practice is generally considered to be anti-competitive if engaged in by a firm with significant market power as it is considered that this firm does not compete on its own merit.
- 5.3 In order to prevent discrimination against every action of a dominant firm, Section 21(2) provides that the Commission shall consider whether the conduct of the dominant firm is a result of ‘superior competitive performance’.
- 5.4 Section 20(1) provides a non-exhaustive list of the types of actions that might be considered an abuse of a dominant position.

## **6. Assessment of pro-competitive effects**

- 6.1 Having found that an activity impedes the maintenance or development of effective competition in a market, the Staff carries out an assessment in accordance with Section 20(2) of the FCA, to determine whether the behaviour of the dominant firm was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress and consumers were allowed a fair share of the resulting benefits. If the firm satisfies these conditions then it is considered not to have abused or to be abusing its dominant position.
- 6.2 If the Staff finds that the above-mentioned benefits are not evident, then the firm’s activities would be found to be in breach of the FCA.
- 6.3 In this regard, where the activity involves vertical restraints, the Staff has regard to conditions such as (i) free-rider problems; (ii) the degree of client-specific investments made by the supplier; and (iii) the possession of know-how which is provided by the supplier.

## **7. Remedy**

- 7.1 Having found that an enterprise is abusing its position of dominance, the Staff will make recommendations as to how the firm should behave in the relevant market. While other jurisdictions apply both structural and conduct remedies, in Jamaica the remedies are primarily based on conduct, because currently the FCA does not contain provisions which will allow for structural remedies.
- 7.2 Conduct remedies speak specifically to the activities which are not permitted by the dominant firm. In other words, the firm is prohibited from engaging in certain behaviours. It must be noted that the Staff has not carried out many full investigations into cases alleging abuse of dominance. In fact it has carried out four investigations relating to abuse of dominance, for which no breach was found in two; one resulted in a consent agreement, even though for certain technical reasons, it was agreed that the agreement would state that there was no finding of law and fact. One was discontinued when the attorney acting on behalf of the firm investigated invoked certain pronouncements made by the Court of Appeal, regarding the legality of vesting the Commissioners with the dual role of investigating and adjudicating.
- 7.3 In cases where there is not a full investigation, or where there is a request for opinion, if it is envisioned that the activity could be anti-competitive, the Staff advises or recommends that the relevant party discontinue such activity.