STAFF REPORT

Fair Trading Commission v. Drug Serv Pharmacy

August 30, 2019

Case No. 8063-18

FAIR TRADING COMMISSION
52 – 60 Grenada Crescent| Kingston 5| Jamaica
Tel: 876.960.0120 |Fax: 876.960.0763
ftc@cwjamaica.com | www.jftc.gov.jm

Contents

CHALLENGED CONDUCT

1. The National Health Fund (NHF) has embarked on a programme of expanding the distribution of medication used to treat chronic illnesses. *Drug Serv* is a division of the NHF, which is tasked with distributing the medication to patients of public medical facilities ('public patients').
2. Under the Public Sector Pharmacy Partner Programme, selected private pharmacies ('partner pharmacies') distribute NHF-owned prescription medication at a minimal charge only to patients of public medical facilities. The NHF pays partner pharmacies a fee of $400 per prescription to dispense medication under the Programme. In addition, partner pharmacies receive $200 per prescription directly from patients.
3. The Fair Trading Commission (FTC) is investigating allegations that the Programme creates an unfair economic disadvantage for non-participating private pharmacies ('third-party pharmacies') by channeling patients of public medical facilities to partner pharmacies. Another complaint is that the Programme is not open to all private pharmacies, that the selection process lacks transparency and may therefore be discriminatory.

THE ISSUES

4. On July 31, 2018 a private pharmacy requested that the FTC investigate whether the Programme violated any provision of the Fair Competition Act ("the FCA"). This in turn requires the Staff of the FTC ("the Staff") to consider the following issues:

5. Whether or not the alleged conduct can be reviewed under the FCA; and

6. Whether or not the alleged conduct can give rise to a violation of the FCA.

7. The first issue can be resolved upon the application of the law to the allegations, which for the sole purpose of resolving jurisdiction, are assumed to be true.

8. The second issue, however, can be resolved only upon the application of the law to facts as established by way of economic analysis.

9. In Section II, the Staff identifies the broad legal framework within which the issue may be considered for further economic analysis. Sections III, IV and V describe and present the main findings of the economic analyses undertaken. Based on the legal and economic analyses, a final determination of liability under the FCA is presented in Section VI.

EXECUTIVE SUMMARY

i. The health industry is a key vehicle for promoting consumer welfare. Access to prescription medication is an important means of managing one's health. Pharmaceutical medication is used to diagnose, cure, treat or prevent diseases. Through multiple initiatives since 2003, the National Health Fund (NHF) has provided subsidies for prescription medication and since 2011 begun operation of publicly-owned Drug Serv pharmacy services in Jamaica when the NHF Act was amended. Thus fulfilling its mandate to offer its customers ('beneficiaries') with more affordable healthcare options. NHF's most recent initiative, the Public Sector Pharmacy Partner Programme, has brought this concern to the fore. In particular, allegations are that pharmacies which enroll in the Programme ('partner pharmacies') are placed at a competitive advantage relative to private pharmacies which are not enrolled in the Programme ('third-party pharmacies'). The effect of the Program on the competitive environment in which these pharmacies operate is the subject of this investigation.

ii. The challenged conduct was investigated under provision of the Fair Competition Act (FCA) governing agreements to substantially lessen competition (section 17) and abusive conduct by an enterprise occupying a dominant position (sections 19 – 21). Any final determination about whether the alleged conduct gives rise to an FCA violation must, however, depend on the findings of an economic analysis in relation to whether or not the specific requirements for liability under either of the provisions have been satisfied in this case.

iii. The Staff finds that the relevant markets for assessing the challenged conduct comprise:

- The set of products VEN list medication available in multiple geographic regions across Jamaica;
- The set of pharmaceutical products other than VEN list medication available in multiple geographic regions across Jamaica; and
- The set of narrower relevant markets segmented on the basis of whether consumers sought medical attention at either private or public medical facilities.

iv. The Staff also finds that the consumer base in the relevant market is segmented by ability to pay. Drug Serv pharmacies cater to public patients with modest disposable income whereas private pharmacies cater to private patients with less modest disposable income.

v. The Staff determined that Drug Serv pharmacies are unlikely to be dominant despite participating in a market without any current rival or prospects for a rival in the foreseeable future.

vi. The Staff further finds that the challenged conduct is unlikely to have the effect of substantially lessening competition in any market. This finding is supported from economic analysis which concluded that the challenged conduct is unlikely to harm private pharmacies in any material respect and that patients with modest disposable income clearly benefit from the Programme.

vii. The Staff's overall conclusion is that the challenged conduct does not breach any section of the Fair Competition Act since it is unlikely to have the effect of substantially lessening competition in the relevant markets identified.

I. INTRODUCTION

1. The health industry is a key vehicle for promoting consumer welfare. Pharmacies, in tandem with medical facilities, play an important role in this industry by facilitating the distribution of medicinal products ('prescription medication') designed to promote healthy living. Through multiple initiatives since 2003, the National Health Fund (NHF) has provided subsidies for prescription medication and since 2011 begun operation of publicly-owned Drug Serv pharmacy services in Jamaica when the NHF Act was amended; thus fulfilling its mandate to offer its customers ('beneficiaries') with more affordable healthcare options. The operations of the public pharmacy are potentially problematic for private pharmacies which are unable to match the subsidized prices. NHF's most recent initiative, the Public Sector Pharmacy Partner Programme, has brought this concern to the fore. In particular, allegations are that pharmacies which enroll in the Programme ('partner pharmacies') are placed at a competitive advantage relative to private pharmacies which are not enrolled in the Programme ('third-party pharmacies'). The effect of the Program on the competitive environment in which these pharmacies operate is the subject of this investigation.

2. Access to prescription medication is an important means of managing one's health. Pharmaceutical medication is used to diagnose, cure, treat or prevent diseases. Consumers typically require health care services throughout their life: prior to birth (pre-natal services), during the life and even after death (post-mortem services). The medication is made by pharmaceutical companies where the active ingredients are synthesized in laboratories. In contrast, natural remedies (herbal treatment) are medicinal products in which the active ingredients were extracted from natural sources without significant processing. At least for some maladies, a natural remedy ('herbal treatment') is considered by a significant proportion of the population in Jamaica as a viable complementary and/or alternative to pharmaceutical medication.[1,2]

[1] Professor Maureen Samms reports that 22% of children in Jamaica were treated with herbal remedies by 9 to 12 months after birth. See *The Daily Gleaner* article by Romario Scott, "Hooked on Bushes- Parents Introducing Traditional Medicine to Infants" published on Friday June 1, 2018. (view at http://jamaica-

3. The pharmacy sector and medical facilities coordinate the distribution of prescription medication to final consumers. By law, prescription medication is distributed to patients only with explicit authorization from a medical practitioner. This medical practitioner expresses authorization on a piece of paper (script) issued to the patient. There are 2.7 million visits to the public health system annually which results in the generation of over 2 million prescription scripts. In addition there are nearly 200,000 admissions to hospitals also requiring pharmaceutical care.[3] There were over 469 pharmacies operating in the private sector during 2016/2017.[4] The number of pharmacies increased from just over 200 in 2003 to 469 by 2016/2017. In the public sector, Drug Serv pharmacy locations increased from 7 in 2003 to 51 in 2019 when NHF started operation of all public pharmacies under the Drug Serv brand. With this growth in the number of private pharmacies, consumers have been given a wider range of choices when choosing where to fill private prescriptions.

4. The Ministry of Health and Wellness (MHW) is responsible for the state of wellbeing for Jamaicans and is the primary regulator of the health care sector. The NHF, an Agency of the MHW, was established by statute in 2003 to support the national healthcare system and improve the effectiveness and affordability of healthcare to the Jamaican population. Funding for the NHF comes from proceeds from special consumption taxes on tobacco, general special consumption tax as well as a portion of NIS contributions. The MHW provides funding for the public sector pharmacies.

5. NHF enforces the NHF Act. Two of its principal objectives are to: (i)"provide prescribed health benefits to all residents, regardless of age, gender, health or economic status;" (ii) "provide greater access to medical treatment and preventative care for specified diseases and specified medical conditions;" and make pharmaceutical and medical

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gleaner.com/article/lead-stories/20180601/hooked-bushes-parents-introducing-traditional-medicine-infants): accessed May 1, 2019 .

[2] For a discussion of natural remedies for popular pharmaceutical medications, see https://www.prevention.com/health/a20438374/top-10-prescription-drugs-and-natural-remedies/: accessed May 1, 2019.

[3] National Health Fund estimate.

[4] Pharmacy Council of Jamaica.

supplies accessible and available to government-ownned health facilities" (from 2011 Amended NHF Act)

6. The NHF distributes prescription medication through its network of Drug Serv pharmacies free of charge to patients of public medical facilities such as hospitals, clinics and health centres ('public patients'). The medication offered through the NHF Drug Serv pharmacies is contained on the Vital, Essential and Necessary (VEN) list of medications and made available to every patient in Jamaica. Currently, there are 51 Drug Serv pharmacies in Jamaica.

7. Over the years, the NHF increased the distribution of subsidized medication to key demographics in the society through its two flagship initiatives: the Jamaica Drug for the Elderly Programme (JADEP) and NHF Card Programme. Since 2004, NHF has managed JADEP, which offers subsidized medication to patients over 60 years old for treatment of select chronic illnesses.[5] The NHF Card Programme also supplies these medications but offered without age restriction. During 2016/17, the NHF spent $4,180 million on the NHF Card Programme and $127.78 million on the JADEP program.[6]

8. There is a legitimate concern being expressed by private pharmacies that NHF's participation in the pharmacy sector will crowd-out some privately owned pharmacies. The NHF's Partner Programme has resurrected this concern. Some private pharmacies have raised concerns that partner pharmacies are likely to have a competitive advantage over third-party pharmacies.

9. The competitive effect of the Programme is the subject of this investigation.

<u>The Public Sector Pharmacy Partner Programme</u>

10. The Pilot Programme was launched in December 2016. Under the pilot, approximately 190 VEN list prescription medication could be accessed by public sector patients at

[5] https://www.nhf.org.jm/the-jadep-card/about-jadep-card
[6] NHF Annual Report 2016/17. Download at https://www.nhf.org.jm/images/pdfs/Reports_Charts/NHF%202017%20Annual%20Report.pdf (accessed: May 1, 2019)

partner pharmacies.[7] The pilot started with five pharmacies in Clarendon. The programme was expanded to Kingston in 2017 where an additional six pharmacies enrolled. Currently, over 50 pharmacies have signed up for the programme.[8]

Rational for Programme

11. According to the Government, customers seeking to fill prescriptions have been complaining of protracted waiting times in filling prescriptions at Drug Serv locations. The government implemented a raft of measures to remedy this issue. These include:

    i. the use of drop boxes where patients can submit prescription, have it processed and then pick up at a later time;
    ii. a smart phone app that allows users to process prescriptions remotely;
    iii. establishing a public-private partnership that sees selected pharmacies having a Drug Serv window.
    iv. Partner pharmacies must be located within proximity of a hospital;
    v. Partner pharmacies must accommodate NHF inspection and auditing; as well as have an adequate and comfortable waiting area;
    vi. Partner pharmacies must have adequate and proper storage facilities for the pharmaceutical medication among other requirements.

12. Through the programme, the NHF partners with private pharmacies to distribute prescription medication owned by the NHF. The NHF-owned prescription medications are sold at a dedicated window within the private pharmacy.

13. The Programme provides prescription medication to public patients at a charge of $200 per prescription. The NHF offers partner pharmacies an additional $400 for each prescription dispensed under the programme.

[7] Latonya Linton, "Six Kingston Pharmacies Sign on to Public Sector Partner Programme" in the **Daily Gleaner**, March 1, 2017.
[8] As at September 10, 2018, approximately 52 pharmacies signed up for the programme. See NHF website for details. https://www.nhf.org.jm/news/item/national-health-fund-expanding-public-sector-pharmacy-partner-programme-april-202018 : last accessed May 1,2019

Selection Process

14. The Staff was advised by the NHF that private pharmacies seeking enrollment in the program may apply by responding to an *Expression of Interest* which is issued by the NHF to all pharmacies in the geographic area of interest. The NHF accepts to the Programme, at most one qualifying partner pharmacy within proximity of a given public medical facility (hospital, clinic, health centre). If multiple applicants meet the criteria established by the NHF, then the pharmacy located closest to the public medical facility is selected as a partner pharmacy. See *Appendix A* for details regarding the criteria for qualification.

II. LEGAL ANALYSIS: Jurisdiction and Liability

(a) Whether the challenged conduct can be reviewed under the FCA

15. This issue is considered in accordance with section 3 of the FCA, which deals with the "Application of the Act". The section uses exclusionary language to prescribe the subject matter to which the statute does *not* apply. Consequently the necessary implication, supported by case law[9], is that the FCA is of general application outside of section 3 subject matter. It is observed that the alleged conduct falls outside of section 3, and is thus not a subject matter excluded from the purview of the statute. Consequently, on its face, the alleged conduct is a subject matter to which the FCA can apply.

16. Given that the alleged conduct is attributable to a government agency, that is, Drug Serv which is a division of the NHF, the jurisdictional question here is whether the fact that the alleged conduct is being carried on by a government agency renders it immune from review under the FCA.

17. The general principle for answering that question was succinctly stated by the Privy Council as follows:

> "The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bounds the Crown unless the Crown was expressly named therein, 'Roy n'est lie par ascun statute si il ne soit expressement nosme'[10]

18. Arguably, one conclusion which may be drawn from this statement of principle is that the actions of government agencies may be subject to statutory control where the statute in question expressly states that it binds the Crown. In this case, it is observed that section 54 of the FCA does state that the Crown is bound, "subject to any provision to the contrary in or under this or any other Act."

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[9] **Fair Trading Commission v Digicel Jamaica Ltd & Anor** [2017] UKPC 28 at para 12; see also **The Fair Trading Commission v SBH Holdings Ltd & Anor** S.C.C.A. 92/2002, Judgment Delivered March 30, 2004, per Harrison J.A. at page 3.

[10] **Province of Bombay v Municipal Corporation of the City of Bombar** [1947] AC 58 as cited and applied in **R (on the application of Black) (Appellant) v Secretary of State for Justice (Respondent)** 2017 UKSC 81.

19. Applying section 54, there are no provisions in the FCA which exempt the NHF or the alleged conduct from review under the statute. Moreover a review of the National Health Fund Act, the constitutive legislation of the NHF, does not indicate any provision therein which can exempt the NHF or the alleged conduct from the FCA.

20. Consequently, the alleged conduct can be reviewed under the FCA notwithstanding the fact that it is attributable to a government agency.

21. The reviewability of the alleged conduct is considered in accordance with Part III of the FCA, which deals with "Control of Uncompetitive Practice". Part III contains the competition law provisions (sections 17 – 21) which would be relevant to the alleged conduct. Generally, those provisions apply to conduct which takes place in a "market". Section 2(3) FCA indicates the statutory meaning of "market" as follows:

> "Every reference in this Act to the term "market" is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them."

22. Based on the foregoing definition, a "market" within the meaning of the FCA must be: (a) in Jamaica; and (b) consist of either "goods" or "services". Given the broad definition of "goods" under section 2(1), it is clear that the alleged conduct, involving as it does the supply of certain pharmaceutical medication in Jamaica, satisfies both conditions to be recognized under the statute as conduct which takes place within a "market". Consequently, the alleged conduct can be reviewed under the competition provisions of the FCA.

23. Finally on this issue, it may be argued that the alleged conduct can be treated as the "conduct of business in Jamaica" for the purposes of section 5(1)(a) FCA, even though the NHF does not carry it on for the purpose of profit or gain. This is on the basis of the expansive definition of "business" under section 2(1) FCA which embraces activity "in the course of which goods or services are manufactured, produced or *supplied*..."; notably this limb of the definition does not require a profit motive to be established.

24. Consequently, the supply of select pharmaceutical medication under the Programme may be treated as the conduct of business in Jamaica so as to cloth the FTC with the requisite jurisdiction under section 5(1)(a) FCA to investigate this matter.

25. The overall conclusion on this issue, therefore, is that the alleged conduct can be reviewed under the FCA.

(b) Whether the alleged conduct can give rise to a violation of the FCA

(i)Theories of liability

26. Under Part III of the FCA, section 17 deals with multilateral conduct among firms (for e.g. cartels) while sections 19 – 21 deal with unilateral conduct by a dominant firm (otherwise called "abuse of dominance").

27. A central premise of this preliminary legal assessment is that the alleged conduct could implicate an issue of compliance with either section 17 or sections 19 - 21 of the FCA. This premise is justifiable on the basis that the policy rationales that inform either section 17 or sections 19 - 21 of the FCA may be engaged in any analysis of the alleged conduct.

28. In that regard, as a general matter one of the policy rationales behind section 17 is its concern with prohibiting or otherwise disciplining agreements between rivals, which have an anti-competitive purpose or, at least, is likely to have an anti-competitive effect.

29. On one view of the matter, the alleged conduct could be interpreted as involving a series of agreements, in the form of the Programme, between firms that would otherwise be rivals, that is, Drug Serv and participating private pharmacies. The question from a liability perspective is whether the Programme have an anti-competitive purpose or effect. As stated above, this question can only be answered upon the application of the law to facts as established by way of economic analysis.

30. Alternatively, as a general matter one of the policy rationales behind sections 19 - 21 is their concern with prohibiting or otherwise disciplining the use of market power by a dominant firm that is likely to have an anti-competitive effect.

31. On another view of the matter, therefore, the alleged conduct could be interpreted as the NHF using its market power over the supply to private pharmacies of select pharmaceutical drugs. The question from a liability perspective is whether the conduct of the participating private pharmacies under the dominant influence of the NHF is likely to have an anti-competitive effect. As stated above, this question can only be answered upon the application of the law to facts as established by way of economic analysis.

32. In light of the foregoing legal theories, the specific requirements for liability under either section 17 or sections 19 - 21 of the FCA will be set out below in order to guide the economic analysis.

33. However, before doing so, a general approach to market definition under the FCA will be outlined; since the first substantive issue in any investigation under the statute must be the definition of the relevant market.

(ii) General approach to market definition under the FCA

34. The statutory definition of “market” under section 2(3) of the FCA, cited above, also indicates that a market may not only consist of one type of goods and services but also other goods and services which are “substitutable for them.”

35. Based on applicable case law, the legal threshold under the FCA for establishing that goods and services are substitutable is the standard of "*close substitutability*", which requires more than a slight or temporary interchangeability between goods and services.[11]

36. More specifically, "close substitution" among goods and services may be established on an economic analysis which takes into account evidence on a range of factors, which may include historical cross elasticity of demand and supply, product functionalities and the views of industry participants.[12]

[11] **Boral Besser Masonry Ltd v ACCC** [2003] HCA 5 at para 258.
[12] **Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd** [1989] HCA 6.

37. Those considerations are implicit in the phrase "as a matter of fact and commercial common sense" found in the definition under section 2(3) of the FCA[13], and should therefore guide the definition of the relevant market in this case.

(iii) Specific requirements for liability under section 17 FCA

38. Broadly speaking, three requirements must be satisfied for liability under section 17:

i. An agreement must exist;

ii. The agreement itself and/or any of its terms must have either: (a) the purpose or (b) the effect or (c) the likely effect of *substantially lessening competition* in a market; and

iii. The absence of authorization under section 29 or any efficiency justification under 17(3).

The standard of review: "substantially lessening competition"

39. In light of the nature of the alleged conduct, the first requirement may be assumed to be satisfied. In terms of the second requirement, it is observed that the FCA does not define or otherwise indicate what is meant by the phrase "substantially lessening competition". Clarity on the meaning of this phrase is relevant to the application of the section because the phrase constitutes the legal standard by which an agreement or a provision of an agreement can be reviewed under section 17 FCA.

40. Notably, the counterpart provisions in European competition law may only be of limited assistance because the relevant treaty provisions do not contain the phrase "substantially lessening competition".

41. In this regard, legislation from other jurisdictions, which employ similar wording to the phrase under consideration, may afford better guidance on this issue.

42. Accordingly, the Trade Practices Act 1974 of Australia is replete with references to "substantially lessening competition".[14] Also, like the FCA it does not define what is meant by "substantially" or "lessening".

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[13] **Auckland Regional Authority v Mutual Rental Cars (Auckland Airport)** (1988) 2 NZBLC 103-041 at 103,080-1.

43. Recourse may therefore be had to relevant case law which clarifies the phrase "substantially lessening competition" under the Trade Practices Act 1974, and therefore by extension the Fair Competition Act. Notably, the Court of Appeal of Jamaica has previously relied on Australian case law in interpreting another provision of the Fair Competition Act, on the basis that both statutes are *in pari materia*.[15]

44. In **Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd** the Trade Practices Tribunal of Australia had an opportunity to elaborate on the content of the concept of "competition" under the Trade Practices Act. The Tribunal explained that:

> "Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case as these:
>
> - The number and size distribution of independent sellers, especially the degree of market concentration;
> - The height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
> - The extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;
> - The character of "vertical relationships" with customers and with suppliers and with the extent of vertical integration; and
> - The nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

[14] See for example section 45 of the Act which proscribes contracts, arrangements or understandings which have the effect of "substantially lessening competition".

[15] **The Fair Trading Commission v SBH Holdings Ltd & Anor** S.C.C.A 92/2002, Judgment Delivered March 30, 2004, per Harrison JA at page 3.

45. Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of any new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct."[16]

46. This passage from the Tribunal's judgment in **Re Queensland** indicates that the statutory concept of "competition" means, or at least relates to, the structure of markets. This in turn implies that the focus of review under the standard of "substantially lessening competition" is the structural elements of the relevant market which may or may not facilitate rivalry among firms, as opposed to a specific relationship or individual case of rivalry between firms. This much was also said by the New Zealand Court of Appeal in **Port Nelson Ltd v Commerce Commission**.[17] In **Port Nelson** the New Zealand Court of Appeal had occasion to consider the concept of "competition" under section 27 of the Commerce Act 1986 of New Zealand, which also uses the phrase "substantially lessening competition". The Court opined that:

> "One further point arises of the legal submissions relating to section 27. The relevant inquiry is as to substantially lessening competition. That is not the same as substantially lessening the effectiveness of a particular competitor. Competition in a market is a much broader concept...that encompasses a market framework which participants may enter and in which they may engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency. There appears to have been consistent acceptance of the elements of competition explained in the *Queensland Co-operative Milling Association* case (p 17,246) and further quotation is unnecessary."[18]

[16] **Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd** (1976) 25 FLR 169, 189.
[17] **Port Nelson Ltd v Commerce Commission** [1996] 3 NZLR 554.
[18] **Port Nelson Ltd v Commerce Commission** [1996] 3 NZLR 554, 564-565.

47. The upshot of this understanding of "competition" under the FCA is that, arguably, as a general matter there must be some connection (whether by way of purpose, effect, or likely effect) between an agreement, or provision of an agreement, and the structural elements of the relevant market necessary for competition therein. In other words, if the Programme is unlikely to have any impact, potential or otherwise, on the structural elements of the relevant market for pharmaceutical drugs then it is unlikely that liability will attach under section 17.

48. As a general matter, the impact on market structure that is required is in the nature of a "lessening" of competition. While the FCA does not define or otherwise indicate what is meant by "lessening" in this context; it is observed that in considering the "substantially lessening competition" standard under the Trade Practices Act 1974 the Federal Court of Australia in **Stirling Harbour Services Pty Ltd v Bunbury Port Authority** explained that:

> "Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would otherwise have existed in that market but for the conduct in question."[19]

49. Arguably, therefore, as a general matter an agreement, or a provision of an agreement, 'lessens competition' within the meaning of section 17 where its purpose, effect or likely effect involves a reduction (whether quantitatively or qualitatively) in the structural elements of a relevant market.

50. Ofcourse not every agreement, or provision in an agreement, which involves a "lessening of competition" will attract liability under section 17. In this regard, the word "substantially" while not defined in the Act, is an important qualifying term. The meaning and effect of "substantially" was the subject of judicial pronouncement when the **Port Nelson Ltd** case was in the High Court of New Zealand. At that stage in the proceedings, McGechan J explained that:

[19] **Stirling Harbour Services Pty Ltd v Bunbury Port Authority** [2000] FCA 1381 at para 66.

"...[the] reference in s 27(1) to 'substantially lessening competition' is taken as meaning 'lessening competition in a way which is more than insubstantial or nominal.' The merely ephemeral or minimal will not suffice. Inevitably, that will involve some attention to relativity; and in the end be a question of judgment on a matter of degree."[20]

51. Arguably, on the basis of the foregoing explanation, while the word "substantially" communicates the idea that "lessening of competition" should be more than *de minimis*, it also indicates that the standard for review under section 17 is flexible insofar as it involves a degree of relativity according to the circumstances of particular cases.

52. The foregoing review of Australian and New Zealand case law regarding the "substantially lessening competition" standard has provided some relevant guidance on the meaning of the same under the FCA.

53. Consequently, it may be said with respect to the application of section 17 of the FCA in this case, that the review herein should focus on whether the Programme has as their purpose, effect or likely effect a more than minimal reduction in any of the structural elements necessary for competition in the relevant market for pharmaceutical medication.

(iv) Specific requirements for liability under sections 19 - 21 FCA

Dominance

54. Section 19 of the FCA defines the concept of "dominance" as follows:

"…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 or potential competitors."

[20] **Commerce Commission v Port Nelson Ltd** (1995) NZBLC 103,762 at 433-434.

55. Relevant case law has interpreted this concept of dominance to mean a firm that is characterized by the freedom it enjoys to act in disregard of other market participants (for e.g. competitors and consumers) without suffering any detriment.[21]

56. Case law also indicates that in general a finding of a dominant position may derive from a combination of several factors which, taken separately, may not necessarily be determinative.[22]

57. The following factors, when considered cumulatively in any given case, have been recognized in the case law as being sufficient to support a conclusion that a firm holds a dominant position: (a) market share in excess of 50%[23]; (b) exclusionary/exploitative conduct in the market[24]; (c) commercial advantages which could include vertical integration[25], technological lead, superior sales force and high goodwill[26]; (d) the strength and number of competitors in the market[27]; and (e) barriers to entry for potential competitors which could include the need for exceptionally large capital investment and the risk of sunk costs[28]. Notably, this list is not exhaustive.

58. The assessment of whether or not any, some or all of those factors exist in relation to the NHF acting through Drug Serv so as to support a conclusion that it holds a dominant position within the meaning of section 19 of the FCA is a matter for economic analysis.

Abuse of Dominance

59. Section 20 of the FCA generally provides that an "abuse" occurs where a dominant firm "...impedes the maintenance or development of effective competition in a market." Section 20(1) then enumerates examples of conduct by a dominant firm which are deemed to have that effect. Notably, this list of firm conduct is merely illustrative, and not exhaustive.[29]

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[21] **Hoffmann-La Roche v Commission** Case 85/76 at paras 39 and 41.
[22] **United Brands Co v Commission** Case C-27/76 at para 66.
[23] **AKZO v Commission** Case C-62/86 at para 60.
[24] **United Brands Co v Commission** Case C-27/76 at para 68.
[25] **United Brands Co v Commission** Case C-27/76 at 70 – 81.
[26] **Hoffmann-La Roche v Commission** Case 85/76 at paras 48.
[27] **United Brands Co v Commission** Case C-27/76 at para 110.
[28] **United Brands Co v Commission** Case C-27/76 at para 122.
[29] **Continental Can v Commission** Case 6/72 at para 26.

60. The Staff must therefore go on to evaluate whether or not the alleged conduct could otherwise amount to an abuse within the meaning of section 20 of the FCA.

61. Based on relevant case law, the Staff takes the view that conduct by a dominant firm may generally amount to such an abuse if it strengthens the existing dominance of that firm to the detriment of consumers and the competitive structure of the relevant market.[30]

62. On this view, there is no need to prove an improper act or some factor of a subjective nature or to substantiate immorality, since an abuse must be understood as being an act the morality of which is immaterial but which is *objectively* harmful to consumers and the competitive structure of the market.[31]

63. Consequently, assuming that there has been a prior finding of dominance, the economic analysis should consider the following in evaluating the alleged conduct in accordance with the foregoing test of "abuse" under the statute: (1) whether or not any of the factors which underpinned the prior finding of dominance have been strengthened under the influence of the alleged conduct; and (2) whether or not consumers and rivals are harmed.

Lessening of competition substantially

64. According to section 21 of the FCA, the abuse of a dominant position must either have had, is having, or is likely to have the effect of lessening competition substantially in a market. This provides the legal basis on which the Commission may take action in relation to the alleged conduct, if it is found to be an abuse. Therefore, on the very language of the section, there must be a causal link between the alleged conduct and the lessening of competition substantially in the relevant market.

65. Although the FCA does not define the phrase "lessening of competition substantially" or otherwise indicate the legal standard connoted by the phrase, the Staff takes the view that the elements of market structure, which have been previously identified in this

[30] **Continental Can v Commission** Case 6/72 at para 27.
[31] Commission submission on the meaning of "abuse" in **Hoffmann-La Roche v Commission** Case 85/76.

report in Section II, guides the economic analysis in applying this standard under section 21 of the FCA.

66. Importantly, in determining whether or not the alleged conduct has caused a substantial lessening of competition, the economic analysis should evaluate the nature and extent of the structural elements of the relevant market that *would exist, but for* the abusive conduct.[32]

67. In this case, where the alleged conduct has occurred or is occurring, the economic analysis should in practice consider the future state of those structural elements without the alleged conduct and compare it with the present state of those structural elements with the alleged conduct in order to determine what, if anything, has been lost.

Superior Competitive Performance

68. Section 21(2) FCA obligates the FTC to consider whether abusive conduct which has had, is having or is likely to have an anti-competitive effect "is a result of superior competitive performance". Consequently, if the Staff finds that the alleged conduct is captured under sections 20 and 21(1), then it must also consider whether it is the result of superior competitive performance by the NHF.

69. Notably, superior competitive performance may not be a defence to a claim of abuse of dominance.[33] It may not relieve a dominant firm from liability for an abuse. This is evident from the difference in language between section 20(2) and section 21(2).

70. The role of section 21(2) is reasonably clear from its language. Superior competitive performance is only a factor to be taken into account when determining the cause of the lessening of competition. While as a technical matter it may not be a defence, the fact that the statute commands the FTC to consider it, does suggest that the FTC may decide, where appropriate, not to take action under section 21(1) where the conduct, though exclusionary in effect, originated from superior competitive performance.

[32] **Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd** (1982) ATPR 40 – 315; (1982) 64 FLR 238
[33] Goldman. C, Bodrug. J, "Competition Law of Canada", 2003, Juris Publishing Inc, Chapter 9, section 9.06[1].

71. Although the FCA does not define the phrase "superior competitive performance" or otherwise indicate the factors that should be taken into account, it is worth observing that a very similar provision exists under section 79(4) of the Competition Act of Canada.

72. While the Competition Tribunal in Canada has so far not expounded on the concept of "superior competitive performance" in its decisions, the following policy position of the Canadian Competition Bureau may provide some useful guidance on the role of the provision in abuse of dominance investigations:

> "If competitors leave the market or lose market share because a competitor is more efficient than its rivals or more effective in meeting consumer needs, the lessening of competition does not result from an abuse of market power, but rather it is a natural consequence of the competitive process. This factor is therefore included in the Act to ensure that efficiency, innovation and like considerations are given proper weight by the Tribunal in its assessment of the trade practices of a dominant firm or firms.
>
> The indicia which may be included in considering whether the practice results from superior competitive performance may include economies of scale, scope or location, innovation and research, and distribution and marketing methods. As well, the origins of the firm's dominant market position could also play an important part in determining whether the practice results from superior competitive performance or the abuse of market power. In this respect, the Tribunal may consider whether the firm acquired its position in the market by way of natural growth stemming from superior skill, foresight or industry, or by way of acquisition, financial power or below cost pricing."[34]

73. Arguably, therefore, section 21(2) may be seen as a statutory expression of the Equally Efficient Firm Test (EEF Test) traditionally found in the competition policy literature. The

[34] H. Westston, Deputy Director of Investigation and Research (Legal), "The Enforcement of Non-Criminal Trade Practices" (Address to the Canadian Bar Association, Ontario, February 5, 1987) at 36-37.

EEF Test is predicated on the premise that a competitive market consists of only the most efficient firms.[35] Therefore, from a competition policy perspective, the competition authority should not intervene even if the abusive conduct harms firms that are less efficient than the dominant firm.

74. In this case, even if the alleged conduct is found to be an abuse under sections 20 and 21(1), the Staff may nonetheless recommend that no action be taken if it also finds that the alleged conduct arises from the greater efficiency of the NHF, acting through Drug Serv.

75. The overall conclusion on this issue, therefore, is that the alleged conduct could implicate an issue of compliance with either section 17 or sections 19 - 21 of the FCA. Any final determination about whether the alleged conduct gives rise to an FCA violation must, however, depend on the findings of an economic analysis in relation to whether or not the specific requirements for liability under either of the provisions have been satisfied in this case. The findings of the economic analysis are presented in sections III, IV and V of this report.

[35] Jenny. F, "Abuse of Dominance: Economic Analysis of Exclusionary Abuses" (PowerPoint Presentation to the Jamaica Fair Trading Commission, Montego Bay, Jamaica, September 2015) at 39-45.

III. ECONOMIC ANALYSIS: Market Definition

Analytic Framework and Overview

76. To evaluate the competitive effects of the challenged conduct, it is useful to identify the boundaries within which competition takes place. This process is known as defining the relevant market. Market definition allows for the assessment of competitive effects and is helpful in examining efficiency claims and designing a remedy to avoid or reverse anticompetitive effects of the conduct, if any.

77. The internationally accepted definition for a relevant market for economic analysis is a product (or group of products), a geographic region and time dimension in which it is produced or sold such that a hypothetical profit-maximising supplier, not subject to price regulation, that was the only present and future producer or seller of those products likely would impose at least a small, but significant and non-transitory increase in price on at least one product in that market, assuming the terms of sale of all other products are held constant.

Relevant Product Market(s)

78. Based on the challenged conduct, a set of relevant product markets for assessing the competitive effects of the challenged conduct is the markets for the various medication included on the VEN List.

79. Another set of relevant product markets are the pharmaceutical products which are not on the VEN list.

Relevant Geographic Market(s)

80. Based on the challenged conduct, the relevant geographic market is no wider than Jamaica. We presume that patients are willing to travel over only a limited distance to fill prescriptions. To map the various geographic markets in which Drug Serv is located, the staff counted the number of pharmacies located within a one mile radius of each Drug Serv pharmacy location in Jamaica. The Staff has determined that Drug Serv

pharmacies are located in 45 geographic markets across Jamaica. There are also geographic markets in which Drug Serv pharmacies are not located.

Customer Segmentation Market(s)

81. Competition authorities may identify relevant markets for a sub-set of customers. This is done when competition authorities have reason to believe that a group comprising a sub-set of customers is exposed to adverse competitive effects.

82. Customer segmentation occurs in this market because of differing strategic objectives pursued by private and public pharmacies. Private sector pharmacies pursue a profit-maximizing objective whereas the public sector pharmacy pursues a consumer welfare oriented objective. In particular, one of the guiding principles under which the NHF operates is to "…provide financial support to our national healthcare system in order to improve its effectiveness and the affordability of healthcare for the Jamaican population."[36]

83. The differing strategic objectives of the state-owned and privately-owned pharmacies have resulted in these institutions serving distinct consumer types. In particular, Drug Serv's pricing strategy seeks to maximize the distribution of prescription medication to consumers who are unable to afford unsubsidized prescription medication sold by private pharmacies. Private pharmacies, on the other hand, price its prescription medication at a level to generate economic profits.

84. Accordingly, the differing pricing strategies have served to segment consumers based on ability to pay. Drug Serv's policy is to distribute its subsidized prescription medication exclusively to public patients.[37] For purposes of this report, we use the term private patients to refer to individuals who seek medical attention at private medical facilities.

85. Drug Serv's policy segments this market by making it less likely that patients with economic means would access prescription medication through Drug Serv. In particular, patients with greater economic means face higher opportunity costs when seeking

[36] https://www.nhf.org.jm/about-us/who-we-are (accessed: June 14, 2019)

[37] The Staff is aware of allegations that at least some partner pharmacies have dispensed NHF-owned prescription medication to persons with scripts issued by private medical facilities in contravention of the Public Sector Partner Pharmacy Programme Agreement. The Staff has not confirmed these allegations.

medical attention at public medical facilities because of the protracted time which is spent when seeking medical attention at public facilities, relative to private facilities.[38] Accordingly, patients with greater economic means tend to seek medical attention at private medical facilities to avoid the high (opportunity) cost associated with public facilities. In particular, a national survey conducted in 2016 indicates that 60% of individuals seek medical attention at private medical facilities in Jamaica.[39] Approximately 47% of those surveyed indicated that the primary reason cited for this was to avoid the extended period they had to wait at public facilities. The next most cited reasons were the incidence of medical mistakes/bad treatment (18%) and poor attitude of the employees (17%) at public facilities. In contrast, 63% of the individuals rate the quality of service/treatment at private facilities as either very good or world class with another 13% indicating that the service/treatment of private facilities was average. Among those who expressed the opinion that the quality of serve/treatment at private facilities were either average or below, the main complaint was that the service was expensive.

86. In concluding, the relevant markets for assessing the challenged conduct comprise:

i. The set of products included on the VEN list available in multiple geographic regions across Jamaica.

ii. The set of pharmaceutical products other than VEN list medication available in multiple geographic regions across Jamaica.

iii. The set of narrower relevant markets segmented on the basis of whether consumers sought medical attention at either private or public medical facilities.

[38] If one uses foregone wages as a proxy for the opportunity costs of seeking medical attention, then individuals who commands the higher wages (greater economic means) will face higher opportunity costs than individuals with lower wages.

[39] Survey results reported by Poyser, Andre "Private Doctors For US…Jamaicans Shun Public Hospitals Because of Time It Takes To Get Treatment." **The Daily Gleaner**, Tuesday, November 15, 2016.

IV. ECONOMIC ANALYIS: Market Structure

Analytic Framework and Overview

87. In Section III of this report, the Staff determined that one set of the relevant markets for assessing the competitive effects of the challenged conduct comprise the markets for VEN list medication available in multiple geographic areas in Jamaica; the Staff also determined that consumers in these relevant markets were segmented based public or private patients. Public patients comprise the group of patients who visit public medical facilities because they have less ability to pay whilst private patients comprise patients who visit private medical facilities because they have a greater ability to pay.

88. In this section, the Staff describes the structure (features) of the relevant markets identified and assesses the scope for Drug Serv to be dominant in any of the relevant markets identified. Market structure analysis is important in assessing competitive effects because the structure of a market conveys useful information about the incentives and opportunities for an enterprise to exercise market power. Dominance is achieved when an enterprise has a high degree of market power.

89. In general, dominance is less likely in markets characterised by: (i) less concentration of enterprises; (ii) fewer product variety; (iii) negligible market friction (such as switching costs); and (iv) easy conditions of entry.

Discussion

A. Structural Characteristics

(i) Number of Pharmacies

Private Patients Segment:

90. In total, there are over 469 pharmacies/dispensaries located in at least one of multiple geographic markets in Jamaica. The number of pharmacies varies across geographic markets.

91. Table 1 below shows the distribution of pharmacies in the geographic markets in which Drug Serv pharmacies are located. It shows, for example, that there are 12 geographic markets in which Drug Serv is the only pharmacy whilst there are also 7 geographic markets in which there is only one private pharmacy.

92. At the other extreme, there are 9 geographic markets in which there are at least 5 pharmacies catering to private patients.

Table 1. Distribution of Pharmacies across Geographic Markets

Number of Geographic Markets	Total Number of Pharmacies serving…	
	…Public Patients	…Private Patients
12	1	0
7	1	1
9	1	2
7	1	3
1	1	4
2	2	5
3	2	7
2	1	11
2	1	15

Public Patients Segment:

93. Drug Serv is the only participant in this market and it operates 51 locations in 46 distinct geographic markets across Jamaica.

(ii) Substitutability of Products

Private Patients Segment:

94. Prescription medication distributed by pharmacies is perfectly substitutable across pharmacy locations in any relevant market.

95. To this extent, therefore, prescription medication is homogeneous.

Public Patients Segment:

96. Since there is only a single supplier in the relevant sub-market, a discussion on substitutability within the sub-market is not applicable.

iii. Switching Costs

Private Patients Segment:

97. Switching costs refer to the ease with which consumers can switch between suppliers. In this instance, it refers to the ease with which patients switch filling prescriptions from one pharmacy to another.

98. The main switching cost associated with patients switching from one private pharmacy to another private pharmacy is the physical distance between the pharmacy locations ('location costs'). For example, a patient contemplating switching to a private pharmacy located, say 20 miles away from his current pharmacy, would incur a greater switching cost than a patient switching to a private pharmacy located adjacent to his current pharmacy.

99. To the extent, however, that pharmacies in a given geographic market are located within close proximity, location costs within each relevant market are likely to be minimal.

Public Patients Segment:

100. Since there is only a single supplier in the relevant sub-market, a discussion on switching costs with the sub-market is not applicable.

iv. Impediments to Entry

101. In this section, the Staff reports on the requirements for entering the market for prescription medication.

102. The Pharmacy Council of Jamaica gives the following as the requirements that the applicant must submit for consideration of a pharmacy registration:

1. A cover letter
2. The relevant Application Form and pay the requisite fee
3. Birth Certificate and two passport size photograph of each owner/partner/shareholder/director
4. Articles of Incorporation or Memorandum and Articles of Association (where applicable.
5. Police record for each owner/partner/shareholder/director (certified receipt of payment for police record is accepted to initiate the process)
6. Letter of commitment from Registered Pharmacist signed in the presence of a Justice of the Peace indicating willingness to be Registered Pharmacist for not less than one (1) year
7. If situated in a residential area an approval from the relevant agencies that are responsible for establishment of buildings will be needed
8. Floor Plan – The layout of proposed pharmacy indicating:
    a. Measurement of entire shop not less than 640 sq. ft
    b. Measurement of dispensary area not less than 130 sq. ft. ($12m^2$)
    c. Confidential area contiguous with the dispensing counter, to accommodate two chairs and a small desk/table for counseling.
    d. Waiting area with chairs at least three chairs.
    e. Designated display area within dispensary for List No. 2 products
    f. Sink (potable water)
    g. Narcotic Control Substances Cupboard with lock (if required)
    h. Adequate storage area and office space
    i. Staff restroom/lunch area

j. Proper partitions should be in place with an independent entrance if the establishment is associated with a supermarket or other business.
k. Filing cabinet for filing filled prescriptions for two years (minimum four drawers)

103. Based on the requirements listed above, entry impediments to the relevant markets are likely to be low.

B. Assessment of Dominance

104. Dominance refers to the ability of a supplier to exercise a high degree of market power. Market power is the ability of a supplier to charge a price above competitive levels for a sustained period.

105. Dominance is assessed for the enterprise engaged in the challenged conduct. As such, the Staff examines Drug Serv's dominance in the markets for VEN list prescription medication available in multiple geographic areas and sold to public patients.

106. In assessing dominance, the Staff examines the extent to which a supplier faces competitive constraints from (i) current rivals; (ii) potential rivals; or (iii) suppliers and buyers. An enterprise is deemed to be dominant only in the absence of any binding competitive constraint.

Competitive Constraint from Current Rivals

107. The extent to which a supplier faces competitive constraints from current rivals is indicated by market concentration. Markets with fewer suppliers are more concentrated and suppliers in such markets are deemed less likely to face competitive constraints from current rivals, all other things constant.

108. Market concentration level is typically measured by the Herfindahl-Hirschman Index and the Concentration Ratio which are based on the distribution of market shares. Calculating market share based on annual revenue is usually the best means of capturing competitive effects.

109. Part A in this Section shows that Drug Serv is the sole supplier of medication to public patients. Accordingly, the Staff concludes that the market is highly concentrated as there is no current rival to constrain Drug Serv pharmacies.

Competitive Constraint from Potential Rivals

110. The extent to which a supplier faces competitive constraints from potential rivals is reflected by the conditions of entry. When conditions of entry are easy, the threat of entry by potential rivals is more likely to constrain the exercise of market power on the part of current suppliers even without actual entry taking place, all other things constant.

111. Entry conditions are considered to be easy if it would be timely, likely and sufficient in magnitude, character and scope. Entry is considered to be likely if it would be profitable for new firms to enter at current prices. Entry is considered timely if the entry is rapid enough to make anticompetitive conduct unprofitable even if profits would have been earned up to the moment of entry. Entry is sufficient if it occurs at a scale and the product offered by the entrant is a sufficiently close substitute for incumbent enterprises.

112. In the introductory section of the Report, the Staff documented that the current prices offered to public patients are highly subsidized by Drug Serv. Accordingly, entry in this market is unlikely as it would be unprofitable at current prices.

113. Based on the above, the Staff concludes that entry conditions are unlikely to be easy in this market and therefore Drug Serv faces no competitive constraint from the prospects of future entry.

Competitive Constraint from Suppliers and/or Buyers

114. The relationship between an enterprise and its suppliers and/or customers could also help to restrain the exercise of market power. Drug Serv is supplied exclusively by the NHF which pursues consumer welfare objectives rather than a profit-maximizing one. To the extent that sustained price increases would serve only to undermine consumer welfare, the Staff concludes that the NHF's strategic objective makes it less likely that Drug Serv will increase prices in the foreseeable future.

115. Further, even if the NHF allowed Drug Serv to increase prices, it is likely that the limited disposable income available to its customer base (public patients with limited disposable income) would frustrate such attempts. In particular, many public patients

are likely to discontinue taking prescription medication (from either public or private pharmacies) when faced with price increases.

116. In this section, the Staff has found that Drug Serv faces no competitive constraints from current or future rivals. Also, that Drug Serv faces competitive restraints from the NHF as well as its customers.

117. To the extent that Drug Serv faces competitive constraints from its customers and its supplier, the Staff concludes that Drug Serv is unlikely to be dominant in any of the relevant markets identified.

V. ECONOMIC ANALYSIS: Competitive Effects

Analytic Framework

118. The main objective of analyzing competitive effects is to identify conduct which is likely to injure competition. To demonstrate that competition is likely to be injured, economists require proof of injury to rivals and consumers in a given relevant market. Demonstrating injury to rivals requires proof that the challenged conduct is likely to unduly induce the exit of current rivals; prevent the entry of potential rivals; or raise rival's costs. Demonstrating injury to consumers requires proof that the challenged conduct facilitated the increase or maintenance of price above the competitive level.

119. To measure the harm to rivals and consumers, the Staff compares two hypothetical markets: the factual market and the counterfactual market. The factual market characterises how the relevant market is likely to evolve in the foreseeable future as a result of the challenged conduct. Contrastingly, the counterfactual market characterises how the relevant market is likely to evolve in the foreseeable future in the absence of the challenged conduct.

120. Harm to consumers is demonstrated if prices are higher, product quality is lower, there are fewer product varieties, or there is a slowdown in the rate or technological innovation in the factual market, relative to the counterfactual market.

121. Similarly, harm to rivals is demonstrated if rivals are excluded, revenue is diverted or rivals' costs are higher in the factual market, relative to the counterfactual market.

Theory of Harm

122. The Theory of Harm describes the way in which the challenged conduct is likely to cause harm.

123. The relevant market which could be harmed by the challenged conduct is the market for VEN list prescription medication available in multiple geographic regions in Jamaica sold to patients of private medical facilities. As described in an earlier section of the report, only private pharmacies cater to private patients.

124. One theory of harm argues that the challenged conduct distorts competition by giving partner pharmacies a distinct competitive advantage over competing third-party pharmacies. In particular, partner pharmacies are likely to see increased customer traffic, hence revenue, from public sector patients filling prescriptions at Drug Serv designated windows located in partner pharmacies. Partner pharmacies would benefit from the sale of other products which public patients may demand while visiting partner pharmacies.

125. With revenue diverted, third party pharmacies are less able to compete with partner pharmacies since they would be able to pass on fewer benefits to customers (private patients). Accordingly, customers of third party pharmacies could also be harmed.

Assessing Harm

The Factual Market

126. Describing the factual market is an important aspect of assessing competitive effects. The factual market describes the likely evolution of the relevant market(s) in the foreseeable future as a result of the challenged conduct.

127. The challenged conduct provides an economic advantage to one group of market participants (partner pharmacies) relative to rival participants (third party pharmacies).

128. In the foreseeable future, the challenged conduct is likely to increase the flow of public patients to partner pharmacies. The flow is likely to be skewed in favour of partner pharmacies as public patients will likely seek to fill their prescription at the most convenient partner pharmacies, to the disadvantage of third party pharmacies.

129. The net benefit from the increased flow of public patients to partner pharmacies would take into account (i) the revenue ($600 per script) from dispensing NHF-owned medication; (ii) the revenue from the sales of other products which public patients may choose to purchase such as pain killers, cough syrup, etc.; and (iii) the incremental costs to the pharmacy to administer the Programme.[40]

130. In the factual market, public patients may obtain Drug Serv prescription medication from partner pharmacies as well as from Drug Serv pharmacies. This wider option to choose from benefits public patients by reducing location costs, as well as allowing shorter waiting time in filling prescriptions, relative to a market in which there is no partner pharmacy.

The Counterfactual Market

131. The counterfactual market describes the evolution of the relevant market in the foreseeable future, but for the challenged conduct.

132. In the absence of the challenged conduct, public patients would likely access Drug Serv's VEN list prescription medication only at Drug Serv pharmacy locations since they would be unable to afford prescription medication sold by private pharmacies. [41]

133. A notable behavior pattern in this market would be that there would be fewer public patients visiting private pharmacies, relative to the factual market, since there would be fewer incentives for public patients to visit private pharmacies without designated Drug Serv windows.

[40] Additional administrative costs arise because partner pharmacies are required to maintain separate accounting records for NHF-owned medication and those sourced independently by the pharmacy.

[41] Another possibility is that the counterfactual market could be described as one in which every private pharmacy was enrolled in the Programme. The Staff ruled out this alternative because information provided by the NHF indicated that it does not have the resources to enrol every qualified private pharmacy in the Programme.

134. Importantly though, the flow of public patients is likely to be uniformly distributed across competing private pharmacies and therefore there would be no economic advantage to any private pharmacy regarding the revenue generated from public patients visiting private pharmacies.

Harm to Rivals

135. Harm to rivals is demonstrated if rivals are excluded, revenue is lower or rivals' costs are higher in the factual market, relative to the counterfactual market.

136. Drug Serv has a significant customer base as it relates to VEN list prescription medication. During 2018 for example, the NHF reports that it filled 2.5 million prescriptions for public patients.[42]

137. The challenged conduct is likely to reduce the revenue generated by some private pharmacies from public patients. In particular, the revenue generated by third-party pharmacies is likely to be reduced in the factual market, relative to the counter factual market. In the factual market, partner pharmacies are likely to get a disproportionately greater share of public patients seeking Drug Serv prescription medication. Contrastingly, in the counterfactual market, the flow of public patients is likely to be uniformly distributed across competing private pharmacies.

138. Notwithstanding the above, the revenues diverted from third partner pharmacies as a result of the reduced flow of public patients are likely to be insignificant in magnitude since public patients, for the most part, have limited disposable income and therefore are unlikely to be a source of significant revenue for any private pharmacy. The costs of administering the Programme would further serve to reduce the net benefits.

139. As such, the Staff concludes that the challenged conduct is unlikely to cause significant harm to competing (third-party) pharmacies.

Harm to Consumers

[42] NHF website. https://www.nhf.org.jm/news/item/nhf-marks-15th-anniversary-with-over-30-billion-on-drug-subsidies (last accessed June 16, 2019).

140. Harm to consumers is demonstrated if prices are higher, product quality is lower, there are fewer product varieties, or there is a slowdown in the rate or technological innovation in the factual market, relative to the counterfactual market.

141. Public patients benefit from the challenged conduct. This is the case because consumers have a wider selection of pharmacies from which to access Drug Serv medication in the factual market, relative to the counterfactual market.

142. The benefits from the wider option of locations result from (i) lower locations costs (i.e., the implicit costs associated with traveling to fill prescription at a location other than the patient's preferred location); and (ii) shorter waiting period to fill prescriptions.

143. As such, the Staff concludes that the challenged conduct benefits public patients.

VI. OVERALL CONCLUSION

144. The relevant markets for analyzing the challenged conduct is the market for VEN list prescription medication sold in multiple geographic regions across Jamaica to public and private patients.

145. Drug Serv is unlikely to be dominant in any of the relevant markets identified.

146. The challenged conduct is unlikely to harm rivals in a material respect in any of the relevant markets identified but likely to benefit patients of public medical facilities.

147. Accordingly, the Staff concludes that the challenged conduct is unlikely to have the effect of substantially lessening competition in any of the relevant markets identified.

148. The overall conclusion is that the challenged conduct is unlikely to breach any provision of the Fair Competition Act.

VII. REMEDY

149. To the extent that the challenged conduct is unlikely to breach any section of the Fair Competition Act, no remedial action is necessary.

APPENDIX A

Below are the selection criteria for enrollment in the Public Sector Pharmacy Partner Agreement:[43]

- Pharmacy must be registered with the Pharmacy Council of Jamaica
- Must be a contracted NHF Provider and member of the electronic Provider Access System (PAS) network
- Strategically located in close proximity to a major hospital/health centre or town centre.
- Must be willing to accommodate inspection by NHF prior to selection and auditing based on defined schedules during the contract period.
- Must have an adequate and comfortable waiting area to accommodate six (6) to ten (10) customers.
- Must have adequate and proper storage facilities to accommodate approximately 190 Vital Essential and Necessary (VEN) list items.
- Willing to provide own computer(s), thermal printer, labels, receipts and any other required equipment for use in the pharmacy as per specifications, for the operation of the NHF Pharmacy Inventory Management System (PIMS)
- Must be willing to utilize web-based pharmacy software system provided by NHF for dispensing of NHF Programme items. This software will allow NHF to remotely monitor transactions and track inventory levels.
- Have cold chain management in place – medication refrigerator, thermometer, and temperature recording log inclusive of proper arrangements for backup power in the event of power outages.
- Must be able to process approximately 30 scripts (indicative) per day with an average waiting time of 30 minutes per customer.
- Willingness to execute prescription processing and handling of its records in keeping with the Pharmacy Act of Jamaica and the defined business rules of NHF.
- Willingness to be responsible for medication errors which occur during practice.

[43] As provided by the National Health Fund.

- Must be willing to accept as payment a service fee of $600 per script. Four hundred dollars ($400) to be paid by the NHF and a service charge of two hundred dollars ($200) to be paid by the beneficiary and to receive payments weekly via electronic bank transfers.
- Shall ensure commitment to treating all patients with equity (public patients and private patients).