

***“The FTC’s Merger Assessment
Guidelines”***





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Merger Assessment Guidelines

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Overview

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- Mandate of the FTC
- The Need for Guidelines
- Aim of Merger Review
- The transactions covered by the Guidelines
- Types of Mergers
- Applicable section of the Fair Competition Act
- The Merger Review Process

Overview (contd)

PART 2:

- Assessment of Mergers
- Theories of Harm
- Competitive Constraints
- Merger Analysis
- Efficiencies
- Remedies

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- Case Studies

PART 1

Mandate of the FTC

- Protect and promote competitive markets
- Provide consumers with better products and services
- Provide consumers with a wide range of choices at the best possible prices

The Need for Merger Guidelines

Potential Benefits of Mergers

- Assist businesses and markets to grow = healthy economy
- Develops new products more efficiently

Potential Harm of Mergers

- Eliminates competition
- Leads to worse outcomes for consumers (higher prices, lower quality, reduced choices)

Aim of Merger Review

- To identify, assess, and challenge likely anti-competitive mergers before they are consummated
- To minimize consumer harm

Transactions covered in the Guidelines

○ Mergers

Joining of two or more enterprises into an existing enterprise or the forming of a new enterprise

Example – Amalgamation of RJR and the Gleaner Company

○ Acquisition

Obtaining of ownership and control by one enterprise, in whole or in part of another enterprise

Example – Digicel's acquisition of Claro

○ Joint Ventures

Two or more parties agree to develop a new business enterprise with its own assets
Example - JETS (Multilink)

Types of Mergers

- **Horizontal Mergers**

Merger between two enterprises that supplies competing products or services

Example – a merger between the Gleaner and the Observer

- **Vertical Mergers**

Merger between enterprises operating at different stages in the same industry

Example – the Gleaner and a paper manufacturer

- **Conglomerate Mergers**

Mergers between enterprises in unrelated lines of business

Example – a car manufacturer and a food processing enterprise

Applicable Section of the Fair Competition Act (FCA)

- Section 17 (1) of the FCA prohibits agreements which:
 - Have as its purpose the substantially lessening of competition or
 - Have or are likely to have the effect of substantially lessening of competition in a market

What is the substantial lessening of competition?

- When rivalry is substantially less intense after the merger than would otherwise have been the case
- Consumers are harmed when competition is harmed
- Examples: higher prices, reduced quality, reduced choices

Applicable section of the FCA

- Section 17 (2) of the FCA provides a non-exhaustive list of provisions which are considered to have the effect of substantially lessening competition.

Applicable section of the FCA (contd)

- Section 17(3) states that an agreement found to substantially lessen competition shall:
 - (i) have no effect and
 - (i) the provision is unenforceable, unless it falls within the exemptions in section 17(4).

Applicable section of the FCA (contd)

○ Section 17(4) provides that an exemption may be obtained in the following circumstances:

1. An authorization pursuant to section 29 of the FCA has been obtained by the merging parties
2. The FTC is satisfied that the merger provides:
 - a) Consumer benefits and / or
 - b) Other efficiencies

A Claim under Section 17 of the FCA

For a claim to be successful the following must be demonstrated:

- (i) The parties have an agreement(s)
- (ii) The agreement(s) contains provisions that:
 - a. Have as their purpose the substantially lessening of competition
 - OR** b. Have the effect of substantially lessening of competition
 - OR** c. Have the likely effect of substantially lessening of competition in a market

A Claim under Section 17 of the FCA (contd)

- iii. No authorization obtained in accordance with section 29 of the FCA
- iv. No efficiency justification as stated in section 17(4) of the FCA

Review of Mergers in Jamaica

FTC v. Digicel Jamaica Limited and Anor [2017] UKPC 28

- Confirmed the FTC's authority to investigate mergers under section 17 of the FCA

Review of Mergers in Jamaica (contd)

- The FTC is only statutory body with jurisdiction to assess the competitive effects of any merger transaction.

Examples of merger transaction:

- A and B come together to form C
- A acquires B and B ceases to operate
- A acquires controlling influence in B and both continue to exist

Controlling Influence in Merger Review

- Controlling influence is ascertained by:
 - (i) Acquisition of majority of voting rights
 - (i) Right to determine strategic commercial behaviour of the enterprise

Circumstances in which the FTC review mergers

- Section 5(1) of the FCA establishes the functions of the FTC and its authority to investigate business conduct that may contravene the FCA.
- Mergers may come to the FTC's attention by:
 - (i) External request
 - (ii) FTC's initiative
 - (iii) Request by the Minister
 - (iv) Interested party

Circumstances in which the FTC reviews mergers (contd)

- Section 29(1) of the FCA allows:
 - the FTC to grant authorizations to parties who propose to enter a transaction that may raise competitive concerns.
- Authorization granted if transaction promotes public benefit

The Merger Review Process

- Two Phases in the Merger Review Process

- ❖ **Phase 1**

- ✓ Assessment of the merger to determine whether it raises competitive concerns
 - ✓ Parties can propose remedies, if competitive concerns are observed
 - ✓ Will last no more than 30 working days

The Merger Review Process (contd)

- Merger review may end at Phase 1 where:

- a. The merger raises no competitive concern

Example – FTC’s investigation into Grace Kennedy Financial Group’s Acquisition of Key Insurance Company Limited (2020)

- b. Parties proffer remedies that rectify the competitive concerns identified

- Globally approximately 92% of mergers are approved without conditionalities in Phase 1

The Merger Review Process (contd)

❖ Phase 2

- ✓ Occurs because the merger raises competitive concerns and
- ✓ Proposed remedies by the merging parties are insufficient
- ✓ Involves an assessment of whether the merger substantially lessens competition
- ✓ Will take no more than 60 working days to complete

The Merger Review Process (contd)

- Phase 2 differs from Phase 1: analysis involves more probing into the merger as the FTC is required to form a definitive view.

- Examples of Mergers assessed in Phase 2:
 - i. Investigation into the amalgamation of RJR and Gleaner Company Limited (2015)
 - ii. Investigation into the acquisition of Pure National Ice Company Limited (2019)

Pre-Merger Notification

- Pre-merger notification is not mandatory in Jamaica
- Benefits of pre-merger notification
 - Confirms to the merging parties with legal certainty that the merger is not anticompetitive
 - Minimizes delay of the merger
 - Provides the ability to identify and remedy problematic transactions

Part 2

Assessment of Mergers

- **Central question:** Will the merger enhance the level of market power, i.e. lead to increased prices or other harm to consumers?
- **Market power:** “the ability to profitably sustain prices above competitive levels”
- If a merger does not create, protect, or enhance market power, it should be cleared

Theories of Harm

- Theories of Harm (ToH)
 - Definition
 - How will an agreement/practice harm competition and adversely affect consumers?
 - Harm to Rivals + Harm to Consumers
- Focuses the assessment
- ToH Phase 1 can differ from ToH Phase 2

Competitive Constraints

- **Existing competition:** firms already in the market
- **Potential competition:** firms that may enter the market and prevent exercise of market power
- **Buyer power:** credible threats by customers to switch to new suppliers or sponsor entry and growth
- **Manufacturer constraint:** credible threats by input supplier to switch supply to other retailers for e.g. resale price maintenance

Merger Analysis

Horizontal Mergers

(merger between enterprises that supplies competing products or services within the relevant market)

Relevant Market	Competition Concerns
Overlapping products of merging businesses	Is the merger expected to enhance the merged entity ability to unilaterally increase its prices?
	Is the merger expected to increase the merged entity ability to coordinate with its rivals to compete less intensely?

Merger Analysis

Vertical Mergers

(Merger between enterprises operating at different stages of the supply or distribution chain)

Relevant Market	Competition Concerns
Products in the same chain	Is the merger expected to foreclose market access in a manner that harms competition e.g. raising rivals cost?
	Is the merger expected to increase the ability and incentive of parties to collude in a market?

Merger Analysis

Conglomerate Mergers

(mergers between producers of competitively unrelated products)

Relevant Market

Products sold to overlapping customers

Competition Concerns

Is the firm able to exercise power as a group of companies?

Merger Analysis: Horizontal Mergers

- Potential pro-competitive effects of horizontal mergers
 - Get rid of ineffective management
 - Reduce and/or eliminate costs

Merger Analysis: Horizontal Mergers (contd)

- Potential anti-competitive effects of horizontal mergers
 - **Unilateral effects**
 - **Coordinated effects**

Assessment of Mergers: Unilateral Effects

- **Unilateral effects** arise when two closely competing products are brought under common ownership
 - Increased prices → sales diverted from each product but same owner
 - The higher diversion of sales between products the higher the unilateral incentive to raise price
 - For this to be effective the owner must have market power

Assessment of Mergers: Coordinated Effects

- Coordinated effects:

Before the merger: $A + B + C$ competed aggressively

Merger: $A + B$ merges $\rightarrow AB$

Post merger: $AB + C$ increase their market power by coordinating their actions

- Collusion

Assessment of Mergers: Coordinated Effects

- Collusion arises when firms are able to coordinate and sustain prices over the competitive level over time.
- Collusion is thus composed of two main mechanisms:
 - Coordination (which often, but not always, involves some form of communication) and
 - Enforcement (or sustainability)

Efficiencies

- Benefits from merging
 - Reduce costs, eliminate duplication, economies of scale
- Could these benefits have been achieved otherwise?:
 - **No.** Merger-specific
 - **Yes.** Not merger-specific
- Consumer benefit: lower prices, better products, more choices

Efficiencies

- Efficiencies → reduction in market share but ↑ consumer benefit
- **Good**

Remedies

- An agreement is found to be anti-competitive where it:
 - i. Substantially lessens competition and
 - ii. Has no merger-specific efficiency gains

Remedies (contd)

- Recommendations by the FTC to mitigate anticompetitive effects
- Commence proceedings in the Supreme Court

Remedies (contd)

Pursuant to section 47 of the FCA, the FTC may request that the court:

- Levy a fine not exceeding \$5,000,000 for enterprises
- An injunction

PART 3

Case Study

❖ Investigation into the acquisition of Oceanic Digital (Jamaica) Ltd (“Claro”) by Digicel Jamaica Ltd (“Digicel”)

○ Facts

- March 2011, Digicel signed an agreement to acquire America Movil’s Claro business in Jamaica
- Digicel would then sell its businesses in El Salvador and Honduras to America Movil
- At that time, there were three significant suppliers – Digicel, Claro and LIME

Case Study 1 (contd)

oLegal Analysis

- The acquisition examined under section 17 of the FCA, specifically s. 17(2)(b) and/or s. 17(2)(c)
- It was found the agreement did not have as its purpose the substantial lessening of competition
- However may be in conflict with section 17 of the FCA if the effect or likely effect was to lessen competition substantially in a market

Case Study 1 (contd)

- Economic Analysis

- Relevant market was identified as short message services (“SMS”) and voice messages

- Geographic market was Jamaica

- It was determined that:

- a. Digicel exercised market power prior to Claro’s entry in 2007

- b. Claro was a significant competitor to Digicel

- c. LIME was unlikely to constrain Digicel in the event that Claro exited the market

Case Study 1 (contd)

○ Conclusion

- Acquisition was likely to result in a substantial lessening of competition
- Both competition and consumers would be harmed
- No merger specific efficiencies
- Based on section 17, the acquisition should not be approved

Case Study 2

❖ Acquisition of Champion Gaming Limited by Supreme Ventures Limited

○ Facts

- In 2019, Supreme Ventures Limited acquired Champion Gaming Limited
- Champion Gaming Limited was the largest market player in the slot machine gaming market
- The acquisition was investigated to determine whether there would be adverse effects in the gaming services market to the detriment of consumers

Case Study 2

- Legal Analysis

- The acquisition was investigated pursuant to section 17 of the FCA
- It was found that the Agreements did not have as their purpose the substantial lessening of competition
- The Agreements' effect or likely effect of substantially lessening competition was examined by way of economic analysis

Case Study 2 (contd)

- Economic Analysis

- Relevant product market was betting services on slot machines.
- Geographic market was Jamaica and in multiple regions that the parties were present in before the acquisition
- It was determined that the easy of entry in the various geographic markets limited the incentive to engage in anticompetitive conduct.

Case Study 2 (contd)

- Conclusion

- Acquisition unlikely to have the effect of substantially lessening competition
- There was no breach of the FCA.

