



Staff Opinion on Online Marketing in Jamaica by Foreign Universities

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This opinion will limit its response to the extraterritorial application of the Fair Competition Act (FCA) to a university incorporated outside of Jamaica that provides its services through distance learning to students in Jamaica. It is based solely on the information received from the University Council of Jamaica in their letter dated November 26, 2020. No additional information, documentation, or material concerning the issue was used.

The Issues

1. Whether a foreign university marketing online in Jamaica or otherwise seeking to sell educational services to Jamaican students, may be regarded as having a presence and operating in Jamaica;
2. Whether the FCA has jurisdiction over online tertiary institutions that market to Jamaican students or whose services are purchased by students in Jamaica; and
3. Whether foreign university marketing online should be accredited.

The Opinion

In addressing the current issues, it must be first established how a market is defined as per the FCA. Section 2(3) of the FCA states that *“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”*.

Thus, a relevant market has both a product and a geographic dimension. The relevant product market consists of a group of products that are considered close substitutes, for example, the market for broadband internet services. The geographic dimension of the market is the area in which that group of products is sold or purchased.

In the present case, the product market is the market for online university or tertiary educational instruction services. As these services are provided, online the geographic market is the area the products are sold or purchased, which would be wherever the purchasers of this service are located. As persons in Jamaica purchase university or tertiary educational services and receive this instruction in Jamaica, it is opined that Jamaica is part of the relevant geographic market.

Thus, these online universities may be considered in breach of the FCA if they make representations that are materially false, misleading, or likely to mislead. This prohibition is found in section 37(1) (a) of the FCA, which

addresses misleading advertising and applies to anyone promoting, directly or indirectly, the supply or use of a product or service or any business interest by any means.

For a representation to be false or misleading or likely to be misleading under section 37 of the FCA, specific elements must be established. These are as follows:

- (i) there has to be a person acting in pursuance of a trade,
- (ii) that person must be acting for the purpose of promoting, directly or indirectly the supply or use of goods and services,
- (iii) the person must make a representation to the public, and
- (iv) the representation is false or misleading or is likely to be misleading in a material respect.

Some examples of conduct by a university or tertiary institution that would constitute a breach of section 37 of the FCA are:

- a. stating that it is accredited if it is not;
- b. claiming it has accolades, it has not been given;
- c. advertising a course that is not provided or does not run; and
- d. advertising courses to be at the degree level but that are offered only as diploma courses.

Therefore, it is correct to say that the foreign university has a “presence” in Jamaica through its distance learning programmes marketed online in Jamaica and accessed by consumers. It must also be noted that such activities amount to “operating in Jamaica” because the foreign universities have extended their operation of providing educational services to students in Jamaica.

Generally, the nationality of a company or a university is the country of its incorporation. A company is a legal person that is subject to the laws of the country of its nationality. However, to establish extraterritorial jurisdiction over a university incorporated outside of Jamaica that does not physically operate in Jamaica, the online nature of its operation restricts the application of the FCA. The foreign university would need to establish a location in Jamaica for it to be subject to the FCA.

As it relates to the issue of accreditation, it must be noted that the FTC’s lack of jurisdiction over foreign universities to enforce measures does not preclude the University Council of Jamaica (UCJ), the Jamaica Tertiary Education Commission, or other relevant educational body from taking other steps to protect Jamaican consumers. Thus, the issue of accreditation is a matter to be addressed by the UCJ.

Conclusion

Finally, while these universities may fall within our geographic market, the FCA does not have an extraterritorial application to universities registered outside of Jamaica. Unless there is a treaty or cooperation agreement to address cross-border anti-competitive conduct within which distance learning falls, the FTC cannot pursue enforcement measures.