

FAIR TRADING COMMISSION

Promoting Competitive Markets

Presentation to Red Stripe March 18, 2021

The Fair Competition Act

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Outline

- Background on FTC
- Competition Law
- Provisions under the FCA
 - 5 main conducts
 - Remedial Measures
- Summary

Fair Trading Commission

Fair Competition Act, 1993

- Encourage competition in the conduct of trade
- Ensure enterprises have an equal opportunity to participate in the economy
- Provide consumers with better products and choices at the best possible prices

What we do at the FTC?

- 1. Investigations
- 2. Competition Advocacy
- 3. Market Studies
- 4. Public Education
- 5. Advisories

What triggers an investigation?

- 1. On its own initiative
- 2. At the request of the Minister
- 3. At the request of any person

When Advocacy?

The FTC uses this tool when there are competition concerns regarding

- a. Legislations
- b. Government policies



WHAT IS COMPETITION LAW?

COMPETITION LAW

- Ensures competition between businesses
 - A combination of Economics and Law
- Data driven relies heavily on data

Provisions under the FCA

- Agreements
 - a. Mergers
 - b. Cartels
- Abuse of Dominance
- Resale Price Maintenance
- Consumer Protection Matters
 - a. Misleading Advertising
 - b. Double Ticketing



Agreements

FCA Section 17 (1)

Prohibits agreements which:

have the purpose or have or likely to have the effect of substantially lessening competition subject to section 17(4)

WHAT IS SUBSTANTIALLY LESSENING OF COMPETITION?



FCA Section 17 (2)

Provides a non-exhaustive list of provisions which are considered to have the effect of substantially lessening competition

FCA Section 17 (3)

States that an agreement found to substantially lessen competition shall:

- have no effect and
- > the provision is unenforceable, unless it falls within the exemptions in section 17(4).

FCA Section 17 (4)

Provides an exemption in the following circumstances:

- 1. An authorization has been obtained by parties to the agreement
- 2. The FTC is satisfied that the agreement provides:
 - a. Consumer benefits and / or
 - **b.** Other efficiencies



A. Mergers

3 Types of Mergers

Horizontal Mergers

Merger between two enterprises within the same market or industry

Vertical Mergers

Merger between enterprises operating at different stages in the same industry.

Conglomerate Mergers

Mergers between enterprises in unrelated lines of business.

Pre-Merger Notification

Pre-merger notification is not mandatory in Jamaica

> FTC encourages enterprises to notify us before consummating a merger

Pre-Merger Notification Cont'd

Benefits of pre-merger notification

- Confirms with legal certainty that the merger is not anticompetitive
- Minimizes delay of the merger
- Provides the ability to identify and remedy problematic transactions

Merger Assessment

Merger assessment not more than 90 working days

Uses empirical data on market participants

Rely on parties to submit data/information



Merging Parties

RJR

- a. Platforms used:
 - i. Television
 - ii. Radio
 - iii. Internet
- b. Services provided:
 - Advertising services
 - ii. Media content
 - iii. Access to platforms

Merging Parties

Gleaner

- a. Platforms used:
 - i. Newspaper
 - ii. Radio
 - iii. Internet
- b. Services provided
 - Advertising services
 - ii. Media content
 - iii. Access to platforms
 - iv. Printing services

FTC's Interest in the Merger

- Overlapping lines of business
 - Provide advertising services
 - ii. Access to their platforms
- Merging entities provide critical input to rivals

Threat to Competition

SLC when:

- 1. Competitors are harmed; and
- 2. Consumers are harmed

Threat to Competition

Pre-merger:

- 1. Gleaner, RJR and independent advertising agencies ("IAA") compete for advertisers
- 2. IAA need to access media platforms to serve its advertisers
- 3. IAA have the opportunity to use any or both entities

Threat to Competition

Post-merger:

- 1. Head to head competition between merging entities is removed
- 2. Merged entity is likely to discriminate against IAA harming them
- 3. Consumers face higher prices, limited choices and a slower pace of innovation

Findings

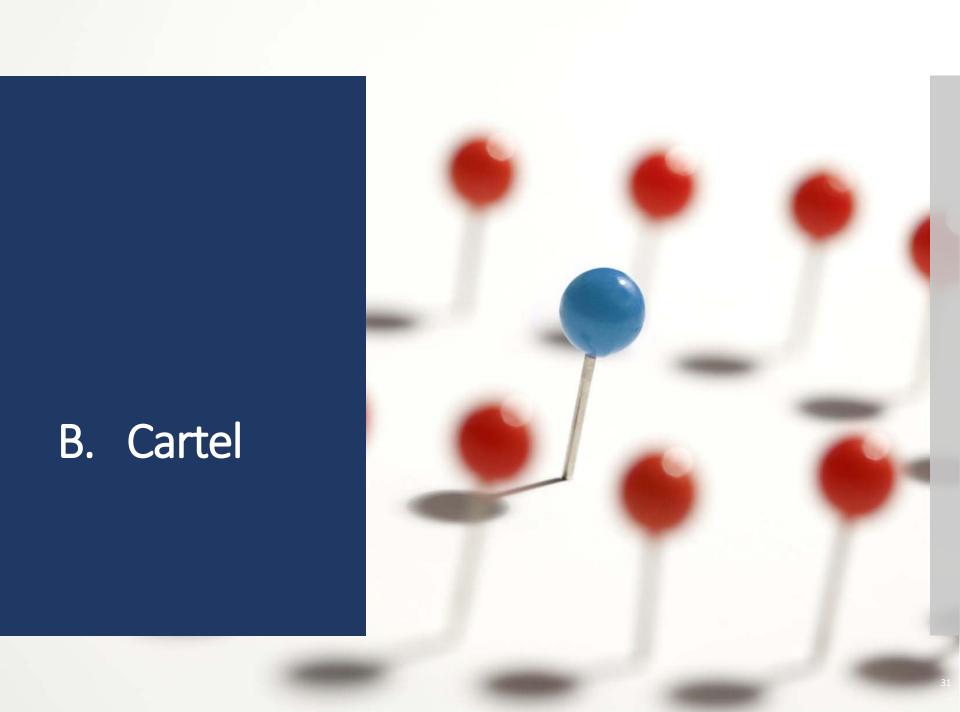
- Harm to competitors
 - IAA's are harmed
- Harm to consumers
 - clients of IAA and customers of advertisers are harmed.
- > SLC

Potential Interest Benefits

- Reduction in cost of offering radio services
- Benefit fails to off-set the SLC

Conclusion

- Proposed merger contravenes section 17 of FCA
- Recommended measures to mitigate SLC
 - Confine creation of advertising content to 'low budget production'
 - Do not engage in anticompetitive discriminatory conduct





What is a cartel agreement?

Cartel Agreements

Aim to achieve the same negative effects as a monopoly

Restricts output and raising prices

Reduces efficiency

Examples of Cartel Agreements

- Price fixing
- Bid rigging
- Controlling the output
- Limiting supply of goods and services

Abuse of a Dominant Position

What is meant for a company to be in a dominant position?

FCA Sections 19 – 20

Claims regarding abuse of dominance.

- The sections require a finding of dominance, and abuse of that dominance.
- A further finding that the abuse has had or is having the effect of lessening competition substantially in a market.

FCA Section 19

"An enterprise holds a dominant position if by itself or 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".

FCA Section 20

- ➤ An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market
- For example, it restricts the entry of any person into that or any other market

Examples: Abuse of a Dominant Position

- Exclusive Dealings
- > Retail Below Cost

Defenses to Abuse of Dominance Position

Section 20(2) of the FCA provides that an enterprise shall not be treated as abusing a dominant position if:

- behaviour was to improve the production or distribution of goods or to promoting technical or economic progress
- consumers are allowed a share of the benefit
- The enterprise enforces or seeks to enforce any right



The Party: Red Stripe

Sells brewed products to

- Bars/restaurants/pubs/clubs
- Events operators
- Supermarkets/wholesales/liquor stores

The Challenged Conduct

- Red Stripe entered into exclusive arrangements with six outlets
 - Outlets must promote only Red Stripe products
 - Marketing rebate is given
- Red Stripe entered into exclusive arrangements with operators of events
 - Operators must sell and promote only Red Stripe products
 - Sponsorship is given

FTC's Interest

- > The challenged conduct could harm
 - Wholesale providers of brewed products
 - Retailers of brewed products
- Final consumers could be harmed

- Define relevant market
- > Assess whether the party is dominant
- Assess the anti-competitive impact
- Assess pro-competitive benefits

- Define relevant market
 - Market for brewed products



- Assess whether the party is dominant
 - Red Stripe was dominant in the relevant market
 - Significant presence in the relevant market
 - Potential entrants face high impediments to entry

- Assess the anti-competitive impact
 - Negatively affect competitor's ability to sell
 - Consumers face higher prices and limited choices
- > SLC

- Assess pro-competitive benefits
 - The restrictions had no pro-competitive benefits

Conclusion

> This contravenes section 20 of the FCA



Resale Price Maintenance RPM



What is resale price maintenance?

FCA Sections 22 – 23

Claims regarding resale price maintenance.

- Unlawful for two or more suppliers of goods, engage in following agreement:
 - Withhold goods from dealers who refuse to sell goods at an agreed price
 - Refuse to supply goods except on less favourable terms/conditions
 - c. To supply goods only to persons who agreed to(a) or (b)

FCA Section 24

Claims regarding resale price maintenance applies to any:

- suppliers or dealers in any goods
- > representatives of such enterprises

FCA Section 25

Provides that any term or condition of an agreement that establishes minimum prices charged on resale of goods is void.

Consumer Protection Matters

MISLEADING ADVERTISING

Section 37 FCA

DOUBLE TICKETING

Section 39 FCA



FCA Sections 37 & 39

- Misleading Advertising
- Double Ticketing

Misleading Advertising

Section 37 of the FCA provides that:

Misleading advertising occurs when the promoter of goods or services makes a representation to the public that is false or misleading in a material respect.

Double Ticketing

Section 39 of the FCA provides that Double Ticketing is:

Supplying goods at the higher of two prices advertised, displayed or as contained on the article for sale.

Remedial Measures

- ➤ If an entity is found to breach any of the provisions of the FCA, then the FTC will:
 - a. Share its findings and allow the company to propose its remedial measures to mitigate the anticompetitive effects
 - b. Commence proceedings in the Supreme Court

Remedial Measures Cont'd

Pursuant to section 45 of the FCA, the FTC may request that the court:

- Levy a fine not exceeding \$1,000,000 for individuals
- Levy a fine not exceeding \$5,000,000 for enterprises
- An injunction



What are Consent Agreements?

Consent Agreements

An agreement between the Commission and a party which is designed to provide an amicable solution to a dispute between itself and such party with respect to an alleged breach of the FCA.

Summary

We examine conducts that are in breach of the FCA, namely:

- Agreements section 17
 - a. Mergers
 - b. Cartel Agreements
- Abuse of Dominance sections 19-21

Summary Cont'd

- Resale Price Maintenance sections 22-25
- Consumer Related matters
 - a. Misleading Advertisement section 37
 - b. Double Ticketing section 39

Public Education

- Quarterly Newsletter FTC NewsLine
- Annual Magazine Compete
- Requests for Opinions
- Newspaper Articles
- Workshops / Seminars
- Website –www.jftc.gov.jm





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