FTC's Guideline to Reviewing Mergers, Acquisitions and Joint Ventures

Fair Trading Commission| Jamaica

ftc@cwjamaica.com| +1 876.960.0120

Available for download at *http://jftc.gov.jm/*

February 2022

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1. OVERVIEW

1. Mergers play a critical role in competitive markets and can benefit the economy and help businesses and markets grow. Enterprises are able to achieve efficiencies such as economies of scale or scope and diversify risk across a range of activities through mergers and acquisitions. Nonetheless, from time to time, certain merger transactions raise the possibility of substantially lessening competition, thereby negatively impacting consumers, businesses, and the economy's overall competitiveness. In Jamaica, the Fair Trading Commission (FTC) was established by the Fair Competition Act, 1993 (FCA) to review these transactions in accordance with its mandate to protect and promote competitive markets.

2. The aim of merger review is to ensure that mergers and other similar transactions do not substantially lessen competition and lead to worse outcomes for consumers through, for example, higher prices, lower quality, or reduced choice. To determine whether an agreement has the purpose, or the effect, or the likely effect of substantially lessening competition, the FTC is mandated under Section 17 of the FCA to review and assess transactions such as mergers, acquisitions, and joint ventures.

3. These Guidelines have been developed to explain how the FTC enforces the *control of uncompetitive practice* provisions of the FCA and provides insights into how the FTC assesses the legality of mergers, acquisitions, and joint ventures. These Guidelines will also show the FTC's approach when reviewing transactions and the types of information that are relevant. They are intended to provide guidance for the business community, their advisers, and the public generally in understanding the FTC's goals, objectives, and processes.

4. These Guidelines are not a prescriptive guide, as the FTC's review and assessment of a transaction are case-specific, and therefore, the FTC's assessment takes account of the particular transaction and the markets being analyzed. These Guidelines may be revised from time to time to reflect new developments as best practices in merger control continue to evolve.

1.1 Are there any notification thresholds?

5. No, the FTC does not currently have a notification threshold.

1.2 What transactions are covered in these Guidelines?

6. These Guidelines generally cover business transactions that fall within section 17 of the FCA, but three of the most common transactions, which are mergers, acquisitions, and joint ventures, are defined below as follows:
   - **Merger**: The term "merger" used in these Guidelines refers to the class of corporate agreements which result in at least one entity legally acquiring controlling influence over a previous independent entity. This amalgamation or joining of two or more enterprises results in either the continuation of an existing enterprise or the forming of a new enterprise.
   - **Acquisition**: The obtaining of ownership and control by one enterprise, whole or in part, of another enterprise. As distinct from a merger, an acquisition does not necessarily entail amalgamation or consolidation of the enterprises. Even where there is complete change in control, an acquisition may lead the enterprises involved to operate as separate entities.
   - **Joint venture**: A business arrangement in which two or more parties agree to develop, usually for a limited period or scope of work, a new business entity with its own assets, usually through the financial contributions of the parties.

7. Although there may be a distinction between mergers, an acquisition, and a joint venture for business efficacy purposes, these transactions pose indistinguishable competitive effects and are therefore given identical considerations under competition law. Accordingly, the treatment of mergers, in general, equally applies to joint ventures and acquisitions. In the case of a merger involving a subsidiary of a company, the investigation will treat the whole company as a unit of the investigation.

1.3 Why are mergers regulated under the FCA?

8. Many mergers benefit competition and consumers by allowing firms to operate efficiently, expand markets and bring benefits to the economy. However, mergers eliminate competition between merging firms, this is particularly so where the parties are direct rivals. In addition, mergers may change how the market operates in ways that lead to higher prices, fewer or lower quality goods or services, or less innovation. Accordingly, mergers are regulated to prevent harm to rivals and harm to consumers.

1.4 Types of Mergers

9. There are three types of mergers:
   - Horizontal Mergers: Mergers between enterprises that supply competing products at the same level of production and/or distribution of a good or service. Horizontal mergers can reduce or eliminate competition but may also enable merging parties to realize efficiency gains. For example, a merger between two automobile manufacturers.
   - Vertical Mergers: Mergers between enterprises operating at different but complementary levels in the chain of production in the same industry, e.g., from raw materials to finished products to distribution. An example would be a steel manufacturer merging with an iron ore producer. Vertical mergers usually increase economic efficiency because the upstream and downstream products or services complement each other. However, they may sometimes have an anticompetitive effect, such as forcing rivals to exit the market, raising rival's costs, or creating barriers to entry in a manner that lessens competition.
   - Conglomerate Mergers: Mergers between enterprises operating in different/unrelated lines of business. For example, a merger between an automobile manufacturer and a food processing enterprise.

1.5 What section(s) of the Fair Competition Act applies to Mergers?

10. The FTC reviews mergers under section 17 of the FCA, which prohibits agreements that have as its purpose the substantial lessening of competition or have or are likely to have the effect of substantially lessening competition for goods and services in Jamaica.

11. Section 17 of the FCA provides that:

"17.-(1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition or have or are likely to have the effect of substantially lessening competition in a market.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) affect tenders to be submitted in response to a request for bids;

(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(f) make the conclusion of contracts subject to acceptance by the other parties supplementary of obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts,

being provisions which have or are likely to have the effect referred to in subsection (1).

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied –

(a) contributes to –

(i) the improvement of production or distribution of goods and services; or

(ii) the promotion of technical or economic progress,

while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned."

12. The authority of the FTC to investigate mergers based on section 17 was confirmed in the Privy Council judgment of *FTC v Digicel Jamaica Limited and Anor.* [2017] UKPC 28. The Court reasoned that: "an agreement by which two competitors merge is an agreement falling within subsection 1 because the reduction in the number of significant competitors in a market is self-evidently likely to have the effect of lessening competition." The Court also stated that no provision in the FCA excluded any particular sectoral market from the FTC's jurisdiction. This, however, is subject to legislative exclusions, for example, the FTC is not permitted to investigate matters relating to the Coffee Industry Board.

2. REVIEW OF MERGERS IN JAMAICA

2.1. Who is responsible for reviewing Mergers in Jamaica?

13. Numerous statutory bodies have regulatory oversight over different aspects of mergers in Jamaica across various sectors. The FTC, however, is the only statutory body responsible for assessing the competitive effects of mergers.

14. In assessing the competitive effects of a merger, the FTC is guided by the FCA, which provides that the effect on competition should be determined with reference to all factors that affect competition in a market.

2.2. What types of merger transactions may the FTC review?

15. The FTC has the jurisdiction to examine any merger transaction (which includes acquisitions and joint ventures). The common feature among these transactions is where two or more enterprises cease to operate independently.

16. *"Enterprise"* as defined by the FCA, means any person who carries on business in Jamaica. It may include whole businesses or parts of businesses, whether or not they operate for

profit. Two enterprises cease to be distinct if they are brought under common ownership or control such as:

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

2.3. What is controlling influence?

17. In conducting its merger review, the FTC will examine whether the transaction enables an enterprise to acquire the ability to exercise some form of control over the previously independent enterprise. In this regard, there is a presumption that an acquisition of a majority of voting rights of another entity involves an acquisition of sole control. Generally, the ownership of the majority of a company's voting stock gives a shareholder(s) controlling influence overall corporate actions of the entity.

18. However, there may be circumstances where a minority shareholder may exercise controlling influence where they are not in the position of outright voting control. For example, by way of a shareholder's agreement or pursuant to corporate governance provisions, a minority shareholder may have the right to determine the strategic commercial behaviour of the entity. The strategic commercial behaviour of an enterprise may include, but is not limited to, prior approval or veto rights over budgets and strategic plans or the hiring/firing of senior management.

19. The acquisition of the assets of an enterprise may also be subjected to merger review by the FTC. For example, an acquisition of all or substantially all of the tangible and intangible assets used in business operation would be deemed a merger. Accordingly, where there is a change in control over the enterprise where the acquirer obtains the possibility of exercising controlling influence by way of ownership, or the right to use, all or part of the assets of another enterprise and it is likely to impact the acquirer's position in the market place, the FTC will assess the transaction.

2.4. How may the FTC come to review mergers?

20. Section 5 of the FCA details the functions of the FTC and establishes the circumstances that invoke the FTC's involvement in any commercial conduct, including mergers. The FTC may come to review mergers as a result of any of the following circumstances:

- **External Request:** Parties to the transaction can formally notify the FTC by submitting the necessary information for the FTC to begin its review.
- **FTC initiative:** The FTC is responsible for reviewing mergers and can do so even when it has not been notified by the parties. The FTC obtains information about proposed and completed mergers from a range of sources, such as third parties, newspapers, and other secondary sources. Where the FTC learns of a merger, the FTC can initiate a review.
- **A request** from the Minister with portfolio responsibility for the FTC**.**
- **An interested party:** This may be any member of the public.

21. Parties are encouraged to contact the FTC before entering into any agreement that falls under section 17 of the FCA. This is so because, during mergers, enterprises combine assets, technologies and redesign their organizations and management, and it is likely to be costly and, in some cases, unfeasible to undo the process should the FTC conclude that the merger is anticompetitive. Accordingly, to ensure legal certainty that the merger does not harm competition, merging parties should contact the FTC about their transaction.

22. Additionally, section 29(1) of the FCA permits persons who propose to enter a transaction that they believe is prohibited by the FCA to apply to the FTC for authorization. This authorization may be granted where the FTC determines that the transaction is likely to promote public benefit.

2.5. How long does the FTC's merger review process take?

23. The FTC's review comprises two phases: Phase 1 lasts no longer than 30 business days. If the FTC concludes that the merger poses competitive concerns at the end of Phase 1, then

the review advances to Phase 2, which will take up to 60 business days to complete. Accordingly, merger reviews should take no longer than 90 business days.

24. Phase 1 starts on the first business day after the FTC confirms (a) that the relevant information for reviewing the merger has been provided by the party (parties) to the merger or any other external source or; (b) in the case of an investigation started on the FTC's initiative or requested by the Minister, that it has received sufficient information to enable it to begin its investigation. The FTC may 'stop the clock' in certain circumstances where the information the FTC has formally requested remains outstanding.

25. Therefore, it is in firms' interest to give full, accurate, and timely information since this will facilitate the process and speed up the review. The FTC will keep the merging firms informed on the progress and be transparent in the proceedings. We encourage open dialogue between the merging parties and the FTC.

26. At Phase 1, the FTC would request from the merging parties documents such as the merger agreement and exhibits, copies of audited financial statements, annual reports, and any other documents relevant to considering the effects of the merger on competition.

2.6. What is done in Phase 1?

27. In Phase 1, the FTC assesses whether the information collected regarding the merger raises competitive concerns. If the merger raises competitive concerns, such as raising prices, limiting choices, reduction in quality, and slowing of innovation, the FTC will proceed to a Phase 2 investigation.

28. Merging parties may offer in Phase 1 to modify aspects of the transaction to remedy any competitive concerns are identified. A merger review may thus be concluded at Phase 1, where, after investigation, the FTC is satisfied that the agreement is unlikely to lead to a lessening of competition. However, where the merging parties' commitments to address the competitive concerns are insufficient, the FTC will proceed to Phase 2.

2.7. Will parties be able to make representation at the end of Phase 1?

29. Upon completion of Phase 1, the FTC will share its findings with the merging parties. Where appropriate, the merging party may either provide justifications to demonstrate that the merger is not harmful to competition (see subsection 17(4) of the FCA above) or propose remedies to resolve the anticompetitive concerns.

2.8. Why would the FTC commence a Phase 2 review?

30. The FTC commences a Phase 2 review if the information available, including proposed remedies, in Phase 1 is not sufficient to address the likely competitive effects. Where it is determined that the merger substantially lessens competition and there is no efficiency justification (see subsection 17(4) of the FCA above), the FTC may enter into a negotiated consent agreement with the enterprise. This consent agreement will include provisions geared at restoring competition. Alternatively, or where a consent agreement cannot be arrived at, the FTC will seek the intervention of the Supreme Court of Jamaica to request an appropriate remedy. The FTC may recommend remedies such as the prohibition of the transaction *en bloc* or the divestiture (sale) of the parts of the resulting entity.

2.9. How does a Phase 2 review differ from a Phase 1 review?

31. The FTC is required to consider both at Phase 1 and Phase 2 whether the merger raises any competitive concerns. The FTC uses the same overall analytical approach in Phase 1 and Phase 2 when assessing the potential effects on competition. At Phase 1, the FTC considers whether the merger raises competitive concerns. At Phase 2, the FTC decides whether the merger is more likely than not to lead to a substantial lessening of competition. Phase 2 requires the FTC to reach a definitive view; this means that the Phase 2 investigation and analysis are deeper and broader than Phase 1.

32. Phase 2 is the final phase of the FTC's investigation, and so the actions that it may take at the end of that Phase are different from those at the end of Phase 1. If the FTC finds after its Phase 2 investigation that the merger is not expected to result in a substantial lessening of competition, no further action is taken. However, if the FTC finds at Phase 2 that a

merger is expected to result in a substantial lessening of competition, it will decide what action should be taken to remedy, mitigate, or prevent that substantial lessening of competition (see **What remedies can the FTC apply?** in section 4.1. below).

2.10. Does the FTC always launch a Phase 2 investigation?

33. No. If the FTC does not find that the merger raises any competitive concerns at the completion of Phase 1 review, it will not commence a Phase 2 investigation. However, where the FTC finds that a merger raises competitive concerns, it must begin a Phase 2 investigation.

34. Additionally, the FTC may decide not to undertake a Phase 2 investigation where the merging parties address the competition concerns within five business days after receiving the FTC's decision that the merger is likely to harm competition. Phase 2 may not occur where the parties at Phase 1 provide remedies that satisfy the FTC's concerns regarding the substantial lessening of competition.

2.11. Do enterprises have to pay a fee for the FTC's merger review assessment?

35. No. Currently, enterprises do not have to pay a fee.

2.12. What happens when parties merge without notifying the FTC?

36. If the FTC finds that a merger lessens competition substantially in a market, the FTC may seek an interim injunctive order from the Supreme Court of Jamaica to prohibit the transaction from being completed. Where the merger has been consummated, the FTC may request that the Court declare the merger agreement void. In which event, the parties to the merger could be required to separate themselves or divest the areas that have anticompetitive effects on the market.

2.13. Why is it in the interest of the parties to notify the FTC?

37. The FTC may review a merger whether or not it has been advised beforehand. Consequently, there may be risks for enterprises if parties fail to notify the FTC of their intention to merge.

38. The FTC has a responsibility to review merger activities and may investigate, on its own initiative, mergers that it has not been notified about. See paragraph 2.11 above.

2.14. Can the merging parties exchange sensitive information before the consummation of the merger?

39. An important fact to note is that until the merger is consummated, the parties are still governed under the FCA provisions that assess the sharing of information. No information should therefore be shared between the parties that have the likelihood to substantially lessen competition in the event that the merger is not consummated.

40. Additionally, the FTC is obligated to observe the strictures of confidentiality, and this is grounded in the FCA, specifically section 53, which prohibits the publication or communication of any information, documents, or evidence given to the FTC in connection with its operations. Any person who breaches this confidentiality is guilty of an offence and is liable to a fine not exceeding JM$1,000,000 or to imprisonment not exceeding two years, or both fine and imprisonment.

3. ASSESSMENT OF MERGERS

41. In assessing the impact of a merger on competition in a market, the following issues are important for the FTC's consideration:

    A. What is the relevant market to be assessed?
    B. Will the merger be likely to substantially lessen competition?
    C. What efficiencies will the merger create for the market?

D. What other benefits or drawbacks will the merger bring to the market, the economy, and consumers as a whole?

3.1. What is the substantial lessening of competition?

42. Competition is the process of rivalry over time between businesses seeking to win consumers' confidence by offering them a better deal. In determining whether there is a substantial lessening of competition, the FTC assesses the nature and extent of the market, the probable nature, and the extent of competition that would exist in the absence of the merger, the way the market operates, and the nature and extent of the contemplated lessening. In other words, this occurs when rivalry is substantially less intense after the merger than would otherwise have been the case, resulting in a worse outcome for consumers (through, for example, higher prices, reduced quality, or reduced choice). The determination of what constitutes substantial lessening of competition depends on the particular facts of the merger under investigation.

43. In evaluating whether a merger is likely to have the effect of substantially lessening competition in a relevant market, the FTC considers the following non-exhaustive list of 'merger factors':

(i) the actual and potential level of competition in the market;
(ii) the height of barriers to entry to the market;
(iii) the level of concentration in the market;
(iv) the degree of countervailing power in the market;
(v) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins or the removal of a vigorous and effective competitor;
(vi) the extent to which substitutes are available in the market or are likely to be available in the market;
(vii) the dynamic characteristics of the market, including growth, innovation, and product differentiation.

44. In measuring market concentration, the FTC may consider the following factors:

(i) Market shares;

- Market shares refer to the percentage of an industry's sales controlled by a particular enterprise over a specific period of time.

(ii) Number of enterprises in the market;

- All firms that currently earn revenues in the relevant market are considered market participants.

(iii) Market Concentration

- The 2010 US Horizontal Merger Guidelines define market concentration as being a function of the number of enterprises in a market and their respective market shares. As an aid to the interpretation of market data, the FTC will use the Herfindahl-Hirschman Index (HHI) of market concentration and concentration ratios. These are used to determine the competitiveness of the market. The closer the market is to a monopoly, the higher the market's concentration.

3.2. How does the FTC determine whether there is a substantial lessening of competition?

3.2.1. Identifying the relevant markets

45. In examining the likely effects of a merger, the FTC first identifies the market(s) that are likely to be affected. Identifying these relevant markets based on international best practices in the field of competition law. The identification of markets establishes the relevant field of inquiry and identifies the sellers and buyers that may potentially constrain the commercial decisions of the merger parties and the merged enterprise, as well as those participants and consumers that may be affected if the merger lessens competition.

46. What the relevant market contains depends on the type of merger:

- When one business acquires a current or potential rival (a horizontal merger), the relevant market contains the overlapping products of the merging enterprises.

- When an enterprise acquires another operating at a different level in the distribution chain (a vertical merger), the relevant markets are those for the products in the same chain
- When an enterprise acquires another that supplies different products that its consumers also buy (as in a conglomerate merger), the relevant markets are those for the products sold to those consumers.

47. In general, the relevant market(s) comprise the products supplied by at least two merging enterprises, which directly compete with each other at the time of the proposed merger or are likely to do so in the foreseeable future.

48. Nonetheless, when assessing a merger, the FTC may consider how some products compete with the merging enterprises' products more significantly than others.

3.2.2. Market Shares

49. As part of its merger assessment, the FTC considers market shares of the merging enterprises in the relevant market(s). Market shares can indicate the potential extent of an enterprise's market power. The combined market shares of the merging enterprises, compared with their respective pre-merger market shares, can indicate the likely effect of the merged enterprise's market power.

3.3. What are the different types of Competitive Effects?

3.3.1. Unilateral effects

50. One way a horizontal merger can harm competition is by removing an important competitor, allowing the merged enterprise to raise prices profitably. This is known as a 'unilateral effect.'

51. The following non-exhaustive list gives circumstances under which unilateral effects are likely:

- The merging enterprises' products are close substitutes.

- Consumers have little choice of an alternative supplier because the costs to them of switching from one to another are high.
- It is difficult for rival enterprises to respond to price increases because they have no spare production capacity.
- The merger eliminates an important competitive force in the market, for example, an enterprise with a novel commercial model.
- There are already few significant enterprises in the market, or if the merger results in an enterprise with a significant market share.

3.3.2. Coordinated effects

52. A horizontal merger may harm competition by enabling or encouraging post-merger coordinated interaction in the market that harms consumers.

53. Coordination may arise when enterprises operating in the same market recognize that they can reach a more profitable outcome if they limit the extent to which they compete against each other.

54. Such coordination needs not be explicit (collusion) but might emerge through implicit understandings and take several forms. For example, enterprises may be able to keep prices higher than they would otherwise be if there is an implicit understanding between those enterprises that they will not compete vigorously against each other, for example, by dividing the market(s) up between them or allocating contracts amongst themselves in bidding competitions. For coordination to be effective:

    - Enterprises need to be able to reach a common understanding and monitor compliance with such an understanding;
    - There is a strong probability that the parties will stick to the coordinated outcome, and
    - It is unlikely that such an understanding be disrupted by other factors, such as entry or expansion by other enterprises.

3.4. Assessing Countervailing Factors

55. The FTC will also consider factors that might prevent or significantly reduce any harmful impact of the merger. There are three main factors — efficiencies, potential entry and expansion in the market, and countervailing buyer power.

3.5. Efficiencies

56. While mergers can harm competition, they can also give rise to efficiencies that make the merged enterprise a more effective competitor. If these merger-specific efficiencies are substantially large and timely, they can enhance rivalry and prevent a merger from giving rise to a substantial lessening of competition. Efficiencies that do not strengthen rivalry can also be considered as benefits to consumers, provided that they are likely to arise within a reasonable period.

57. The FTC considers the advantages and disadvantages created by a merger. A merger is considered advantageous if it results in:

    (a) A substantially more efficient unit with lower production or distribution costs;
    (b) An increase in net exports;
    (c) An increase in employment;
    (d) Lower prices to consumers;
    (e) An acceleration in the rate of economic growth; and
    (f) A more rapid rate of technological advancement by enterprises

58. The FCA allows for merger agreement(s) that it is satisfied:
    (a) contributes to:
        (i) the improvement of production or distribution of goods and services; or
        (ii) the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;
    (b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

3.7. Entry and expansion

59. In some cases, entry by other enterprises or expansion by enterprises already in the market may be expected to be timely enough and sufficient to reduce any harmful impact of the merger.

60. However, there may be barriers to entry or expansion in the market. These barriers may be absolute, for example, a patent; structural, for example, economies of scale; or strategic, for example, the advantage of being the first mover or pioneer in a market.

3.8. Countervailing buyer power

61. A consumer has countervailing buyer power when it has adequate negotiating power to limit an enterprise's ability to raise prices. A substantial lessening of competition is less likely to occur where consumers have countervailing buyer power post-merger. A consumer's negotiating strength is more significant if it can easily switch its demand away from the merged enterprise.

3.9. How does the FTC decide which factors to assess?

62. The FTC focuses early in its inquiries on what factors mean that the merger leads to a substantial lessening of competition. These factors are embedded in what is known as 'theories of harm'. They assist the inquiry by narrowing down the issues that must be addressed, reducing the information that must be gathered, and minimizing the risk that the FTC will pursue unproductive lines of inquiry. Theories of harm are kept under review, may not be the same at Phase 2 as at Phase 1, and may be revised as the inquiry develops to maintain the inquiry's focus on the relevant factors likely to lead to a substantial lessening of competition.

4. REMEDIES

4.1. What Remedies can the FTC apply?

63. If the FTC decides that a merger gives rise to a substantial lessening of competition, it will examine whether the merger results in any efficiency gains. Where it is found that there are no merger-specific efficiency gains, the FCA deems the agreement between the parties void. The FCA provides various enforcement methods where the parties proceed with the merger. The FTC may commence proceedings in the Supreme Court of Jamaica and request that the Court levy a fine not exceeding One Million Jamaican Dollars (JM$1,000,000) in the case of an individual and not exceeding Five Million Jamaican Dollars (JM$5,000,000) for a person other than an individual. Additionally, the FTC is empowered to request an injunction to restrain the party from engaging in conduct contrary to the FTC's directive.

A full text of the FCA is available on https://jftc.gov.jm/wp-content/uploads/2017/08/Fair-Competition-Act.pdf

For more information, contact:

The Executive Director
Fair Trading Commission
Address: Unit 42A, New Kingston Business Centre, 30 Dominica Drive | Kingston 5| Jamaica
Tele: (876) 960-0120-4
Fax: (876) 960-0763
Email: jftc@cwjamaica.com