



Guidelines Regarding The Use of Panels

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Overview

1. The Fair Trading Commission (FTC) is the competition authority in Jamaica, established since 1993 to enforce the Fair Competition Act (FCA). The FTC aims to preserve and restore competition in markets in which goods or services ('products') are supplied in or into Jamaica. Competition creates an environment in which rival suppliers have adequate incentives to offer products at lower prices, higher quality, in greater variety and/or at a faster pace of technological innovation, relative to markets in which competition is absent.
2. The FTC has conducted extensive investigations into the practice whereby a business, as a condition of accessing its products, stipulates that customers utilise only pre-designated third-party providers of a complementary product. These designated providers constitute what is commonly referred to as a *panel*, which is created and managed by the business. This practice is particularly prevalent in the financial sector among commercial banks, insurance companies and mortgage banks. For example, mortgage companies typically direct customers to their panel of valuation surveyors when processing mortgage applications.
3. While panels are established ostensibly to verify the adequacy of third-party providers, they also create an additional layer in the respective complementary markets. The opportunity of a given third-party provider to participate in complementary markets is often contingent on becoming a member of these panels, which may be governed by ambiguous or subjective criteria. Panels invariably limit the opportunity of otherwise adequate providers to compete in complementary markets and therefore implicate the FCA.
4. These guidelines identify measures which businesses establishing panels may take to limit exposure to enforcement actions of the FTC.

Economic Assessment

5. Panels are often established in markets in which the economic surplus gained by parties to a transaction (i.e., a business and its customer) ultimately depends on the actions of a third party. Economists would say the third party exerts an externality in the market in which the transaction takes place ('transaction market'). Industrial Organisation economists have shown that externalities are a source of market failure whereby even free markets inefficiently allocate

scarce productive resources. The externality is underpinned by asymmetric information in the sense that the actions taken by the third-party provider (i.e., the steps used to generate the report) is unobserved by parties in the transaction market.

6. An unbiased report is herein characterised as one in which the unobserved actions of the third-party provider generating the report faithfully align with the acceptable credentials, competencies and ethical/professional standards of the respective profession— otherwise, the report is characterised as being biased.
7. To minimise exposure to adverse outcomes due to biased report, businesses sometimes screen the third-party providers they rely on. These pre-screened designated providers comprise members of panels established and managed privately by the business. As such, the FTC is mindful that panels could be a legitimate private mechanism to improve efficiencies in transaction markets as they mitigate information asymmetries, thereby reducing the incidence of market failure.
8. Panels concerns the FTC given its potential to unduly stymie competitive entry in complementary markets. To screen third-party providers effectively, businesses ought to determine whether the actions of the third-party provider to generate reports are likely to conform to the respective profession.
9. Effective screening of providers would be difficult for businesses since the actions of third-party providers are unobserved and require a minimum level of expertise and other resources to discern. A mere comparison of the reports from multiple third-party providers may be insufficient to characterise the report of any provider. For professions such as valuation surveyors, for instance, the process generating an unbiased report permits an albeit limited range of non-identical reports from multiple third-party providers. In other professions such as land surveyors, however, the process generating an unbiased report could permit only identical reports from multiple third-party providers.
10. To the extent that businesses may not have the financial resources or expertise to efficaciously screen all third-party providers, panels may unduly restrict the participation of third-party providers in the complementary markets. Given the potential for panels to mitigate market failure in transaction markets, and its potential to unduly restrict competition in complementary markets, the use of panels is the subject of the Guidelines.

Use Case: The Real Estate Sector

11. The real estate sector presents a useful case study to demonstrate the competitive effects of panels underpinning these guidelines, given the high degree of information asymmetries inherent in this sector. Let us say that a buyer has negotiated to acquire real estate by way of a mortgage. Typically, neither the financial institution nor the buyer is aware of the actions taken by valuation surveyor to produce the report. As such, asymmetric information exists between the valuation surveyor, the buyer and the financial institution.
12. A financial institution extends a mortgage based on, inter alia, a report of the valuation surveyor. The value of the mortgage that the institution is willing to extend to the buyer hinges on a third-party's valuation of the property. The action taken by valuation surveyor in generating the report is said to exert an externality in the two (transaction) markets: the market for mortgages and the market for real estate.
13. This externality impedes the ability of the free-market mechanism to efficiently allocate the scarce productive resources in both these markets. If the valuation surveyor produced a biased report, then either the financial institution or the buyer would be exposed to greater harm, compared to the scenario in which the valuation surveyor produced an unbiased report. For example, if the valuation surveyor determines a market value higher than the range of market values which would have been determined in an unbiased report, then this would significantly increase the exposure of the financial institution to a loss on the transaction if the buyer went into early default. Due to asymmetric information regarding the characteristic of the report, therefore, the financial institution would have a legitimate interest in taking steps to ensure that it received an unbiased report from an *a priori* unknown valuation surveyor.
14. Similarly, if the valuation surveyor determines a market value lower than the minimum value than the range of market values which would have been determined in an unbiased report, then the mortgage extended to the buyer would be insufficient for the buyer to acquire the real estate. Due to asymmetric information, the vendor of the real estate would have a legitimate interest in taking steps to ensure that it received an unbiased report from any *a priori* unknown valuation surveyor.
15. In either case, the prospect of relying on a biased report from a randomly selected valuation surveyor creates market failure and leads to an inefficient allocation of resources in the real

estate sector in terms of a sub-optimal number of transactions being completed in the market for mortgages (fewer sums extended for mortgages) and the market for real estate (fewer properties being sold).

Summary

16. The net effect of panels on competition is indeterminate. While there is legitimate business justification for panels, the FTC must ensure that panels do not lessen competition substantially. A panel substantially lessens competition when it relaxes competitive constraints in complementary markets by distorting competitive rivalry, depriving consumers of the potential benefits. Competitive rivalry could be distorted between members and non-members of the panels (inter-panel competition). Also, competitive rivalry could be distorted among members within a panel (intra-panel competition). The FTC's law enforcement strategy regarding panels is informed by the economic assessment and is described below.

Legal Assessment

17. The FTC's authority to investigate panels is grounded under multiple sections of the FCA: sections 17, 19-21, 33 and 35.
18. The FTC recognises the benefit of panels in improving efficiencies in transaction markets. The FTC also recognises the potential detrimental effect of panels restricting entry in complementary markets. Accordingly, the FTC challenges panels only after the positive and adverse effects have been considered. As such, the FTC challenges panels under only the *rule of reason* provisions of the FCA; namely, sections 17 and 19-21.

Section 17 [agreement having the effect of lessening competition]

19. Section 17(1) of the FCA prohibits 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.
20. Section 17(2) contains a non-exhaustive list of agreements which prima facie, contain provisions which have the purpose, effect or likely effect referred to in subsection (1) and are therefore

unenforceable.¹ One such agreement is one that contains provisions that “...apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.” [section 17(2)(e)].

21. Section 17(4) of the FCA recognises that some provisions that may otherwise appear anticompetitive may have a business/economic justification or the FTC may authorise the entry into said agreement. Such exemptions include, but are not limited to, where the FTC is satisfied that the agreement contributes to technical or economic progress while giving consumers a fair share of the resulting benefit. Provided that the agreement or its provision qualifies for exemption under section 17 (4) of the FCA or be one to which the FTC has granted authorisation according to section 29 of the FCA, then there will be no breach of section 17 of the FCA.

22. Therefore, to establish a contravention of section 17 of the FCA, the following must be established:

- 1) There is an agreement:
- 2) The agreement contains provisions that have:
 - a. the purpose;
 - b. the effect; or
- 3) are likely to have the effect of substantially lessening competition in a market; and
- 4) The agreement does not fall within the exemptions listed in section 17(4) of the FCA and is not one to which the FTC is authorised under Part V section 29.

Sections 19-21 [abuse of dominant position]

23. Sections 19-21 of the FCA deals with abuse of a dominant position. These sections prohibit an organisation that occupies a dominant position in a market from engaging in abusive/anticompetitive conduct which has had, is having or is likely to have the effect of lessening competition substantially. Having a dominant position in the market creates special obligations for the concerned undertaking not to interfere with competition.³ It is important to note that dominance in and of itself is not a contravention of the FCA, it is the abuse of this position that is anticompetitive.

¹ Fair Competition Act sections 17(2) & 17(3).

³ [Online platforms and refusal to deal- Unlocked vs. Google- a seminal case in the making?](#) By D by Daniel Mandrescu dated May 18, 2018

24. Section 19 defines dominance and states that 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. This is known as market power.
25. Section 20 identifies several types of conduct that are considered abusive if engaged in by a dominant organisation. It is important to note that, similar to section 17(2), this list is not an exhaustive list and conduct that is not enumerated and specified on this list may constitute abusive conduct. Some behaviour includes restricting the entry of any person into that or any other market and imposing unfair purchase or selling prices or other uncompetitive practices.⁴
26. Section 20(2) provides that an enterprise will not be treated as abusing a dominant position if, for example, its behaviour was exclusively directed to improving the production or distribution and consumers were allowed a fair share of the resulting benefit or because the organisation is seeking to enforce specific intellectual property rights.
27. Section 21 of the FCA prescribes that the Commission will determine whether an enterprise has abused or is abusing its position of dominance and whether such abuse has had, is having or is likely to have the effect of lessening competition substantially in a market. Where the Commission makes this determination, it must notify the organisation of its findings and advise of the steps necessary to remedy the same.
28. Therefore, for a business to breach sections 19-21 of the FCA, the following elements must be satisfied:
- 1) The organisation must hold a dominant position in the relevant market;
 - 2) The organisation must abuse its position of dominance;
 - 3) There must be no economic or other justification for the conduct as espoused under s.20(2)

Summary

29. The FTC confines investigations of panels to section 17 and sections 19-21 of the FCA. To establish a breach, therefore, the FTC is required to balance the pro-competitive effect of panels in transaction markets and the anticompetitive effect in complementary markets as guided by

⁴ Ibid. section 20(1)(a) & (e) respectively.

the economic assessment of panels. Section 17 prohibits businesses from entering into agreements which substantially lessen competition. Similarly, sections 19-21 prohibit a business from substantially lessening competition by abusing its dominant position in a market.

Guidelines

30. Panels limit entry to complementary markets. Panels are socially desirable to the extent that they promote economic efficiency by reducing the incidence of market failure in transaction markets through the mitigation of asymmetric information regarding the adequacy of providers in complementary markets. In the absence of such asymmetric information, the economic benefits of panels are less obvious to the FTC.
31. The key principle of these guidelines is that if panels are deemed necessary by businesses in transaction markets, they are to be managed in such a way that imposes no more stringent restriction on third-parties participating in complementary markets than those which would reasonably allow businesses to mitigate the underlying information asymmetries inherent in transaction markets.
32. This key principle aligns with the FCA's treatment of provisions of an agreement to lessen competition (section 17). The FCA instructs the FTC not to consider as a breach, agreements which, among other things, "... (b) imposes on the enterprises concerned, only restrictions which are indispensable to the attainment of the objectives...; or (c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned..." [section 17(4)(b& c)].
33. Similarly, this key principle also aligns with the FCA's treatment of abuse of a dominant position (section 19-21) as the FCA instructs the FTC not to consider as abusive, conduct in which, among other things, "...[the enterprise's] behaviour was exclusively directed to improving the production and distribution of goods or to promoting technical or economic progress..." [section 20(2)(a)(1)]
34. For businesses which deem it necessary to manage panels, the FTC offers the following guidelines to limit exposure to enforcement measures.

Guideline 1: Rationale

35. Businesses maintaining panels should document the intended purpose of the panel in a *Statement of Justification*. The Statement should identify the mischief the business is seeking to address by using the panel as a prerequisite to engage third-party providers in complementary markets. In complementary markets in which independent regulatory/oversight bodies are active, businesses should briefly articulate why reliance on these bodies is inadequate to attain the intended purpose for which the panel is being administered.
36. This guideline encourages businesses to identify the potential economic benefits the panels are intended to facilitate.

Guideline 2: Quality Control

37. Businesses which opt to establish or continue managing panels should determine the characteristics of the third-party providers they are seeking to admit to their panel. Members of panels should decide upon the requisite credentials, competencies and ethical/professional standards, among others. This enhances consumer protection, industry integrity and trust in panel decisions. See also, Guideline 7.
38. This guideline underscores the commitment to competence, professionalism and accountability in panellist selection.

Guideline 3: Non-Discriminatory

39. Businesses managing panels are encouraged to apply similar treatment to all members of its panel. Without more, businesses which apply dissimilar treatment to members within its panel may convey a distinct competitive advantage to the favoured members to the detriment of competition and customers in complementary markets. See also, Guideline 7.
40. This guideline promotes intra-panel competition by encouraging a level playing field among panel members.

Guideline 4: Third-Party Service Variety

41. Businesses managing panels should list at least three non-affiliated third-party providers on their panel. This provision enables consumers to select a third-party provider most suited to their preferences based on price and non-price factors. When establishing empanelment

regulations, businesses have the discretion to specify a maximum number of third-party providers on their panels. This maximum number must be clearly outlined in the regulations, and third-party providers meeting the criteria cannot be refused unless the maximum capacity is reached. See also, Guideline 7.

42. This guideline strikes a balance, safeguarding consumer choice while affording businesses flexibility in managing the cost of administering panels.

Guideline 5: Third-Party Market Dynamics

43. Businesses managing panels should mitigate the risk of prolonged, exclusive arrangements that could stifle competition by inhibiting new entrants from expanding in complementary markets. Businesses are encouraged to review their panels at least once annually. During this review, current panel members may be required to reapply, providing an opportunity for re-evaluation of their application. Moreover, previously rejected applicants as well as new applicants should be permitted to apply. See also, Guideline 7.
44. This guideline promotes market dynamism, prevents monopolistic tendencies, fosters panel diversity and encourages competition.

Guideline 6: Transparency

45. Businesses managing panels are encouraged to make regulations and criteria relating to the approval of panel members accessible to the public. Additionally, in the interest of transparency, businesses should provide clear reasons to applicants if their application is rejected. Furthermore, a mechanism should be established to inform previously rejected applicants of any future opportunities that may arise, ensuring that third-party providers continue to have equitable access to the panel.
46. This guideline encourages a commitment to openness and communication.

Guideline 7: Indispensability

47. Businesses managing panels are encouraged to ensure that any restriction imposed pursuant to the Guidelines 2-5 is not more onerous than required to achieve the intended purpose of the panel, as documented pursuant to Guideline 1.

48. This guideline ensures that the inherent harm panels pose to competition in complementary markets is not proportionately greater than the benefits being pursued by businesses in transaction markets.

Summary

49. Guidelines 1 through 7 describe considerations for businesses managing panels when seeking measures to limit exposure to the FTC's enforcement actions. Businesses which manage panels that do not conform to any of the Guidelines 1 through 6 face greater exposure to litigation under the FCA, compared to businesses which conform to the guidelines. Guidelines 2 through 5 should each be read in conjunction with Guideline 7.

Practical Application of Guidelines

50. In this section, the FTC offers some practical applications of the guidelines to an issue raised by many stakeholders who participated in consultations informing the development of these Guidelines. This discussion is intended to assist any business assessing the extent of their exposure to the law enforcement efforts of the FTC when contemplating the establishment or continuing management of panels for the purpose of procuring third-party complementary services when engaging their clients. Guidelines 1, 2 and 7 are most instructive when contemplating exposure to law enforcement actions by the FTC when using panels.

51. Guideline 1 encourages businesses in transaction markets to document the rationale for establishing and managing panels. A *Statement of Justification* would be incomplete if it did not outline a counter-factual scenario by describing the harm the business anticipates it would face in the foreseeable future, absent the use of the panel. Unless the harm that the business is seeking to avoid entails adverse outcomes arising from the actions of third-party providers not subjected to the panel managed by the business, then the economic benefits of establishing panels to address the harm are less obvious to the FTC. As such, businesses which manage panels would be exposed to enforcement actions if they do not demonstrate to the FTC, how third-party providers in complementary markets would impose negative externalities on the business, absent the panel.

52. Guideline 2 addresses the quality control characteristics of panels. As described earlier, panels function as screening mechanisms to limit the business's exposure to adverse outcomes arising from the actions of third-party providers in complementary markets. The actions of third-party providers may be subject to, for example, incompetence or impropriety. Where there is an independent body which serves as a quality control mechanism for providers in complementary markets, then businesses which require more stringent conditions than required by the independent body would be exposed to litigation actions of the FTC unless the business can demonstrate that the independent body's mechanism is insufficient to identify the quality of the third-party provider that the business established the panel to identify. Further, the business must demonstrate that the quality of the providers sought by the panel (described in Guideline 2) is no higher than is required to overcome the harm described in the *Statement of Justification* (described in Guideline 1).
53. For a practical demonstration of this point, attention is drawn to the contrasting experience of providers in two distinct complementary markets: the land surveyor market and the valuation surveyor market.
54. To process a mortgage application, financial institutions require applicants to secure reports from a land surveyor (to identify the physical boundaries of property being acquired, among other things) and a valuation surveyor (to assess the market value of the property). In this scenario, the financial institution participates in the transaction market whereas the surveyors participate in two distinct complementary markets.
55. In both complementary markets, there are statutory bodies which regulate the competencies and integrity of the service providers. Land surveyors are governed by the Land Surveyors Act and regulated by the Land Surveyors Board (LSB). The oversight of the LSB spans the training, certification and accountability of land surveyors. Valuator surveyors are governed by the Real Estate (Dealers and Developers) Act and regulated by the Real Estate Board (REB). The oversight of the REB spans the training, certification and accountability of valuation surveyors.
56. A comparison of the regulatory oversight of land surveyors and valuation surveyors is presented in Table 1 below.

Table 1 Comparing Markets for Land Surveyor and Valuation Surveyor

Land Surveyor	Valuation Surveyor
Must be commissioned	Must be licensed
Must work under an experienced surveyor to be commissioned	Must work under an experienced valuation surveyor to be licensed
Must have a valid practising certificate	Must have a valid certificate or chartership
Must complete the examination for certification	Must complete examination for licensure
The list of commissioned surveyors authorised to practice is publicly available	The list of licensed valuation surveyors authorised to practice is publicly available.
Grievance and Complaints Committee	REB acts as the accountable body
Identical reports (land surveyors deliver identical positions based scientific and mathematical analyses)	Similar reports (valuation surveyors deliver differing positions based on available data sources)

57. The table shows that the regulatory processes governing the training, certification and accountability of land and valuation surveyors are comparable.
58. If engaging surveyors certified by their regulatory body would allow the financial institution to achieve the purpose outlined in Guideline 1, then using a panel which rejects surveyors who are in good standing with their respective regulatory body would be unjustified under the FCA and would expose a dominant financial institution to enforcement actions of the FTC.
59. If engaging surveyors certified by their regulatory body would not allow the financial institution to achieve the purpose outlined in Guideline 1, then using a panel which rejects surveyors who are in good standing with their respective regulatory body may be justified under the FCA. To limit its exposure to enforcement action by the FTC, however, a dominant financial institution would have to demonstrate that surveyors certified by the regulatory body are typically not of a sufficiently high quality (Guideline 2) to perform the duties they were engaged to perform.
60. The FTC notes that in practice, businesses do not use panels to engage land surveyors but use panels to engage valuation surveyors.

Conclusion

61. While panels may promote benefits within transaction markets, they also pose significant risks to competition in complementary markets by potentially restricting entry and limiting provider participation. The FTC recognises this delicate balance and emphasises that panels should be designed and managed in a manner that minimises anti-competitive effects. The guidelines outlined provide a framework for businesses to establish or manage panels where necessary, while still ensuring quality and transparency and fostering competition. By adhering to these principles, businesses can mitigate the risk of enforcement actions under the Fair Competition Act, promoting both efficient transaction markets and a competitive environment in complementary markets to the benefit of consumers.