Merger Assessment in Developing Economies Practical Challenges and Solutions – A Jamaica Perspective

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Challenge – Jurisdiction to Investigate

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

- Confirmed the Fair Trading Commission's (FTC) authority to investigate mergers under section 17 of the Fair Competition Act (FCA) in all sectors, unless specifically precluded by legislation

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

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Challenge – Detection of 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.

- Most merger investigations are undertaken through *the FTC's initiative*

Challenge – Legislative Provision for Assessment

- FTC investigates mergers pursuant to section 17 (1) of the FCA

- This section 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

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Challenge – Legislative Provision for Assessment (contd)

- Pre-merger notification is not mandatory in Jamaica

Disadvantages:

a) Parties do not have legal certainty that the merger is not anti-competitive

b) Eliminates the FTC's ability to identify and remedy problematic transactions

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Challenge – Legislative Provision for Assessment (contd)

- Solution:

➢ Draft Bill to Amend the FCA

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Challenge – Public Awareness about Merger Review

- FTC's Guideline to Reviewing Mergers, Acquisitions and Joint Ventures – *February 2022*

Purpose of the Guidelines:

1. To explain how the FTC enforces the control of anti-competitive practice provisions
2. To provide insight into how the FTC assesses the legality of mergers, acquisitions and joint ventures
3. To educate on the FTC's approach to reviewing transactions

The Merger Review Process

- Two Phases in the Merger Review Process

❖ **Phase 1**

✓Assessment of the merger to determine whether it raises competition concerns

✓Parties can propose remedies, if competition concerns are raised

✓Will last no more than 30 business days

The Merger Review Process (contd)

- Merger review may end at Phase 1 where:

a. The merger raises no competition concern

Example – MailPac Group Limited & My Cart Quick Limited (2024)

b. Parties proffer remedies that rectify the competition concerns identified

The Merger Review Process (contd)

❖ **<u>Phase 2</u>**

- Occurs because the merger raises competition concerns (for example due to restraint of trade clause in the Agreement(s))
- Proposed remedies by the merging parties are insufficient

➢ Involves an assessment of whether the merger substantially lessens competition

➢ Will take no more than 60 business days to complete

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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 recent mergers assessed in Phase 2:

i. The Acquisition of IGL (St Lucia) IBC Ltd by Massy Gas Products Holdings Ltd (2023)

ii. The Acquisition of Massy Distribution (Jamaica) Ltd by Caribbean Distribution Partners Ltd (2025)

Other Challenges

- Absence of merger specific remedies in the legislation
- Information Gathering from Third Parties/Industry Players
- Theory of Harm / Identifying the relevant market

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Solutions

- Draft Bill to Amend the FCA
- Education campaigns / advocacy
- Allocate additional resources

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