

Restraints of trade and dominance in Jamaica: overview

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RESTRAINTS OF TRADE

Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

Restrictive trade practices are regulated under the Fair Competition Act (FCA). Jamaica does not use the term "restrictive trade practices"; it uses the term "fair competition".

As a general rule anti-competitive conduct or behaviour is regulated as either rule of reason prohibitions or per se prohibitions. Rule of reason prohibitions require evidence before a breach of the FCA can be found. However, per se prohibitions do not require evidence and are proved by the mere existence of the act or practice that is proscribed. The rule of reason prohibitions are found under sections 17, 20, 21 and 33 of the FCA and per se prohibitions are found under sections 18, 25, 27, 33, 35 and 36. The prohibitions are summarised as follows (*para: 1.5, FCA: A Guide to Anti-Competitive Practices, 2002*):

- Section 17: agreements that have as their object or effect a lessening of competition (cartel provisions).
- Section 18: prohibits agreements containing exclusionary provisions.
- Section 20: prohibit the abuse of a dominant position.
- Sections 22 and 23: prohibit collective resale price maintenance.
- Sections 25 and 27: prohibit minimum resale price maintenance.
- Section 33: prohibits market restriction, exclusive dealing and tied selling.
- Section 34: prohibits price fixing.
- Section 35: prohibits conspiracy (cartels).
- Section 36: prohibits bid rigging and collusive tendering.

Regulatory authority

The regulatory authority is the Fair Trading Commission (FTC). There is no distinction between the investigatory body and the decision-making body.

The FTC produces issued reports, which are for internal use or issued to infringers in the course of investigations to compel compliance with FCA prior to an FTC hearing or issuing

proceedings in court. Reports produced as a consequence of investigations have been used to support litigation.

See box, *The regulatory authority*.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

The regulations under the Fair Competition Act (FCA) apply to all agreements, formal and informal. This includes "any agreement, arrangement, or understanding whether oral or in writing or whether or not it is intended to be legally enforceable" (*section 2, FCA*).

Exemptions

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

Exemptions

Exemptions and exclusions are considered under the Fair Competition Act (FCA) at sections 17, 20 and 33:

- **Section 17, FCA.** Agreements under section 17(4) are not included in the prohibitions. These are agreements or categories of agreements that contribute to the:
 - improvement of production or distribution of goods and services; or
 - promotion of technical or economic progress.
- The exemptions under section 17 allow consumers a fair share of the resulting benefit. However, they must either:
 - only impose on the enterprises concerned restrictions that are necessary to attain the objectives under section 17(4)(a); or
 - not afford such enterprises the possibility of eliminating competition in respect a substantial part of the goods or services concerned.
- **Section 20, FCA.** Under section 20(2) an enterprise does not abuse a dominant position if:
 - it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit;



- the enterprise only enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

- **Section 33, FCA.** Under section 33(4), the FCA will not take action under section 33 if it finds that the exclusive dealing or market restriction is for a limited period to permit marked entry

by a new supplier of goods into the market. It also does not apply in respect of exclusive dealing or market restriction among interconnected companies.

Statutes of limitation

Civil action cases for liability for contravention of Parts III, IV, VI or VII of the FCA must begin within three years of the time when the cause of action arose.

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

See *Question 3*.

Statutes of limitation

See *Question 3*.

Notification

5. What are the notification requirements for restrictive agreements and practices?

Notification

Section 29(1) of the Fair Competition Act (FCA) authorises any person who proposes to enter into any restrictive agreement or engage in a business practice, which is, in the opinion of that person, prohibited by the FCA to apply to the Fair Trading Commission (FTC) for permission to do so. The FTC has the prerogative to grant or deny permission based on whether or not the agreement or practice in question promotes public benefit. This application is not mandatory; however they may be liable under section 48 of the FCA if they continue to engage in a practice or agreement in contravention of the Act without being granted permission. Authorisation cannot be requested retrospectively.

Informal guidance/opinion

There is no procedure for informal guidance before a request for authorisation. Formal authorisation must be requested from the FTC if a person is proposing to enter, or believes he is entering, into any restrictive agreement or practice.

Responsibility for notification

The person proposing to enter or who believes he is entering into any restrictive agreement or practice should apply for authorisation.

Relevant authority

The FTC is the relevant authority (*section 29(1)(t), FCA*).

Form of notification

Request for authorisation is by way of letter to the FTC.

Filing fee

There are currently no filing fees and it is unclear when filing fees will be implemented, if any.

Investigations

6. Who can start an investigation into a restrictive agreement or practice?

Regulators

The Fair Trading Commission (FTC) can start an investigation of its own initiative. This is provided for by section 5 of the Fair Competition Act (FCA), which makes provision for the FTC to start an investigation or inquiry into any matter that it thinks involves anti-competitive practices in contravention of the FCA.

Section 5 of the Telecommunications Act grants the Office of Utilities Regulations the power to refer any matter relating to specified services (telecommunication services) to the FTC if it is of "substantial competitive significance" and if it falls under the function of the FTC. This was the basis on which the FTC purported to exercise jurisdiction over the merger in the Digicel/Claro merger (*2012 JMCC Comm 7*) (see *Merger control in Jamaica: overview, Question 18*).

Third parties

Third parties can make complaints and there have been several instances of this. There are no special forms for filing complaints. Cable and Wireless Jamaica intervened in the Digicel/Claro merge case on the basis that they had made an independent complaint.

Under section 5 of the FCA states the FTC can start an investigation or inquiry into any matter that it thinks involves anti-competitive practices in contravention of the FCA at the request of any person including a third party.

It can also carry out an inquiry in relation to an alleged abuse of dominance at the request of the person affected and take such action as may be necessary with respect to the abuse of dominance.

There is no formal procedure to request an investigation; requests are usually made by letter.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Third parties need not have a special interest to complain to the Fair Trading Commission (FTC). The rights of initial complainants and other third parties are indistinguishable for these purposes.

Representations

A party affected by an investigation can be heard orally. It seems that the FTC has discretion to do so on its own initiative but must do so if the person makes a written request for a hearing. The written request must set out the reasons why the person is or is likely to be affected by the hearing investigation or inquiry or if there are particular reasons why the person should be heard (*section 7(2), Fair Competition Act (FCA)*).

Document access

The inquiries and investigations conducted by the FTC must be done publicly except in circumstances where the FTC chooses to hold the investigations privately (*section 8, FCA*). The contents of any documents requested by the FTC during the investigations are likely to be made public in these circumstances, as the investigation is public. However, in

special circumstances where the FTC feels a private hearing is warranted, that option will be pursued.

Document access is otherwise restricted and treated as confidential under the FCA.

Be heard

The request must be made in writing in accordance with section 7(2) of the FCA. Hearings do not have to be oral. An oral hearing must be given however where the party asks for it and sets out how it is affected by the inquiry or investigation.

8. What are the stages of the investigation and timetable?

When a complaint is lodged, the Fair Trading Commission (FTC) acknowledges receipt of the complaint within 21 days. The FTC then determines whether the complaint falls under the Fair Competition Act (FCA). If the complaint falls under the FCA then the FTC conducts a preliminary investigation to determine if there are any sufficient prima facie grounds to do a full investigation. If sufficient grounds are found then a full investigation is conducted and the FTC has the authority to make inquiries and gain information from any party it considers necessary. Often this is in the form of information. If a breach of any regulations is found then a staff report is provided to the infringers requesting that the infringer meet with the FTC to settle issues relating to the breach. If no settlement is arrived at or the infringer denies breach or fails to meet with the FTC then a hearing before the FTC or the Supreme Court takes place and the information gathered in the staff report can be used as evidence.

Publicity and confidentiality

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The Fair Trading Commission (FTC) makes the report on the full investigation available to the public. The hearings are also done in public as per section 8 of the Fair Competition Act.

Automatic confidentiality

Commercially sensitive material, such as trade secrets, banking information and so on, is generally treated as automatically confidential by the FTC.

Confidentiality on request

Parties can request that certain information is kept confidential.

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The powers of the Fair Trading Commission (FTC) in conducting their investigations are stipulated in the Fair Competition Act (FCA) and include the power to:

- Request any information it deems necessary for an investigation (*section 6, FCA*).

- Summon and examine witnesses (*section 7(1)(a), FCA*).
- Call for and examine documents (*section 7(1)(b), FCA*).
- Administer oaths (*section 7(1)(c), FCA*).

- Require any document be submitted to the FTC to be verified by affidavit (*section 7(1)(d), FCA*).
- Adjourn any investigation or inquiry from time to time (*section 7(1)(e), FCA*).
- Call any witness that is affected by the investigation to be heard orally (*section 7(2), FCA*).
- Require a person engaged in business or a trade or such other person as the FTC considers appropriate, to state facts concerning goods manufactured, produced or supplied by him or services supplied by him as the FTC may think necessary (*section 7(3), FCA*).
- Search and enter, with a warrant, any premises and remove and make copies of any documents on a premises (*section 10, FCA*).

Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

After a breach of anti-competition laws have been found by the Fair Trading Commission the infringing party is afforded an opportunity to settle via a consent agreement. The terms of the consent agreement are negotiated and if signed then the action against the infringing party ceases.

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

During the settlement negotiations for a consent agreement, the Fair Trading Commission can accept a remedy from the infringing party before reaching an infringement decision.

Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The Fair Trading Commission has the power to prohibit any anti-competitive agreement or practice contrary to the Fair Competition Act (FCA). This can be done by way of injunction.

Fines

Any person found guilty of participating in any anti-competitive practice will be guilty of a criminal offence. The penalty is a fine of no more than JMD1 million if it is an individual or JMD5 million if it is a company (*section 47, FCA*). If the fine is not paid a prison term will be imposed.

Personal liability

Personal liability can extend to directors and managers.

Furthermore any person who obstructs the investigation of the FTC or brings false evidence to the FTC is liable on summary conviction to a fine not exceeding JMD500,000 and/or a term of imprisonment not exceeding one year.

Any person who fails to appear before the FTC when required without reasonable explanation is guilty of an offence and is liable to a fine not exceeding JMD1 million and/or a term of imprisonment not exceeding two years.

Immunity/leniency

Immunity from fines can be negotiated in the settlement stage of the investigation and included in the terms of the consent agreement.

Impact on agreements

Entire non-competitive agreements can be determined void and the effect of the agreement undone as far as possible.

Third party damages claims and appeals

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages

The Fair Competition Act (FCA) provides that any third party who has been adversely affected by any agreement or practice restricted under the FCA can take private legal action in Jamaican courts against the offending party and claim for damages. Section 48 of the FCA provides that once third parties are affected by a practice restricted under the Act they have a right to claim damages. These actions are separate legal actions.

The Claro/Digicel (2012 JMCC Comm 7) merger action is an example of a follow on action taken as a consequence of a decision by the regulator (see *Merger control in Jamaica: overview, Question 18*). This is even though an independent third party report was made prior to the decision.

Special procedures/rules

The action can be brought in the Supreme Court. The findings on the reports of an Fair Trading Commission (FTC) inquiry against an infringing party can be used as evidence in third party claims. The hearings in the Supreme Court are binding and therefore third party actions can rely on the judgment of the court to advance their claim. The statute of limitations for a third party claim is three years from the time the cause of action arose (section 48(2), FCA).

Criminal proceedings can also be commenced in the Resident Magistrate's Court.

Collective/class actions

Class actions are not prohibited. Class action lawsuits can therefore be brought against an infringing party; however there are no precedents.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

A right of appeal exists under section 49 of the Fair Competition Act. Any person aggrieved by a finding of the Fair Trading Commission (FTC) can appeal within 15 days of the decision to a Supreme Court Judge in Chambers.

Third party rights of appeal

Third parties aggrieved by a finding of the FTC are included as persons who have the right of appeal.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

The Fair Competition Act (FCA) prohibits agreements and practices that substantially lessen competition (section 17, FCA). This is the extent to which monopolies are regulated. In addition the FCA also prohibits exclusionary provisions, the abuse of a dominant position and exclusive dealings and market restrictions (sections 18, 20 and 33, FCA). Along with section 17 of the FCA, this is the extent to which abuses of market power are regulated.

Regulatory authority

The Fair Trading Commission is the regulatory authority.

17. How is dominance/market power determined?

Under the Fair Competition Act (FCA) "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" (section 19, FCA).

As a guideline the Fair Trading Commission will consider an enterprise as being in a dominant position if it has more than 50% of the market's share. This is however a guideline only and the true test is whether it can act to an appreciable extent with little to no constraints.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

The Fair Competition Act (FCA) sets out non-exhaustive examples of abusive conduct. These include practices that (section 20(1), FCA):

- Restrict the entry of any person into a market.

- Prevent or deter any person from engaging in competitive conduct in a market.
- Eliminate or remove any person from a market.
- Directly or indirectly impose unfair purchase or selling prices or other uncompetitive practices.
- Limit production of goods or services to the prejudice of consumers.
- Make the conclusion of agreements subject to acceptance by other parties of supplementary obligations that by their nature, or according to commercial usage, have no connection with the subject of such agreements.

Exemptions and exclusions

19. Are there any exemptions or exclusions?

Exemptions apply to sections 17, 20 and 33 of the Fair Competition Act (FCA).

Agreements under section 17, which prohibits agreements that lessen competition, do not apply to agreements that:

- Contribute to the improvement of production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit.
- Impose on the enterprises concerned only such restrictions as are indispensable to the attainment of the above objective.
- Do not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Practices under section 20, which prohibits abuse of a dominant position, will not be considered an abuse if it is shown that both:

- Its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress.
- Consumers were allowed a fair share of the resulting benefit.

Practices under section 33, which prohibits exclusive dealings or market restrictions, will not be prohibited if the practice is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of goods into a market or of new goods into a market.

The exclusive dealing or market restriction is done between interconnected companies (between parent companies and subsidiaries or among subsidiary companies).

Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

It is not necessary to notify the Fair Trading Commission for a practice to fall under the exemptions.

Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

See Questions 6 to 9 and Questions 11 and 12.

22. What are the regulator's powers of investigation?

See Question 10.

Penalties and enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

See Question 13.

Third party damages claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages

Third parties can claim damages for losses suffered as a result of abuse of market power.

Special procedures/rules

See Question 14.

Collective/class actions

See Question 14.

EU LAW

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

26. How are joint ventures analysed under competition law?

Joint ventures are not treated separately or specifically in Jamaica.

INTER-AGENCY CO-OPERATION

27. Does the regulatory authority in your jurisdiction cooperate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and

extent of co-operation (in particular, in relation to the exchange of information)?

Not at this time.

RECENT CASES**28. What are the recent developments or notable recent cases concerning abuse of market power?**

Notable cases include:

- **Grace Kennedy Remittance Services (GKRS).** An investigation was carried out by the Fair Trading Commission to determine whether GKRS was engaging in tying in the markets for electronic money transmission and utility bill collections.
- **Jamaica Lottery Company Ltd (JLC).** This was an investigation to determine whether the JLC participated in

exclusive dealing and whether the company abused their dominant position by making agreements with their retailers insisting they do not participate in the selling of any other competing company's gaming tickets without the consent of the JLC.

PROPOSALS FOR REFORM**29. Are there any proposals for reform concerning restrictive agreements and market dominance?**

There are currently no official proposals for reform. However, there have been talks of the amendment of the Fair Competition Act to expressly include the regulation of mergers. This is as a result of the Court of Appeal ruling in *FTC v Digicel* where Digicel successfully appealed that the Fair Trading Commission (FTC) did not have jurisdiction over matters that the Telecommunications Act regulated. The FTC is in the process of appealing to the Privy Council.

ONLINE RESOURCES**Fair Competition Act (FCA)**

W <http://moj.gov.jm/laws/fair-competition-act>

Description. This website carries the link to the FCA, the piece of legislation which regulates Fair Competition in Jamaica. It is maintained by the Ministry of Justice on their official website and is up to date.

Fair Trading Commission (FTC)

W www.jftc.com

Description. This is the official up-to-date website of the FTC, the regulatory authority responsible for the prevention of anti-competitive behaviour and the enforcement of the Fair Competition Act. Case reports, publications and recent developments in the area are displayed on the site.

THE REGULATORY AUTHORITY**Fair Trading Commission (FTC)**

Structure. The FTC is headed by the Executive Director. The Senior Legal Counsel is in charge of the legal division who supervises legal officers. The General Manager is in charge of running the accounts department as well as other secretarial portfolios. The Competition Bureau Chief is in charge of investigative research, with staff of Competition Analysts and Research Officers.

Responsibilities. The FTC is responsible for the monitoring of business practices in Jamaica with the aim of preventing anti-competitive behaviours and the implementation of the Fair Competition Act.

Procedure for obtaining documents. By way of a written letter to the Executive Director of the FTC.

W www.jftc.com

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Professional qualifications. Jamaica, Attorney-at-Law; Ontario, Barrister and Solicitor, Notary Public; FCI Arb, Chartered Institute of Arbitrators

Areas of practice. Commercial and civil litigation; arbitration; intellectual property and technology; corporate governance; employment; labour; finance and securities.

Non-professional qualifications. BA in History and Government, University of the West Indies; LLM, University of Toronto; EC Council (CCFE, CHFI)

Recent transactions

- Acting as arbitrator in a recent employment law dispute where the issue concerned the use of the employer's computer equipment to download prohibited material.
- Acting as counsel in arbitrations in telecommunications and cable matters.
- Handling commercial matters shareholder and director disputes, technology and information security matters.

Languages. English

Professional associations/memberships. Member of the Jamaican Bar Association; Chair of the Continuing Legal Education Committee; International Trade Mark Association; Integrated Advisory Group; International Technology Law Association.

Publications.

- *Legislating Cybercrimes in Jamaica: Issues in Corporate Liability, Ringtones of Opportunity: Policy, Technology and Access in Caribbean Communications*, edited by Hopeton S Dunn.
- *Copyright Laws in the Creative Economy: How can Science and Education Flourish in the Digital Era in LAC?, Enabling Openness: The Future of the Information society in Latin America and the Caribbean*, edited by Bruce Girard and Fernando Perini.