KEY LEGAL CONCEPTS FOR THE COMPETITION LAWYER IN LITIGATION

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INTRODUCTION

Competition law and policy has assumed more significance in recent times in non-mature competition jurisdictions due to treaty obligations requiring that competition authorities be established.

This is due in part to the absence of a multilateral framework for such rules or the inability of the multilateral framework to devise rules acceptable to its Members, prompting countries to negotiate these rules in regional trading arrangements to ensure the gains of tariff liberalisation are not nullified or impaired by private restraints.

There is no firm multilateral obligation requiring this development, but provisions in the General Agreement of Trade in Services (GATS) suggest that particular obligations can only be met by the establishment of competition authorities.[1]

As for regional trading agreements, the Revised Treaty of Chaguaramas and the Economic Partnership Agreement with CARICOM Members require competition law and policy to be observed, resulting in jurisdictions without established competition authorities taking the necessary steps to satisfy their treaty obligations. Competition law and policy, therefore, is more likely than not to assume increasing importance in short order in several jurisdictions within CARICOM.

Given this development, the aim of the paper is to provide an introduction or overview of some of the key legal concepts in competition litigation matters regarding prohibited conduct under competition legislation and the usual defences available.

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[1] For example, Article VIII (2) of GATS provides that "Where a member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments."

OVERVIEW OF THE RULES OF CARICOM COMPETITION LAW

In this overview we address the rules of CARICOM Competition law under Chapter VIII of the Revised Treaty of Chaguaramas (RTC), including obligations for rule implementation and enforcement, types of prohibited anti-competitive conduct, such as anti-competitive agreements, abuse of a dominant position, and anti-competitive mergers, and the regulation of cross-border anti-competitive conduct within CARICOM.

Chapter VIII of the RTC sets out 4 main obligations, namely for Member States to enact legislation to prohibit anti-competitive conduct and the types of prohibited conduct, establish competition authorities to apply and enforce competition laws consistent with the RTC, for cooperation between the Community Competition Commission and national competition authorities, and for the enforcement of Community Competition Commission decisions.

In this regard Article170 (b) of the RTC provides as follows:

(b) the Member States shall:

(i) take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;

(ii) provide for the dissemination of relevant information to facilitate consumer choice;

(iii) establish and maintain institutional arrangements and administrative procedures to enforce competition laws; and

(iv) take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.

And, with respect to the establishment of national competition authorities, Article 170(2) which provides that:

Every Member State shall establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition.

TYPES OF PROHIBITED CONDUCT UNDER THE RTC

Article 177 of the Revised Treaty sets out the types of prohibited conduct that Member states must at a minimum include in their domestic legislation. Article 177 states that:

1. *A Member State shall, within its jurisdiction, prohibit as being anti-competitive business conduct, the following:*

(a) agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community;

(b) actions by which an enterprise abuses its dominant position within the Community; or

(c) any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME.

These provisions are in mandatory terms but require some further action on the part of Member States beyond the promulgation of the terms of the treaty as an Act of Parliament. Because the language used is directory in nature the passage of an Act to give effect to the treaty cannot result in these provisions having legal effect in as much as further action is required.

REQUIREMENT FOR HARMONIZATION OF COMPETITION LAW

To ensure community competition law and policy is harmonized, Article 174(6) of the Revised Treaty provides that "*Member States shall enact legislation to ensure that determinations of the Commission are enforceable in their jurisdiction*". This provision establishes a positive obligation with respect to determinations by the Commission, albeit not with respect to the Commission's other powers, for example, powers exercisable pursuant to Article 174:2 (a) and 174:2 (b).[2]

[2] That is, securing the attendance of any person to give evidence and requiring the discovery or production of any document or part thereof. These powers are to be exercised in 'accordance with applicable national laws…' but without a requirement that the national laws provide for the exercise of these powers.

It is not clear whether *all* determinations of the CC should be enforceable in CARICOM Member States or those determinations relating to a dispute involving an enterprise incorporated in the particular Member State.

Additionally, Article 171 of Chapter Eight of The Revised Treaty refers to the establishment of a Competition Commission (CC) to implement the Community Competition Policy. The primary goal of this policy is to ensure that "the benefits expected from the Caricom Single Market and Economy (CSME) are not frustrated by anti-competitive business conduct".[3] To ensure this objective is met, Member states are enjoined to, *inter alia*, to put in place the necessary legislative measures for compliance with competition rules, provide penalties for anti-competitive conduct, and to establish the requisite institutional arrangements and administrative procedures to enforce competition law.[4]

OVERVIEW OF THE RELATIONSHIP BETWEEN CARICOM COMPETITION LAW AND MEMBER STATE COMPETITION LAW

In this overview we address the relationship between the regional competition authority and domestic competition authorities, the obligations for consistency in regional and domestic legislation on competition law and policy, and for the enforcement of decisions of the regional competition authority.

Article 170(3) of the RTC provides for cooperation with the Community Commission and other regional competition authorities by stipulating that Member States are to:

(a) co-operate with the Commission in achieving compliance with the rules of competition;
(b) investigate any allegations of anti-competitive business conduct referred to the authority by the Commission or another Member State;
(c) co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.

[3] Article 169 of the Revised Treaty.
[4] Article 170 of the Revised Treaty.

Regarding investigations to be conducted by the CC, this can be done pursuant to a request by The Council for Trade and Economic Development (COTED)[5] where COTED has reason to believe that business conduct by an enterprise in CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects. The CC then consults with the interested parties on receipt of the request for an investigation to be launched. On the basis of such consultations the Commission determines whether (a) the investigation is within the jurisdiction of the Commission, and (b) the investigation is justified in all the circumstances of the case.[6]

Further, Article 176 provides that the CC shall request a national competition authority to conduct a preliminary investigation where the Commission has reason to believe that the business conduct of an enterprise in the Caricom Single Market and Economy (CSME) prejudices, prevents or restricts trade in the CSME. Article 176(2) provides that where a request is made of the national competition authority that authority shall investigate the matter.

In brief, the RTC establishes obligations regarding domestic and regional enforcement of competition law by requiring national competition authorities to be established, prohibited conduct which must at a minimum be included in domestic legislation, harmonization of competition laws, provisions for investigations to be conducted by national investigating authorities involving cross-border anti-competitive conduct, and the giving effect of Community Commission decisions in domestic legislation.

MARKET DEFINTION

The following discussion provides some of the main conceptual tools used to determine anti-competitive conduct. We begin with the premise that anti-competitive conduct is concerned with conduct in markets. Therefore, a central consideration for any competition authority or legal

[5] Article 175(2) of the Revised Treaty.
[6] Article 15(4) of the Revised Treaty.

practitioner is the definition of the relevant market for the purposes of the investigation or litigation proceedings, the relevant market referring to both a product and a geographic market.

Identifying the relevant market is important to assess the market share or market concentration of the supplier of a product, and the competitive pressure on the supplier of a product in relation to substitute products. This is not only a question of administrative practice but is also a legal requirement.

Often, there will be a dispute as to whether '*the'* or *'a'* relevant market has been properly defined and delineated for assessment of anti-competitive conduct. In other instances, there may be an issue of whether there can be a finding of anti-competitive conduct in the absence of an elaborate market definition and analysis typically provided by economists. This is no less true for the determination of the competition authority than for the expert testimony of experts on whom much reliance is placed by competition authorities, legal practitioners and the courts.

In brief, competition analysis, having identified the relevant provision to examine the conduct complained of, will often begin with identifying the relevant market.

Identifying the relevant market is important to assess the market share or market concentration of the supplier of a product, and the competitive pressure on the supplier of a product in relation to substitute products. This is not only a question of administrative practice but is also a legal requirement.[7]

The Court of First Instance has explained the role of market definition under Article 81 and 82[8] cases as follows:

> The approach to defining the relevant market differs according to whether Article 85 or Article 86 of the Treaty is to be applied. For the purposes of Article 86, the proper

[7] See, for example, Case 6/72 *Europemballage Corp. and Continental Can Co. Inc v. Commission* [1973] ECR 215, at 247; [1973] CMLR 199 at 226.
[8] That is, the provision regarding abuse of dominance and anti-competitive agreements respectively.

> definition of the relevant market is a necessary precondition for any judgement as to allegedly anti-competitive behavior since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement, the deci-sion by an association of undertakings or the concerted practice at issue is li-able to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the Common Market.[9]

There is, however, little guidance on how the relevant market is to be defined in a given case, the market here referring to a product and a geographic market.

PRODUCT MARKET

The relevant product market is often assumed to be one which is capable of being monopolized or one whereby a single supplier can raise prices profitably.

By contrast, a market is not worth monopolizing if a significant number of consumers of the product would switch to substitute products for a given price increase say of between 5 and 10 percent as this would make the price increase unprofitable.

To determine if a market is capable of being monopolized or in other words to determine the relevant market for investigation, the Small But Significant and Non-Transitory Increase in Price (SSNIP) test is often used. The test assumes that the product as defined is the relevant product and asks what the likely effect would be were there to be a 5 to 10 per cent increase in the price of the product. If consumers would switch to substitute products these must be added to the list of products constituting the relevant market, the process continuing until the hypothetical monopolist is able to profitably increase its price for the product.

[9] Case T-29/92 *Dutch Building Companies v Commission* [1995] ECR II-289, para. 74.

At the point where the hypothetical monopolist is able to increase its price profitably, all the substitute products already included would be identified as being part of the relevant product market, the substitute products being able to provide competitive restraint to the supplier of the product in question.

The process of adding substitute products until prices can be increased profitably is so as to determine what scope of products are involved for the supplier to be able to monopolize the market. That is, the availability of substitutes determines the extent to which it would be worthwhile to attempt to monopolize the market.

In brief, the relevant market includes products which are substitutable and excludes those which are not. Where a supplier is able to profitably increase the price of its product in relation to another, the availability of the other product is deemed as not being able to provide any competitive restraint and would not be included in the relevant market for competition analysis.

Determining the relevant market is not limited to issues of demand substitution but includes the extent to which other suppliers are able to respond to the price increase by switching their production facilities to making and supplying the particular product or what is often termed *supply-side substitutability*.

The requirement for a *supply-side substitutability* analysis is endorsed by the courts as an important part of the analysis for determining the existence of or the extent to which substitute products can be available for inclusion in the relevant market.[10]

GEOGRAPHIC MARKET

An important part of the analysis for the relevant market is to determine the geographic market. This refers to an area in which the conditions of competition applying to the product concerned are the same for all traders. The geographic market is determined on the basis an analysis of

[10] See, for example, Case 6/72 *Europemballage Corp. and Continental Can Co. Inc. v. Commission* [1972] E.C.R. 215.

those areas from which a firm can act as a producer of substitutes to those of the product under consideration.

Factors often taken into consideration in defining the relevant geographic market often includes:

1. Regional differences (for example, if there is a need to access distribution and marketing infrastructure);
2. Product prices (e.g. similar price levels or price movements in another region indicates substitutability of the products under consideration;
3. Consumer preferences (e.g. consumer loyalty, despite similarity in the products characteristics and end use may suggested different product and geographic markets; and
4. Transport costs (e.g. high transportation costs between regions may suggest the infeasibility of competition across regions although this factor is not definitive)

CRITIQUE OF THE SSNIP TEST

There are several criticisms of the SSNIP test. Here we will focus on three main flaws. First, the test is price based and does not account for quality differences in products as a factor for switching in response to a 5-10 per cent price increase.

An increase in price may bring the price of the product so close to a possible substitute of a higher quality such that consumers switch to the higher quality product instead. Here the SSNIP test would assume that the two products are substitutes and are within the same market when they are not because of differences in quality between the products.

Secondly, often reliable price data for the subject product and competing products is not readily available. Current or historical data of price movements may be unreliable or of short duration and would not meet the *non-transitory* requirement in the SSNIP test.[11]

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[11] *See Gulfstream Park Racing Assoc. v. Tampa Bay Downs, Inc.*, 2003 U.S. Dist. LEXIS 20225 at *50-51 (M.D. Fla. Nov. 7, 2003) (rejecting historical price increase on the grounds that it lasted "for a transitory period of time, five years.") For this reason, the Guidelines themselves caution: "the picture of competitive conditions that develops

The *US Merger Guidelines*, for example, embraces the use of historical data but caution against its use as well because of the possibility that such data can be misleading.

Thirdly, the SSNIP test assumes that the prices of competing products are held constant, that is, the focus is on own price elasticity and not cross price elasticity of demand. Price changes are, however, not likely to be limited to this situation in reality. A change in price of the product under investigation may trigger an upward price movement for competing products. This may result from several factors including cartel behavior, collusion, strategic pricing to increase revenue whereby the price of the competing product is increased marginally but below the price increase of the product under investigation, or a price increase justified by an increase in cost affecting the whole industry.

In this scenario the price data relied on for the SSNIP test is static while there are price movements in reality by the response of competing products which occur after the initial price increase of the product under investigation which is still subject to adjustments depending on consumers' response to the price change of the competing product.

ANTI-COMPETITIVE AGREEMENTS

Several CARICOM legislation refer to anti-competitive agreements as prohibited. In some instances a *per se* standard is used and in others a *rule of reason* standard is used to determine if there is a breach of the provision.

A *per se* standard refers to a situation whereby if elements of the offending conduct are met there is a breach of the provision without any proof of an anti-competitive effect in a market. By contrast, a *rule of reason* standard refers to a situation whereby the elements of the offending conduct and proof of anti-competitive conduct in a market must be established for there to be a breach of the provision.

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from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines" Horizontal Merger Guidelines, 4 Trade Reg. Rep. ¶ 13,104, at § 0.

Some of the provisions in CARICOM legislation include sections 17-18 of the FCA, sections 13-15 of the Fair Competition Act, 2002 Barbados, sections 17-18 of the Fair Trading Act, 2006 of Trinidad and Tobago, and sections 20-22 of the Competition and Fair Trading Act, 2006 of Guyana.

In some legislation, the combination of a *rule of reason* and a *per se* standards are employed. Sections 17(1) and (2) of the FCA are instructive in this regard. Sections 17(1) and (2) of the FCA provide as follows:

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 of supplementary 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)

Section 17(1) makes a distinction between agreements with an anti-competitive purpose and agreements with anti-competitive effect.

An agreement with anti-competitive purpose[12] is subject to the *per se* standard and an agreement with an anti-competitive effect is subject to the *rule of reason* standard.

In other instances, a *per se* standard is used for exclusionary agreements or agreements between or among competitors containing provisions to restrict the supply of goods and services.[13]

The term 'agreement' is given a broad definition. For example, section 2 of the FCA defines an agreement as including *'any agreement, arrangement or understanding whether oral or in writing or whether or not it is or is intended to be legally enforceable'*.

This broad definition has given rise to concerns of whether mergers and acquisitions are covered by the term because there is no provision for pre-merger notification or express post-merger enforcement provisions as exist in mature competition jurisdictions.

There is no local case law expressly addressing this issue, that is whether the absence of express pre-merger notification provisions in the FCA means that the term agreement should be interpreted as excluding mergers, but the Supreme Court has recently held in *Fair Trading Commission v. Digicel Jamaica Ltd and Oceanic Jamaica Ltd* that the term 'agreement' in the FCA covers any agreement with an anti-competitive effect.[14]

Also, decisions from the European Court of Justice (ECJ) before the promulgation of their pre-merger notification provisions indicate that similarly worded provisions were interpreted to include mergers.[15]

[12] For example, price fixing agreements.

[13] See for example, section 18 of the Fair Competition Act, 1993 of Jamaica, section 18(1) of the Fair Trading Act, 2006 of Trinidad and Tobago, section 21(2) of the Competition and Fair Trading Act, 2006 of Guyana, and section 14(1) of the Fair Competition Act, 2002 of Barbados. These agreements are usually referred to as horizontal agreements, that is, agreements between or among competitors. The *per se* standard is, however, applied to vertical agreements in some legislation, that is, agreements between manufacturer and distributor or supplier and customer who need not be in competition with each other. See, for example, section 18(3) of the Fair Trading Act, 2006 of Trinidad and Tobago which prohibits vertical price fixing agreements.

[14] *Fair Trading Commission v Digicel Jamaica Ltd. and Oceanic Jamaica Ltd*., Claim No: 2011 CD 00090, unreported, para. 14.

[15] See, for example, *BAT&Reynolds v Commission*, Cases 142&156/84 [1987] ECR, 4487; 1988 4 CMLR 24.

Different standards are used in CARICOM legislation for the *rule of reason* approach regarding anti-competitive agreements. For example, in Barbados the standard is the '*restriction, prevention or distortion*' of competition,[16] in Trinidad the standard is also the '*restriction, prevention or distortion*' of competition,[17] in Guyana the standard is the '*restriction, prevention or distortion*' of competition,[18] in the Organisation of Eastern Caribbean States (OECS) the standard is *restriction, prevention or distortion*'[19] and in Jamaica the standard is a substantial lessening of competition.[20]

Arguably, the standard under the FCA is higher than what obtains in other jurisdictions in CARICOM since some *restriction* or *distortion* of competition is not sufficient for the anti-competitive effect found to be in breach of the provision but a finding of a substantial lessening of competition.

SUBSTANTIAL LESSENING OF COMPETITION

Sections 17 and 20 of the FCA require a consideration of substantial lessening of competition in a market, in the former for agreements and in the latter for abusive conduct.

Pursuant to section 17 of the FCA, the subject agreement must have as its purpose or effect the substantial lessening of competition in a market. Section 17 identifies a non-exhaustive list of conduct which can give rise to a claim that an agreement is substantially lessening competition in a market.

Conduct not specifically identified under section 17 (2) (a) –(e) as the impugned conduct in question does not obviate an examination of an agreement to determine if it is inconsistent with

[16] Section 13 of the Fair Competition Act, 2002 of Barbados.
[17] Section 17(2) of the Fair Trading Act, 2006 of Trinidad and Tobago.
[18] Section 20 (1) of the Competition and Fair Trading Act, 2006 of Guyana.
[19] Section 13 Draft Competition Bill, 2009, Organisation of Eastern Caribbean States (OECS)
[20] Section 17(1) of the Fair Competition Act, 1993 of Jamaica.

section 17 since the list identified in section 17(2) (a)-(e) of the FCA is not exhaustive, provided that the agreement in question is capable of breaching section 17 of the FCA.[21]

Therefore, the provisions referred to in section 17(2) of the FCA as contained in agreements covered by section 17(1) are not exhaustive and may apply to any provision in an agreement which has the purpose or effect stipulated in section 17(1) of the FCA.

Section 17 of the FCA requires that the purpose or effect of the agreement in question is a substantial lessening of competition in a market.

Where the purpose of the agreement as opposed to the effect thereof is a substantial lessening of competition in a market but there is no corresponding anti-competitive effect, there is less likely to be a finding of breach of the provision, although a finding of anti-competitive effect without the corresponding purpose will suffice for a breach of the provision.[22]

[21] See, for example, Case C-95/04 P *British Airways v. Commission,* paras. 57-59. This is a case on abuse of dominance but the provision implicated is similarly worded with the provision on anti-competitive agreements in its opening clause and the enumerated conduct, except for conduct identified in paras (a) –(e) under section 17 of the FCA.

[22] See, for example, Court of Appeal in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 – where purpose is primarily assessed objectively, but subjective evidence of anti-competitive purpose is relevant to the inquiry. Further, there can be a prohibited purpose notwithstanding there's no actual or likely effect of substantially lessening competition. However, if the conduct is incapable of substantially lessening competition that will also be relevant to the purpose inquiry. The Court stated at [456]:

> "If we apply an objective analysis of purpose as preferred by the majority of the Court of Appeal in ANZCO, then the substantial margin by which Todd fails to make out any requisite effect or likely effect in the nature of an SLC [substantial lessening of competition] tends to negative the existence of any relevant anti-competitive purpose. Where, on a fully informed analysis, it appears highly unlikely that an anti-competitive effect could be achieved, then an objective assessment of purpose would tend to lead to a consistent result, that an anti-competitive purpose could not be made out."

Section 27 of the Commerce Act of New Zealand, 1986, is similar in terms to section 17 of the Fair Competition Act, 1993, Jamaica. Section 27 of the Commerce Act of New Zealand, 1986 provides as follows:

1. Section 27(1) of the Act provides:

Therefore, a finding of no anti-competitive effect or a negative finding of a substantial lessening of competition in a market obviates an analysis on whether an agreement covered by section 17 (1) of the FCA has as its purpose the substantial lessening of competition in a market.

This position is at variance with EU jurisprudence[23] whereby the absence of anti-competitive effects is no bar to finding a breach of provisions prohibiting anti-competitive conduct, and including a breach of Article 101 of the TFEU, in similar terms as section 17 of the FCA, if anti-competitive purpose can be established.[24]

SUBSTANTIAL LESSENING OF COMPETITION UNDER SECTION 20 OF THE FCA.

Under section 20 of the FCA, the FTC has to take into account whether an identified abusive conduct has had is having or is likely to have the effect of substantially lessening competition in a market before being able to issue directives to rectify the impugned conduct.

A reading of section 20 of the FCA also indicate that additional factors, other than those taken into account for this determination under section 17 of the FCA, are important in the analysis, in particular whether the abusive conduct is the result of superior competitive performance.

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27. Contracts, arrangements, or understandings substantially lessening competition prohibited

(1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

By way of contrast section 17(1) of the Fair Competition Act, 1993, Jamaica provides as follows:
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.

[23] For example, in *Campagnie Maritime Belge*, the Court of First Instance (interpreting Article 102 of the TFEU in similar terms to section 20 of the FCA) held that a dominant firm engaging in conduct with the purpose of removing a competitor is involved in abusive conduct even if that result is not achieved.
[24] See, for example, Consten and Grundig v. Commission [1966] ECR 299, at 342.

ABUSE OF DOMINANCE

Section 19-21 of the FCA requires a finding of dominance, abuse of dominance, substantial lessening of competition and that a finding of substantial lessening of competition in a market must take into account whether the impugned conduct is the result of superior competitive performance.

CASE LAW IN JAMAICA

There is no decision in the Jamaican courts on the interpretation and application of sections 19-21 of the FCA. However, some recent decisions suggest how the court may be minded to address the issue of abuse of dominance.

In case of the **Jamaica Stock Exchange**[25], abuse of a dominant position does not arise if the enterprise concerned is not operating in a market whereby, for example, the goods or services it provides are exempt from the application of the FCA or are not within the definition of a market.

Here the Court of Appeal held that the exclusion of securities from the definition of goods and services means that the Jamaica Stock Exchange is not operating in a market as defined under the FCA because the definition requires that an enterprise is offering goods and services.

The Court of Appeal noted as follows:

"It will be recalled that earlier it was shown that "goods" as well as "services" do not relate to securities. It follows therefore that the term in the market has no relationship or relevance to the appellant, as the appellant does not "operate in the market" as defined." [26]

Two other decisions are worth noting, namely *Olin*t *Corp Ltd. v. National Commercial Bank Jamaica Ltd* and *National Commercial Bank Jamaica Limited v. Olint Corp. Limited.*

In **Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd**.[27] the claimant sought an order to extend an interim injunction to prevent the defendant from closing its accounts,

[25] *Jamaica Stock Exchange v. FTC*, Civil Appeal No. 92/97, January 2001, unreported.
[26] Ibid., p.65.
[27] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Claim No. 2008 HCV 00118, April, 2008.

claiming, *inter alia*, that there are serious triable issues with respect to the defendant abusing its dominant position in breach of section 19-20 of the FCA. The Court, however, found no evidence that the defendant bank could be in a dominant position.[28] The court observed further that:

"There is, however, evidence that there are five other commercial banks operating in Jamaica and they compete for business. There is also evidence that the Defendant is the second largest bank with assets of between 34% to 37% of total deposits and 30% to 34% of total loans. The largest bank and competitor to the Defendant is the bank of Nova Scotia with over 40% of total deposits and loans. In my judgment there can be no serious issue that the Defendant firstly, occupies such a position of economic strength as will enable it to operate without effective constraints from its competitors in the market under the Fair Competition Act; and secondly, was abusing it in relation to the Claimant".[29]

On this holding, the existence of competitors within a market forecloses the relevance of an abuse of dominance claim under section 19-21 of the FCA.

At the Court of Appeal a different position was taken. The Court of Appeal held that it could not conclusively hold that there is no serious issue to be tried, for the purposes of extending the injunction, given the Defendant's market share in excess of 30%,with only one bank similarly circumstanced in a field of six banks, but also because section 19 of the FCA is not a legal term of art, but a provision that involves the intersection of law and economics for which expert evidence would have to be provided to make judgments on concepts such as 'a position of economic strength' and 'effective constraints'.[30]

The decision was again subject to appeal and, like the decision of Mr. Justice Jones in the court below, the Privy Council paid short shrift to the appellant's claim of abuse of dominance. Bearing in mind that this is the first statement of the Privy Council on section 19-20 of the FCA, it is worth quoting in full. The Privy Council held the following:

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[28] Ibid.,p.18.
[29] Ibid.
[30] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Supreme Court Civil Appeal no. 40/2008, July 2008, p.34.

The claims under the Fair Competition Act appear to their Lordships to be equally unpromising. First, it is said that by closing the account, the bank was abusing a dominant position in the market. There appears to have been no evidence to suggest that the bank occupied a dominant position – defined in section 19 as "such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors" – in the market for banking services in Jamaica. The bank is the second-largest in Jamaica, with 34-37% of total loans and 30-35% of total deposits, but the Bank of Nova Scotia is larger and there are four other commercial banks in Jamaica, to say nothing of foreign banks. They are all in competition with each other. It is not easy to acquire a dominant position in the banking market. However, even if the bank did occupy a dominant position, their Lordships cannot see how a refusal to be the company's banker can be an abuse of that position. Abuse of a dominant position is normally with a view to securing some advantage in the market. Section 20 defines such abuse as impeding the "maintenance or development of effective competition". It does not appear to their Lordships that the bank's action could have any effect on competition between banks. On the contrary, it enabled competitors to pick up another customer if they felt inclined to do so.[31]

On the basis of the foregoing, a bank's closing of a customer's account, in circumstances where there are many banks with none being dominant, does not affect competition if a competitor bank will pick up that account. This, however, amounts to an *a priori* position without any analysis as to what is the relevant market for purposes of determining if an enterprise is dominant in that market. The Privy Council engaged in no analysis of what the relevant market is or should be, and whether market share by itself can establish either (a) the relevant market, and/or (b) whether the claimant is being or likely to be excluded from that market as a circumstance of abuse. Rather, it assumed that the relevant benchmark for whether competition is affected is that of competition between banks, without an appreciation of the likelihood of the claimant being a part of the relevant market from which it could be excluded.

Importantly, the implication of the decision is that a claimant for an injunction claiming a breach of section 19-20 of the FCA must show evidence of dominance of the enterprise concerned at the stage of requesting the injunction. It is, therefore, not enough to allege dominance by reference to

[31] *National Commercial Bank Jamaica Limited v. Olint Corp. Limited, Privy Council* Appeal No. 61 of 2008, paragraph 8.

some benchmark of market share that could be taken into account in a preliminary assessment of whether a triable issue exists. This seems contrary to the guiding principles for the granting of an injunction, namely that the claimant must establish that there is a triable issue as against proving the elements of a claim.

The abuse of dominance provision in the FCA is in similar terms to Article 102 (ex Article 82 EC, ex Article 86 EC) of the Treaty on the Functioning of the European Union (TFEU) which provides as follows:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

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

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

There are notable differences between Article 102 of the TFEU and section 19-21 of the FCA. In particular an abuse of dominance *simpliciter* is prohibited, and there is no provision for taking into account superior competitive performance in the remedy for abusive conduct, unlike the FCA.

Therefore, an abuse of dominance in and of itself is not prohibited under the FCA. Further, the directive to consider substantial lessening of competition and superior competitive performance is a directive to the Commission and not to the court.

The directive to the Commission to consider these issues may suggest that it is the Commission and not the court that is competent to consider them. However, a court may properly consider these issues in an application for judicial review whereby the Commission's decision is subject to challenge on the basis that these issues were not addressed in its finding that particular conduct is an abuse of dominance and directives or recommendations are issued to the alleged offending firm for compliance with the FCA.

An interesting question arises as to whether the Commission must first find an abuse of dominance that substantially lessens competition in a market before a court of competent jurisdiction can determine that such abuse has occurred. Section 46 of the FCA authorizes the Commission to apply to the court to enforce the provisions of the FCA.

Section 46 reads as follows:

If the Court is satisfied on an application by the Commission that any person—
(a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI or VII; or
(b) has failed to comply with any direction of the Commission,
the Court may exercise any of the powers referred to in section 47.

An abuse of dominance resulting in a substantial lessening of competition in a market and factoring the result of superior competitive performance is one of the prohibitions imposed in PART III of the FCA. Section 46 of the FCA contemplates the Commission making the application to the court and it is arguable that in so far as the law enforcement function is concerned it is the Commission which is charged with applying to the court for enforcement.

Section 48 of the FCA, for example, permits a private cause of action where a breach of the FCA results in loss to a person, and may be read as distinguishing between the purpose of section 46, for a purely law enforcement function arguably, and of section 48 providing for a remedy to an individual separate from a purely law enforcement function.

There is no requirement in section 46 of the FCA, however, that it is only the Commission that can make the application to the court for enforcement of the provisions of the FCA. Section 46 of

the FCA refers to an application to the court where an obligation or prohibition is breached or where a person has failed to comply with any direction of the Commission.

With respect to the latter it is to be expected that it is the Commission that would make the application to the court for enforcement of the Commission's directives. Regarding a breach of the obligations or prohibitions referred to in section 46, the Commission could also make the application to the court but there is no foreclosing of applications by other parties in the language used since the term 'on an application by the Commission' is non-exhaustive of the parties that may apply to the court.

If, however, an application may be made to the court by a private party against any person in breach of any prohibition or obligation imposed by the FCA there would be no sound reason in principle to deny a private party making an application to the court for compliance with the directions of the Commission. This is so because no distinction is made as between a private party and the Commission as to who can make the application in respect of the types of conduct involved, that is, contravention of obligations under the FCA or contravention of the directives of the Commission.

The factors to be considered by the Commission in determining whether to issue directives for a finding of abuse of dominance suggests that section 46 is directed to the Commission to apply to the court for enforcement and not to a private party, at least as it relates to an allegation of abuse of dominance. Specifically, the question of superior competitive performance must be considered in the Commission's determination whether the abuse of dominance results from superior competitive performance.

Section 21 does not, however, provide any guidance as to what the Commission must do if it finds that the substantial lessening of competition is the result of superior competitive performance perhaps because the Commission, as an expert body, would be fully equipped to address this question. A court is also left in the dark as to what factors must be considered on the question of superior competitive performance and what it must do if it finds that a substantial lessening of competition results from superior competitive performance.

Since there must be a prior finding of abuse of dominance before the question of substantial lessening of competition is determined, a finding that the abusive conduct results from superior

competitive performance does not negate the abuse but relates to the question of substantial lessening of competition.

Indeed, it is not clear whether the superior competitive performance requirement adds anything of value to the provision, since there is no guidance to the Commission or to the court of how an affirmative finding would affect the kind of directive the Commission should provide or the analysis in which a court should be engaged.

In sum an abuse of dominance is not prohibitory conduct under the FCA because there are other criteria to be met for the conduct to require directives from the Commission to remedy the conduct, namely substantial lessening of competition and factoring superior competitive performance.

In addition, a court would not be able to complete the analysis if the matter were brought before it in the first instance to evaluate alleged abusive anti-competitive conduct there being no guidance on how to address the question of superior competitive performance. The latter requirement should therefore be removed to avoid unnecessary confusion or difficulty in the application and enforcement of the provision.

Despite this proposition, section 46 seemingly refers to abuse of dominance as a prohibition or obligation under Part III of the FCA. Section 46 does not expressly refer to abuse of dominance as a prohibition, however, and the language of the provision does not suggest a prohibition of abuse of dominance in and of itself.

Consequently, an abuse of dominance is not one of the prohibitory provisions referred to in Part III of the FCA, and it therefore seems as though it is a directive from the Commission in relation to the Commission's finding of an abuse of dominance that would be the subject of enforcement under section 46 of the FCA.

THE EFFICIENCY DEFENCE

As discussed below, an efficiency defence exists for prohibited conduct such as an abuse of dominance and anti-competitive agreements.

TYPES OF EFFICIENCIES UNDER SECTION 17(4) OF THE FCA

Section 17(4) of the FCA recognizes three types of efficiencies without any explicit reference to the terminology employed by economists, namely allocative, productive and dynamic efficiencies.

Section 17(4) provides as follows:

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 satisified –

(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 indispensible 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.

The jurisprudence of the European Union is instructive in the interpretation of this provision due to its similarity with Article 101(3) of the TFEU which provides as follows:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: -any agreement or category of agreements between undertakings -any decision or category of decisions by associations of undertakings -any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Turning to the efficiencies, allocative efficiency refers to a situation in which goods and services are allocated among consumers in accordance with the prices they are willing to pay such that prices are equal to marginal costs. Allocative efficiency is achievable under a state of perfect competition whereby a firm by reducing output cannot affect the price of the good or service. By contrast, allocative inefficiency occurs under a state of imperfect competition whereby a firm can affect prices by reducing output such that prices are above marginal costs.

Productive efficiency, on the other hand, refers to a situation whereby under perfect competition goods and services are produced at the lowest possible cost such that as little of society's wealth is used in the production process. Firms with market power are not necessarily driven to produce at the lowest possible cost if they are not constrained by competition, and a firm without market power is driven to reduce its costs as much as possible to earn profits since the price at which it sells is not dictated by its output.

In the case of dynamic efficiency, this refers to a situation in which firms constantly innovate in developing new production techniques and products to attract customers as they compete to gain market share.

Arguably, the goal of competition law is to ensure that these efficiencies are met by the promotion of competitive markets. However, inconsistency may arise among the efficiencies claimed.

POSSIBLE INCONSISTENCY IN EFFICIENCIES

A joint venture agreement, for example, may allow the joint venture to reduce production costs, enhance economies of scale and scope and generate new products by the coordination of production facilities, but may increase market power and lead to an increase in prices thereby affecting the realization of allocative efficiency.

Similarly, competition in a downstream market may be enhanced by access to an essential facility resulting in lower prices and more allocative efficiency, but may reduce dynamic efficiency by affecting the incentive of the dominant firm to innovate since its ability to enjoy super normal profits is reduced.

In addition, an agreement exhibiting dynamic efficiency may not produce either productive or allocative efficiency in the short run as in a situation whereby the sunk costs for the innovation being pursued is significant and the attendant high production costs have to be offset by higher prices to consumers.

Moreover, by the operation of law dynamic efficiency may trump allocative efficiency. In this regard one may observe that there seems to be some confusion in the goal to be pursued by the FCA regarding anti-competitive agreements. For example, while section 17(4) recognizes allocative efficiency as a defence that must be demonstrated even if the agreement has dynamic efficiencies, section 3 of the FCA exempts, from the prohibition under section 17, dynamic efficiency agreements based on intellectual property (IP) rights.

MUST ALL THE EFFICIENCES BE MET UNDER SECTION 17(4) OF THE FCA?

In as much as at least one of the three efficiencies mentioned above (i.e. allocative efficiency) requires the existence of perfect competition, it is arguable that this efficiency need not be established since the very premise of its operation is non-existent, that is, perfect competition.

WHAT IS A FAIR SHARE OF THE RESULTING BENEFITS?

There is no definition of what is a fair share to consumers. Arguably, this must depend on the circumstances and the type of efficiency claimed. In the EU Guidelines, a sliding scale approach is used whereby the anti-competitive effects (or likely effects) are balanced against the pro-competitive effects (or likely effects) of the challenged conduct. The sliding scale approach refers to the main principle governing the balancing exercise whereby the higher the degree of market power generated by the challenged conduct, the greater the need for the parties to demonstrate substantial efficiencies.

Under this approach, a resulting benefit to consumers is presumed if the pro-competitive effects outweigh the anti-competitive effects.

However, this test under the EU Guidelines is often stricter than what is applied by the courts. The ECJ jurisprudence suggests, for example, that the advantages generated by the agreement must compensate for the negative effects of the agreement on the structure of competition.[32]

In the case of productive efficiency factors often examined in the balancing exercise include:

(a) The characteristics and structure of the market;

(b) The nature and magnitude of the efficiency gains;

(c) The elasticity of demand; and

(d) The magnitude of the restriction of competition.[33]

Dynamic efficiency in the form of new, improved and innovative products often trumps productive efficiency in the short run, as a preferred efficiency, although this may affect consumer benefit in the short run because of higher prices.

The EU Guidelines, for example, treat innovative products as important for consumer welfare, and that consumers are likely to be better off with such products (or that the consumer benefit can be more readily presumed) than without despite the increase in price caused by the agreement.[34]

This is not to suggest that dynamic efficiency is controlling irrespective of the effect on the market. Whatever the claimed efficiency for an exemption, there is no justification for the agreement if it will eliminate competition for a substantial part of the market for the product in question.

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[32] See Case 56/63, *Consten and Grundig v. Commission* [1966] ECR 299, at 342.
[33] EU Commission's "Guidelines on the Application of Article 81(3) of the Treaty" (2004/C 101/08) at para 87.
[34] Ibid. para. 104.

CONCLUSION

Competition law and policy has now assumed an expanding role in the tapestry of the legal framework for regulating business conduct. Obligations exist under the RTC for CARICOM Members to institute competition authorities to govern anti-competitive conduct and several CARICOM countries have instituted legislation to give effect to their treaty obligations.

It is expected that these developments will continue resulting in the need for legal practitioners to be conversant with the applicable legal principles and procedures used by competition authorities in determining the existence of anti-competitive conduct.

Some of the main legal principles addressed include the main types of prohibited conduct, such as abuse of dominance, anti-competitive agreements, and anti-competitive mergers.

A noted above, a crucial exercise for determining anti-competitive conduct is the definition of the relevant market and the means often employed to do so including use of the SSNIP test.

Although criticisms abound regarding the tools used in competition analysis, there is no firm judicial stance negating the standard approach adopted by competition authorities in evaluating anti-competitive conduct.