THE FAIR TRADING COMMISSION: ROLE, STRUCTURE AND THE CURRENT INTERPRETATION OF THE FAIR COMPETITION ACT

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WHY THE NEED FOR THE FAIR COMPETITION ACT?

Over the past twenty (20) years, the world has witnessed a trend towards economic liberalization. Many developed and developing countries have begun to emphasize decentralized competition rather than centralized state direction as a means of determining the production and distribution of goods and services.

It has become widely accepted that the adoption of a free market system holds the best prospect for Jamaica's economic development and improvement in the welfare of its citizens. It is this recognition that has led the Jamaican government to introduce a number of policy measures popularly associated with such terms as liberalization, deregulation, divestment etc.

What the government hopes to achieve is the promotion of a free market economy with the attendant benefits, namely, (a) the efficiency which results from competing firms; (b) lower prices and more choices for the consumer; (c) better products and services; (d) more choices for consumers; and (e) increasing opportunities for existing and new businesses.

It has also been recognized that the gains from the operation of a free market can be subverted if care is not taken to ensure that certain controls are put in place. The passing of the **Fair Competition Act** (**FCA**), in 1993 and the establishment of its administrative body, the Fair Trading Commission (FTC), demonstrate a clear understanding of this reality.

The **FCA** was put in place to ensure competition in the conduct of business in Jamaica. All legitimate business enterprises must have an equal opportunity to participate in the Jamaican economy. Additionally, the consumer ought to have the benefit of adequate and relevant information, and be afforded meaningful choice.

THE STRUCTURE OF THE COMMISSION

As stated above, the FTC was set up to administer the **FCA**, which was passed in March 1993 and became law on September 9, 1993.

Composition

The Commission is in fact made up of two distinct arms: The quasi-judicial portion (as represented by the five (5) appointed Commissioners) and the investigative arm or Commission's staff (headed by the Executive Director, who directs three (3) lawyers, two (2) economists, two (2) research officers and a cost accountant).

The Commission's staff sees to the day-to-day running of the Commission and has the

ability to resolve matters out-of-court prior to recommendation to the Commissioners that a lawsuit be filed.

The Commissioners may summon witnesses, call for documents and, in certain instances, issue directions to a company believed to be in breach. They are empowered to make "findings" in certain cases, those cases being abuse of dominance, exclusive dealing, market restriction and tied selling; in this regard, they behave very much like judges. (This will be discussed more fully, *infra*) In other matters, the Commission will have to take the entity charged to court.

It should be pointed out that the Commission as a body performs the functions of investigator, complainant and adjudicator. While this may appear conflictual, other jurisdictions with similar agencies have found that this does not necessarily violate the principles of natural justice.[1] The Commission is aware of the possible perceptions of injustice and has put in place certain safeguards, for example, on those occasions when the Commissioners act in a judicial capacity, the Executive Director never participates as a Commissioner, even though the Act identifies the Executive Director as an "ex officio" Commissioner. Also the Commission's staff must observe certain rules put in effect to preserve the fairness of the proceedings.[2] Most notably, there can be no *ex parte* communications with the Commissioners with regard to the matter being adjudicated. In other words, the Commissioners are treated as judges in that, with regard to the complaint before them, there can be no discussion of the matter being adjudicated without the other side being present.

How It Works

It is important to understand that the Commission is not a Business Court. Rather, it is an enforcement agency. In practical terms, that means that the Commission is not the adjudicator of individual disputes but rather seeks to address matters of national interest. For example, Mrs. X makes a complaint against Company Y. The Commission investigates and decides that Company Y is in breach of the Act and decides to take them to Court.

The lawsuit that ensues is then the FTC v Company Y, NOT Mrs X v Company Y. Consequently, any money recovered as a result of that lawsuit does not go to Mrs X but to the government. If Mrs X wants to recover money for Company Y's breach of the Act, she can retain counsel and go to court directly, bypassing the Commission entirely.

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[1] *See*, FTC v. Cinderella Career and Finishing Schools, 404 F.2d 1308 (D.C. Cir. 1968) (holding that for the Federal Trade Commission to consider recommendations of subordinates, issue a complaint and a press release and later to decide the case does not violate due process). *See also*, Sharpe v. The Jamaica Racing Commission, (1974) 12 J.L.R. 1319; and Withrow v. Larkin, 421 U.S. 35 (1975) (discussing how bodies that serve combined functions do not violate natural justice in so doing).

[2] *See, infra*, section on legal procedure.

It is helpful to use the analogy of the Director of Public Prosecutions (DPP) to best understand how the Commission works. In the case of a crime being committed,(e.g. P murders Q), in a subsequent trial for murder, it is not the family of P v Q, but the DPP v Q. The resources of the state are brought to bear against Q. If the DPP is successful, the family of P does not receive money, Q simply goes to jail. If P's family wants money or other remuneration, they will have to institute a separate civil lawsuit, usually entitled Estate of P v Q. In that lawsuit, they keep whatever is recovered.

It is important to understand the Commission's law enforcement posture because that has implications for those who bring matters to the attention of the Commission. Specifically, the Commission's staff, in doing an investigation triggered by a complaint, is not required to report to the individual who made the complaint. Certainly, if that individual has pertinent information they wish to pass to the Commission, they may do so. And there are times the Commission will request information. But, there is no duty on the part of Commission's staff to continuously report the complaint's status to the person who lodged the complaint initially. That person is not a party and has no right to information obtained by the Commission.

The FTC's Position vis - a - vis Complainants

Section 5-(1)(a) of the **FCA** empowers the Commission to "carry out , on its own initiative or at the request of *any person* such investigations in relation to the conduct of business in Jamaica . . ."[*emphasis added*] Those persons who bring matters to the attention of the FTC are referred to by the Commission as complainants.

From these persons, the Commission may garner information to assist in the investigation.[3] Section 7 gives the Commission discretion to entertain live testimony during the course of its investigation. (Obviously, this might be from the very person who initiated the complaint.) However, the Commission must hear that person if there has been a written request for a hearing.

What is conspicuously absent from the **FCA** is any reference to a duty on the part of the Commission to report to, or consider evidence from, the complainant. Indeed, the Commission need not even tell the complainant of a decision to discontinue the investigation, only the Minister is so entitled.[4]

It is the Commission's practice to look to other jurisdictions for guidance as to interpretation and practice. With regard to the function and practice of an agency of a similar nature, the Canadian approach is distinctly different. Under their Competition Act, an appointed

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[3] Section 6 of the **Fair Competition Act** (hereinafter referred to **FCA**).

[4] Section 11-(1) of the **FCA**.

Director of Investigation and Research may initiate an investigation on his own or at the request of six (6) Canadian residents.[5]

If a decision is made to discontinue an inquiry initiated as a result of such request, the Director must notify those who brought the complaint to his attention.[6] If applicants are displeased with that decision they may write to the Minister, who then decides whether or not further inquiry is warranted by the Director.[7]

The Jamaican FTC (JFTC) has communicated with the Canadian Director as to the frequency of this type of Ministerial intervention. We were informed that the Minister has never exercised this power. The reason stated was the obvious negative connotations which would necessarily flow from such a decision. It was felt that only in the face of extraordinary circumstances would the Minister issue such a directive.

In the United States, the person who lodges a complaint has no standing before the Commission.[8] As a matter of policy, that person is not even told if the investigation has, in fact, commenced. They are certainly not informed if the investigation is discontinued. Of course, if the complaining party has evidence the Commission may take it, but, there is no duty to contact them nor to apprise them of the status of investigations.

This approach was confirmed in the case of Consumer Federation of America et al v. Federal Trade Commission F.T.C. Docket No. 8860, U.S. Ct of Appeals, D.C. Cir. (1975). There, a consumer group complained to the court because it was dissatisfied with an FTC ruling. The consumers had complained to the FTC concerning the advertising practices of a certain group of bakers. The FTC investigated and issued a cease and desist order but did not order corrective advertising. The consumer group petitioned the court to review the FTC's refusal to order corrective advertising.

The Court concluded it had no jurisdiction to hear consumers' petition. This position the Court maintained even in the face of a provision of the law which stated, that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute, is entitled to judicial review."

The Court found that provision inapplicable by reviewing legislative history. The legislative history showed that only persons subject to an FTC order could be considered aggrieved,

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[5] Section 9 of the **Competition Act** (Canada).

[6] Section 22-(3) of the **Competition Act** (Canada).

[7] Section 22-(4) of the **Competition Act** (Canada).

[8] Rule 2.2(c) of the **Federal Trade Commission Act** (United States).

i.e. the defendant/respondent.

In sum, those who bring complaints to the Commission are not accorded party-status. In keeping with the Act's provisions, this Agency should not be viewed as a Trade Court. Rather, it is a law enforcement agency which seeks to advance matters of public interest; not an alternate forum for the adjudication of personal disputes. Contact with the complainant once the complaint has been lodged is discretionary on the Commission's part, unless the complainant makes a written request to the Commissioners for a hearing.

THE PROCEDURAL APPROACH OF THE FTC

Complaints are accepted at the offices of the FTC on a daily basis. They are received from complainants who make contact with the Commission by either telephone, mail or simply walking into the office and completing a complaint form. The FTC itself also initiates complaints based on observation of seemingly uncompetitive practices in any industry.

When a complaint is filed with the FTC, the staff first reviews the matter to determine whether there is a possible breach of the **FCA**. The staff then commences the investigative process first by acknowledging receipt of the complaint and requesting additional information from the complainant, if necessary. Armed with the complainant's version of the facts, the staff informs the party complained against of the possible breach and requests their response to the allegations. After a thorough review of all the information collected, the staff presents its position to the Commissioners with its recommendations. The Commissioners then decide if the company's behaviour is sufficiently serious to warrant taking the entity to court or if some other settlement would be appropriate.

The staff would prefer that all matters be resolved without resorting to a more formal process. Therefore, in many instances the staff attempts to convene informal meetings in an effort to settle the matter in a non-adversarial environment. In instances where the party complained against refuses to comply with the requests of the staff, they are served with a Notice of Examination to appear before the Commissioners. Acting in their quasi-judicial capacity, the Commissioners will at this stage meet with the respondent to determine the cause of the lack of co-operation and inform the respondent of the Commission's expectations with a view to settling the matter.

Realizing that the Commission does not always have the necessary expertise in-house to handle the varied matters that form the substance of the numerous complaints that it receives, it is the Commission's practice to seek assistance from experts in the industry being investigated to carry out specialized analysis.

Additionally, in an effort to carry out its mandate and to effect the relevant changes in

keeping with a new liberalized economy, the FTC has undertaken to inform and educate consumers and businesses alike. To that end, the FTC publishes policy papers on issues that relate to specific sections of the **FCA**, it produces guidelines for certain industries about which numerous complaints have been lodged and it often disseminates press releases to advise the public of findings that the Commission feels warrants public attention. The FTC, as a courtesy, also prepares advisory opinions for members of the public upon request, regarding proposed or ongoing conduct or business practice.

ASPECTS OF THE FAIR COMPETITION ACT: CURRENT INTERPRETATION

LEGAL INTERPRETATION

This area will be discussed substantively and procedurally. The substantive matters to be analyzed are Misleading Representation and Abuse of Dominance given their importance in a free-market economy. The issue of jurisdiction will also be addressed.

SUBSTANTIVE ISSUES

Section 37 - Misleading Advertising

Section 37 of the **FCA** is a recognition of the need of the consuming public to be adequately informed so that the appropriate purchasing decisions can be made.

Economists universally agree that in order to develop a healthy liberalized regime, consumers must be able to make choices in a rational way. In other words, they must be able to rely on, with great confidence, information given to them in the marketplace. Investment is stymied if doubt persists as to the reliability of representations made in the course of doing business.

Section 37 is largely taken from Section 13 of New Zealand's Fair Trading Act. That country's, as well as Australia's, interpretation of the section will be reviewed hereinbelow. To a lesser extent, some features of the American position in this area will be considered, given America's established history of antitrust legislation. Given the newness of the Jamaican law, the JFTC must seek guidance from others with recognized experience in this area.

Section 37 of the Fair Competition Act states, in pertinent part:

> (1) A person shall not in pursuance of trade and for the purpose of promoting, directly or indirectly, . . . any business interest, by any means -
>
> (a) make a representation to the public that is false or misleading in a

material respect . . . ."

(3) For the purpose of this section . . . the following types of representation shall be deemed to be made to the public by and only by the person who caused it to be expressed, . . . that is to say, a representation that is . . . .

(d) made in the course of selling the article to the ultimate consumer.

Therefore, in order to decide if there has been a breach one must establish:

(a) what is a "**misrepresentation**;"
(b) what is considered "**misleading**;"
(c) what is the definition of "**material;**" and
(d who is the "**public**" for the purposes of the **FCA**.

Each will be dealt with in turn.

(a) ***"Misrepresentation"***

Misrepresentation may be oral or written. The entire advertisement, transaction or course of dealing will be considered.[9]

In the cases of express claims, the representation itself establishes the meaning. Where the claim is implied, the Commission will consider the entire presentation, the placement of words and images, the nature of the claim and the nature of the transaction.[10]

With respect to the making of a misleading representation, there is clear authority that there is **no requirement to prove intention** to establish liability under Section 37.[11]

The making of misleading representation encompasses representations **express** as well as those made through deliberate or inadvertent **omission**.[12] Note too that this definition

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[9] Industrial Equity Ltd v. Northern Broken Hill Pty Ltd (1986) ATPR para. 40-682.

[10] Taco Company of Australia, Inc v. Taco Bell Pty Ltd (1982) ATPR para. 40-303.

[11] *See,* Chase Manahattan Overseas Corp. v. Chase Corp. Ltd. (1986) ATPR para. 10-750 (stating that "even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is likely to mislead or deceive"). *Accor,* TPC v. Annard & Thompson Pty Ltd. (1979) ATPR para. 40-116 (ruling that it is not necessary to show an intent to deceive).

[12] *See,* Alan A. Ransom, *The Fair Competition Act, 1993 (Jamaica) - Analysis and Comment,* Part 2 - Vol. 4, No 2, Dec. 1994, Caribbean Law Review pp. 295-6. Silence may be relied on to show a breach of section 9 of the New Zealand Fair Trading Act (the section equivalent to Jamaica's FCA section 37), when the circumstances give rise to an obligation to disclose a relevant fact. "The duty to disclose is not confined to cases where there are particular relationships, such as trustee and beneficiary, solicitor and client, principal and agent or guardian and ward." See Yvonne van Roy, Guide to New Zealand - Competition Laws, (2nd ed. 1991 CCM N.Z. Ltd., Auckland) at p. 361.

includes "**implied**" representations.[13]

*(b) What is Considered "**Misleading**"*

With regard to determining whether a representation is "misleading," **the issue is** not whether the representation actually misleads, but **whether the representation is likely to mislead**.[14] Whether or not a representation is "misleading" is a question of fact to be determined in the context of the surrounding conduct.[15]

The misleading representation or public deception is to be tested from the perspective of the reasonable member of the targeted consumer group. Therefore, the standard would not necessarily be the "reasonable man on the Clapham bus" of English Common Law notoriety.[16]

As noted in World Series Cricket Pty Ltd v. Parish (1977) ATPR at para. 40-040, the standard of the "reasonable man" in competition law, may be the gullible, the poorly educated or the unsuspecting modest member of the community. This approach is adopted from New Zealand and Australia.[17]

*(c) The Definition of "**Material**"*

A representation is considered material where it impacts on the consumer's purchasing choice/decision by inducing the representee or consumer to act on the representation, i.e., where the consumer may have chosen differently but from the misrepresentation.

In short, materiality is defined with reference to whether or not the misrepresentation is likely to affect consumers' choice.

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[13] "A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. **The statement may be oral or in writing or arise by implication from words or conduct** ... The usual permanent symbols by which a representation is conveyed are words and figures written or printed or produced by any other equivalent means; but plans and drawings, maps, pictures and photographs and the like, may serve the same purpose and quite as effectually. Speech is the most ordinary method for the communication of a statement not in writing, but gestures and demeanor may supplement spoken language or even stand in its place." *See* Given v. Pryor (1979) ATPR para. 40-119 (quoting 26 Halsbury's Laws of England (3d Ed.) at 1515).

[14] *See*, *supra*, note 10.

[15] *Ibid.*

[16] Warren Pengilley, *New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of the Australian Experience*, N.Z. L. J. April 1986 at pp. 59, 67.

[17] Consider the approach adopted by the US Supreme Court. "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." Bates v. Arizona, 433 U.S. 350, 383, n37 (1977).

In Central Hudson Gas and Electrical Co v. PSC, 447 U.S. 557, 567 (1800), the Court held that express claims are automatically deemed material "as businesses in their drive for profits, will obviously tell customers information they have determined to be relevant and which they wish to have an effect."

Section 37 basically lists those characteristics which will be considered material, namely, information relating to warranty or guarantee of performance, efficacy or length of life of goods, standard, quality, quantity and price. Based on that set forth above, this Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the average consumer would be concerned. Once materiality has been established, injury will be presumed likely to exist as a result of the representation or omission.

With regard to the omission of material information, the test is whether or not the disclosure of that material is necessary to prevent the claim from being false or misleading.[18] There are other occasions when it is clear that the information omitted is vital and would, more likely than not, have influenced consumer choice. At other times, proof will be required as to what consumers would have liked to know prior to making a decision. Obviously, each situation will be reviewed on its own merits and it will be the particular circumstances of each case which will determine the approach to be taken.

In sum, the Commission, in seeking to determine whether or not a consumer has been misled will consider the following questions:

(a) how clear is the representation?
(b) how conspicuous is any qualifying information?
(c) how important is the omitted information?
(d) do other sources for the omitted information exist?
(e) how familiar is the public with the product or service?

*(d) Who is the "**Public**"*

In determining whether misrepresentation has occurred, the Commission considers the reaction from a reasonable member of the targeted group.[19] If the group is the general consuming public as opposed to a discrete sector, then the advertisement is considered from the perspective of that group.

In Taco Co. of Australia v. Taco Bell Pty. Ltd[20] the court found that where a

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[18] Puxu Pty. Ltd. v. Parkdale Custom Built Furnity Pty. Ltd, (1982)1 ATPR para. 40-171.

[19] *See, supra*, note 10.

misrepresentation is claimed to have been made to the public, one must consider, inter alia, (a) the relevant section of the public; (b) the matter must be considered by reference to all people who come within that section of the public including the astute and the gullible, the intelligent and not so intelligent, the well educated and the poorly educated; and, (c) evidence that some person has in fact formed an erroneous conclusion, while not conclusive of the fact that there has been misrepresentation, may be persuasive. Such evidence, however, is not essential.

The Commission has adopted the "targeted audience" approach, it looks to the group which has been targeted by an advertisement in determining that the advertisement is misleading.

Note, however, that the Commission's perspective is also guided by the following approach adopted in the U.S.: -

In Heinz v. Kirchner 63 F.T.C. 1282, 1290 (1963), it was stated that:

> "An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded . . . A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."

However, there are times when the Commission may require proof that certain consumers made distinct assumptions as a result of implied claims. That proof may be in the form of surveys, expert opinion, copy tests or other evidence of consumer interpretation.

In sum, the JFTC will consider the advertisement in its entirety and the course of dealing of the advertiser in determining the manner in which a member of the targeted group will respond. This was the approach utilized when a complaint was brought against Xerox Corporation (MA041).

XEROX advertised computers for a specific price. The letters "U.S." were inadvertently omitted. Consumers complained that Xerox was engaged in misleading advertising. The Commission disagreed. Its opinion was based on the fact that the computer-buying audience was a relatively sophisticated one and therefore knew, or should have known, that one could not purchase a computer for $2,000 Jamaican dollars. Similar facts have often times been referred to as the "obvious error" principle

Additionally, Xerox took immediate steps to print a retraction and apology. The

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[20] *Ibid.*

Commission was of the view that was evidence of good faith on their part and decided not to prosecute.

Abuse of Dominance

" No area of competition law is more controversial than that of abuse of dominant market position,"[21] so states Alan Ransom in his in-depth analysis of the **FCA**. The JFTC has indeed found this to be the case and believes that the difficulty lies in the historical approach to monopolies as opposed to how those entities are presently treated.

Historical Perspective

Historically, antitrust laws have dealt with dominant companies under the label of monopolies. In 1890, when the Sherman Act was passed, it was designated as "An Act to protect trade and commerce against unlawful restraints and monopolies".

In 1914 the Clayton Act was passed and the purpose of that was stated to be "an Act to supplement existing laws against unlawful restraints and monopolies."

In the United States, the concept of dominance is expressed in terms of market power. There, market power is defined as "the ability to raise prices above those that would be charged in competitive market" (NCAA v Board of Regents, 486 U.S. 85, 109 n. 38 (1984); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2. 27 n 46 (1984); Murrow Furniture Galleries v. Thomasville Furniture Indus 889 F. 524. 528. N. 8 (4th Cir. 1989).

Present-day Commonwealth Interpretation

The Jamaican **FCA** treats with monopolies in much the same way as certain commonwealth countries. Firstly, it has adopted the term used by New Zealand and Australia to wit, dominance. Secondly, it has also utilized their approach, namely dominant companies are not in, and of themselves, illegal. Rather, it is an 'abuse' of their position of dominance that triggers sanctions.

Section 36 of New Zealand's Commerce Act is the relevant provision. It states:

> 1) No person who has a dominant position in a market shall use that position for the purpose of :-

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[21] Alan Ransom, *The Fair Competition Act, 1993 (Jamaica) - Analysis and Comment,* Part 1, vol. 4, No. 1, June 1994, Caribbean Law Review pp. 110-178 at page 138.

a) restricting the entry of any person into that or any other market; or

b) preventing or deterring any person from engaging in competitive conduct in that or in any other market; or

c) eliminating any person from that or any other market.

The Jamaican **FCA** speaks to the matter of dominant companies in Sections 19-21. Section 20 parrots Section 36 above and adds three (3) other subparts, namely,

d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;

e) limits production of goods or services to the prejudice of consumers;

f) makes the conclusion of arrangements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

Given our virtual wholesale adoption of the New Zealand legislation, we have utilized their analytical approach, which is discussed more fully hereinbelow.

Definition of Dominance

Section 19 of our **FCA** defines dominance thusly:

> "For the purpose of this Act an enterprise holds a dominant position in 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."

According to Alan Ranson, the Jamaican **FCA**'s test of dominant position .

> "reflects the more modern concept of economic analysis as opposed to the mere measurement of market percentages. The virtue of the latter of course is that it is certain and simple. The virtue of the former is that it leads hopefully in the difficult cases to a more rational result."[22]

New Zealand's Commerce Act, the legal counterpart of Jamaica's competition legislation, uses a similar approach. Section 3(8) defines dominant position in a market as any enterprise which is "in a position to exercise a dominant influence over the production, acquisition, supply, or price or goods or service" in a market".

The Commerce Commission in New Zealand had ruled that dominant position in a market means "an absence of effective competition, or an ability to act independently" Re News

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[22] *Id.* at 139.

Ltd - Independent Newspaper Ltd (1987) 1 NZBLC (com) 104,051, at p. 104, 055).

Definition of Market

The Jamaican **FCA** provides a definition for market at Section 2(3). There it is stated that 'market' is a reference to a market in Jamaica for goods or services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them.

This is identical to New Zealand's definition of market (mutatis mutandis) in their Commerce Act at Section 3 (1A).

Yvonne van Roy in her text, Guidebook to New Zealand Competition Laws ((c) 1991 CCH New Zealand Limited) posits that in order to identify the relevant market, three market dimensions must be considered, namely, the product, function and geographic dimensions. The geographic dimension being that area in which the sellers are willing to operate and in which buyers will "shop around" to find the best deal (ibid. at p. 148).

Substantially Lessening Competition

Interestingly, the Jamaican **FCA** has deviated somewhat from its Commonwealth counterparts in this area. Section 21 (1) requires that the Commission finds that that entity's conduct "has had or is having the effect of lessening competition substantially in a market."

Therefore, the Jamaican **FCA** also requires that having established "dominance" and "abuse of dominance", there must also be shown that the conduct has, or is likely to have the effect of "substantially lessening competition in a market." In other countries, once abuse is shown, the negative impact on competition is presumed. (The JFTC is seeking to have this additional requirement deleted from our Act.)

In other words, it is not enough to point out that a company is engaged in one or more of the forbidden practices. There must then be an additional finding that competition has been, is likely to be, or is being, lessened "substantially" in a market.

The phrase "substantially lessening competition" is found in the U.S. Clayton Act 1914 (Sec 7) and was adopted in the Australian Trade Practices Act 1974. The New Zealand Commerce Act 1986 is based on the latter. The word "substantial" is defined in the Commerce Act at Section 2(1A) as meaning "real or of substance." The Jamaican Act does not provide a definition.

The Commonwealth courts have grappled with a workable definition and it is helpful to review their decisions.

The first in a line of Australian cases is Cool and Son Pty Ltd v. O'Brien Glass Industries

Pty Ltd (1981) ATPR para.42-992. There Keely, J. reasoned:

> "The word 'substantial' has been described as a "word of no fixed meaning" and "an unsatisfactory medium for conveying the idea of some ascertainable proportion of the whole" . . . Its meaning must depend to a large extent on its context . . . [I]n my opinion the word 'substantially' is not intended to convey the idea of some proportion of the whole of the actual or potential competition in the relevant market . . . It is nonetheless required to be a 'substantial' lessening in the sense that . . . [i]t must be capable of being fairly described as a lessening of competition that is real or [of] substance as distinct from a lessening that is insubstantial, insignificant or minimal."

The case of Dandy Power Equipment Pty Ltd v. Mercury Marine Pty Ltd (1982) ATPR para. 43-872 is viewed as a more instructive. There Smithers J. gave detailed consideration to the meaning of the word 'substantial.' He reasoned thusly:

> "To apply the concept of substantially lessening competition in a market. It is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening. To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what has been lost in relation to what would have been, is seen to be a substantial lessening of competition . . . Although the words 'substantially lessened in a market' refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of competition which exists in the total market . . ."

The meaning of the word 'substantial' was again discussed in the case of Radio 2UE Sydney Pty Ltd v. Stereo F.M. Pty Ltd and Anor (1983) ATPR 43-912. There it was said:

> ". . the word 'substantial' is used in a relative sense. The very notion of competition imports relativity. One needs to know something of the business carried on in the relevant market and the nature and extent of the market before one can say that any particular lessening of competition is substantial . . ."

Economic analysis is mandatory when analyzing a complaint alleging abuse of dominance. Looking to other jurisdictions for assistance in the interpretation of this concept, it has been determined that the following questions are considered relevant in establishing whether or not there has been any "substantial lessening of competition in the market":

(1) Does the conduct at issue have the effect of threatening the independent initiatives of some firms in the market?

(2) Does it coerce these firms into pulling their punches?

(3) Does it reduce the ability of buyers to shop around for the best deal?

(4) Are potential entrants now less likely to enter the market than before?[23]

Jamaica has utilized the wording of the New Zealand Commerce Act in drafting its position in the area of abuse of dominance. However, the FTC also considers the policies of other jurisdictions in ruling on complaints brought before it. New Zealand is highly persuasive but the Commission's duty is to fashion an approach specifically suited to Jamaica's own cultural and economic idiosyncrasies.

It bears mentioning that, economic analysis plays a vital role in this area and must necessarily be relied upon in the assessment of complaints brought to the Commission. An economic discussion is outlined, *infra*.

THE FTC'S JURISDICTION

The FTC has been empowered to regulate the conduct of all businesses in Jamaica, whether public or private. However, trade unions, matters covered by copyright, and treaties which bind Jamaica internationally are exempt. Other governmental agencies may also be regulated, to the extent that they engage in trade. The Commission's power does not extend to government when the latter acts in its executive capacity.

It has been held by the Supreme Court, in a recent case, General Legal Council v. Fair Trading Commission, Suit No. E35 of 1995, that the **FCA** does not govern lawyers, to the extent that where a particular practice has been expressly covered by the Canons, found in the Legal Profession Act, the provisions of the **FCA** do not apply.

The FTC is presently seeking to have the **FCA** amended to include all professions, notwithstanding the existence of specific statutes which govern their conduct.

PROCEDURAL ISSUES

Sections 5, 6, 7 and 10 of the **FCA** outline the functions and powers of the FTC. For

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[23] Stevens & Round, *The Commerce Act, 1986 - A Legal and Economic Commentary upon some Fundamental Concepts*, **N. Z.. Uni. L. Rev.** vol. 12, June 1986 at p. 252.

example, for the purposes of carrying our the investigative functions outlined in Section 5, Section 7 of the **FCA** empowers the FTC, *inter alia*, to summon and examine witnesses as well as call for and examine documents.

Under Section 52 of the **FCA**, the FTC **may,** with the approval of the Minister, make Regulations prescribing the procedure to be followed in respect of applications, notices or other proceedings of the Commission.

To date the Commission has not promulgated regulations. However, it has formulated a comprehensive set of procedures in keeping with the principles of natural justice and in order to carry out the powers granted to it.

Briefly, these procedures may be outlined as followed.

- Procedure for the Examination of Witnesses.
- Procedure for the Production of Documents.
- Procedure for Hearing Re application for Authorization under Section 29 of the Act.
- Procedure for Commencement of Proceedings before the Commission. (In those areas were the Commission is authorized to make a Finding) .
- Procedure in the Event of an Application for Authorization Filed Contemporaneously with or Subsequent to a Complaint.
- Pre-Hearing Procedures.
- Procedure for the Appeal of the Staff's Investigation Findings.

These are titled as Sets 1-7 respectively and are freely available from the Commission.

Applicable Procedure Where Commissioners Sit as Judges

Where the staff of the Commission makes a determination that there has been a breach of Sections 20 (abuse of dominant position) or 33 (exclusive dealing, market restriction or tied selling), the staff will inform the entity of its findings. The entity is then given an opportunity to approach the three (3) Commissioners directly if it wishes to refute those findings.

Note that it is the three Commissioners who act as the Court of first instance in determining the existence of the alleged breach. In other words, the Commissioners must be approached before taking the matter to the Supreme Court.

The meeting which is convened before the three Commissioners for the purpose of refuting the staff's findings, **is an informal private meeting**, where the entity has the option of being represented by legal counsel. At this meeting, the Commission's counsel is always present to answer questions that any Commissioner may have, not to be cross-examined by the entity in question.

The Commissioners then have the option of either:

a) agreeing with the staff's position; or

b) accepting the entity's position and disagreeing with the staff; or

c) requiring that further investigation be done.

Should the determination be made by the Commissioners that a "colourable" claim has been made by the staff, (or a "prima facie" case has been made out), the Commissioners may then instruct the entity to follow the staff's recommendations. Should the entity fail to do so, the Commissioners may permit the staff to file a complaint before the three Commissioners naming the entity as Respondent.

Once the complaint is filed by the staff, the hearing which follows is a **public hearing**, pursuant to Section 8 of the **FCA**, which requires that all hearings be held in public unless special circumstances dictate a private hearing.

At that public hearing, the staff is represented by counsel, and the entity in question also has that right to retain counsel. Witnesses are then sworn in and evidence is presented by both sides. The Commissioners will then arrive at a finding as to whether or not the staff has failed to prove its case. In the latter event, the matter would be dismissed.

Should the Commissioners find in the staff's favour, they may issue any directions to the company they deem appropriate to correct the breach. Under Section 49 of the **FCA**, a finding by the Commissioners may be appealed within fifteen (15) days after the date of the finding, to a Supreme Court Judge in Chambers. At that point, the Judge has complete discretion to uphold the Commissioners' finding, to modify it, or to reverse it completely.

ECONOMIC ANALYSIS

The **FCA** represents a marriage of law and economics. As stated earlier, certain areas such as abuse of dominance require economic analysis before there can be a legal finding.

ABUSE OF DOMINANCE

Definition[24]

The dominant or the monopoly firm, unlike the firm that operates in a competitive market, may be able to affect price and may find it profitable to charge a price higher than marginal cost. A monopoly firm that has the ability to affect the price of a good has market power. Factors which determine the degree of market power include the elasticity of market demand, the number of firms in the market, and the interaction among firms[25].

The economic analysis of abuse of dominance begins with a definition of both the product and geographic markets so as to establish the kind of market environment in which the offending firm operates. If the offending firm is found to be dominant (i.e. it has market power due to its high market share and the existence of entry barriers), then there is a need to find out if the alleged offense constitutes an abuse of this dominance. Lastly, there is a need to evaluate the likely welfare effects of the abuse in order to determine if there has been or is likely to be a substantial lessening of competition in a market.[26]

Market Definition

"The relevant market is the smallest group of products and smallest geographic area for and within which a hypothetical . . . (dominant) supplier of products could profitably sustain a significant permanent increase in price (a 5 per cent standard is usually applied). A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, prices and intended use.

The relevant geographic market comprises the area over which the undertakings concerned are involved in the supply of products or services, in which the conditions of

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[24] Section 19 of the FCA 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." Section 20 states "An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular...if it- (a) restricts the entry of any person into that or any other market; (b) prevents or deters any person from engaging in competitive conduct in that or any other market; (c) eliminates or removes any person from that or any other market; (d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices; (e) limits production of goods or services to the prejudice of consumers; (f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements." Section 21 (1) states "Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall- (a) notify the enterprise of its finding; and (b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned." Section 21(2) states "In determining...whether a practice has had, is having or is likely to have the effect of lessening competition substantially in market, the Commission shall consider whether the practice is a result of superior competitive performance."

[25] Elasticity measures the percentage change that will occur in one variable in response to a 1 percent change in another variable. The elasticity of demand for a good depends to a large extent on how many close substitutes it has. If a good has many close substitutes, then its demand curve is likely to be very responsive to its price changes or very elastic.

[26] *See*, the Commerce Act 1986-A Legal and Economic Commentary upon Some Fundamental Concepts, p. 231

competition are sufficiently homogenous and which can be distinguished from neighbouring areas because...conditions of competition are appreciably different in these areas." [27]

In practice, it may prove difficult to apply the 5 per cent standard and more general evidence is solicited via surveys and interviews of industry participants (i.e. consumers, suppliers, producers, and trade associations) and experts.

Establishing Dominance

In many cases, dominance can be demonstrated structurally, by showing that one firm or group of firms accounts for the bulk of sales in the market -- standards like 35 per cent or 65 per cent have been proposed. However, the fact that competition does not currently exist or is limited, is not sufficient to establish dominance. The critical factor in determining dominance is the level of entry barriers, that is, the ease or difficulty of entering the relevant market. High initial capital costs, licensing restrictions, and factors tying customers to existing firms are all defined as entry barriers. The extent of these barriers will determine the existence of potential competition.

In the case of **PETROJAM** (FTCINV250), the FTC found that PETROJAM was not dominant in the supply of petroleum products. An assessment of the market structure revealed that PETROJAM was by far the major supplier (that is, they are the only producer and the largest importer) of most of the petroleum products in the Jamaican market. However, since the petroleum industry is not regulated and marketing companies already possess a significant portion of the installed capacity required to import and distribute within six months,[28] the Commission concluded that PETROJAM's pricing was constrained by the existence of potential competition. If PETROJAM were to charge more than a competitive price, marketing companies could import their own fuel rather than purchasing from PETROJAM.

Simple dominance is not a violation of the **FCA**. Abuse of that dominance must be demonstrated. This abuse includes, tied selling and predatory pricing. These practices could eliminate existing competitors or prevent the emergence of new competitors.

Once abuse has been demonstrated, effect has to be shown. Quantitatively, an assessment of the way a practice affects other companies in the same market or potential new entrants has to be done. A company's plans and motives in adopting a particular practice and the views of affected parties should be considered. (Please see discussion on substantial lessening of competition, *supra*.)

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[27] *Barriers to entry and exit in UK competition policy, Office of Fair Trading Research Paper 2 "United Kingdom"*

[28] *See*, United States v. Penn-Olin Chem. Co., 378 U.S.158 (1964).

TYING ARRANGEMENTS

Definition[29]

A tied selling transaction is one where a good or service is sold or leased (the tying product) only on condition that the buyer or lessee purchase a different product or service (the tied product) from the seller or lessor. Tying arrangements foreclose competition in the market for the tied good. For there to be tying there must be two distinct products and the absence of a rational conomic justification for the tying of such.[30]

In terms of tying, the availability of information to the buyer on the terms of the sale arrangement both before and after he purchases the tying product is very important. If the seller does not possess market power (that is, the seller is dominant), and if there is vigorous product market competition, then a well informed buyer would not enter into a tying arrangement that he did not consider to be beneficial.

A tying investigation, therefore, will consider whether or not the buyer is well informed about the terms of sale at the time he purchased the tying product, and also after he purchased the tying product, in addition to the usual procedure required in assessing abuse of dominance.

A case in point is FTC v. Moore's Transport (Suit No. M1994-F91) presently before the courts. Moore's Transport contracted with a taxi operator to transport individuals to various locations in the corporate area at an agreed price. At the end of the month, the taxi operator, in attempting to collect his pay, was offered a portion in cash and told that the rest would have to be collected in gas at a designated station. The Commission has taken the view that this constitutes tied selling with an attendant negative impact on competition and, as stated above, has taken the company to court.

Welfare Effects

Tying arrangements may be justifiable on efficiency grounds and therefore could be exempted under Section 17(4) of the Act. Scherer and Ross for example, argue that

> "...the producer of a technically complex machine may try to control the quality of raw materials used with its machine, so that its machine is not sullied by breakdowns caused through the use of faulty supplies. Cost savings may also be realized by

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[29] *See*, Sections 33(1) and 17(2)(f) of the FCA. Section 33(2) states that "Where on investigation the Commission finds that an enterprise is engaging in tied selling, the Commission shall prohibit that enterprise from doing so." However, certain tying arrangements may be exempted under Section 17 (4) of the FCA.

[30] Gellhorn and Kovacic, Antitrust Law and Economics in a Nutshell, (Fourth Edition, West Publishing Company) at p. 326.

producing or distributing the tied and tying goods together."[31]

PREDATORY PRICING[32]

Definition

Predatory pricing involves a reduction in prices in the short-run which result in losses that are deliberately incurred. Firms may engage in this type of action in an effort to remove competing firms from the market or prevent the entry of new firms in an effort to obtain super-normal profits[33] in the long run by imposing higher prices.

Methodology

Predatory pricing is usually precipitated by price cuts by a dominant firm. However, price-cuts are generally seen to reflect the pressures of competition and not an attempt to monopolize. The challenge that faces the economist is to distinguish between a predatory price and a competitive one. As a general rule, predatory pricing is not plausible in markets that are not concentrated or in which barriers to entry are low.

The first step is to determine if the alleged predator is in a dominant position. However, the firm's short-run dominance in itself is not of primary concern. The critical point is whether or not the dominant firm can use its position to maintain prices at an uncompetitive level in the long run. This is, of course, dependent on the conditions of entry into the market. Generally, the more costly it is and the longer it takes to enter the market, the more likely it is for a dominant firm to exercise its dominance.

The second stage in the investigation entails an analysis of the behavioral factors. Certain types of pricing behaviour is used to assess predation. Pricing below average variable cost (AVC) is said to be a sufficient indicator of predation, but it is not a not a necessary condition. Pricing between AVC and average total cost (ATC) could drive equally efficient and even more efficient firms from the market, or deter them from entering[34].

Merely observing a price-cut in the face of entry or potential entry is clearly not sufficient evidence of predation. For example, the economic climate in a particular industry (recession) might be such that, it is necessary to reduce prices to a level where AVC is not covered. However, since pricing below AVC is never profitable in the short run, it is used

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[31] Scherer et al, *Industrial Market Structure and Economic Performance*, p. 565.

[32] Section 20 of the FCA.

[33] Profit in excess of the opportunity cost of capital., i.e., profits above the minimum amount necessary to attract entrants or to induce an entrepreneur to remain in an industry.

[34] Pricing below ATC is the primary cost standard for an assessment of predation, but it is easier to calculate AVC (which is less than ATC) so this is examined first.

as a possible indicator of predatory behavior.

In the matter of **ESSO** (ADP228), although the Commission found that ESSO (the accused predator) was not dominant in the relevant market, a comparison of AVC and price was still undertaken. The result showed that prices remained above AVC, indicating that the major behavioral test for predation was passed.

Determination

Assuming that the objective of dominant firms is to maximize profit, a price response to competition or potential competition that is less than ATC should be presumed predatory unless it can be proven that this is the short-run profit maximizing price or that the economic climate dictates such a price-cut.

CONCLUSION

The FTC Moving Towards the 21st Century

Most prominent among the goals that the FTC has set for itself in the coming years as it seeks to meet the challenges of the twenty first century are:

The cultivation and nurturing of a culture of competition at all levels of entrepreneurial activities.

Increasingly, the requirement from within and without is for the achievement of market-driven efficiency in the production of goods and services. In this context, it is imperative that businesses learn to, and also become accustomed to, the idea of competing on the basis of price, quality of service, variety of products and services offered and the efficient delivery of such. The fact is that unless the lessons of competition are learnt at home, firms will be ill-prepared to compete in the global economy where competition is now the norm.

Securing an increase in the flow and quality of information available to the general public.

It is axiomatic that competition thrives best in an atmosphere in which there is a free flow of information. The Commission considers it its duty as mandated by the **FCA** to ensure that the information supplied to the public in the course of business transactions is accurate, adequate and easily understood.

Whenever decisions are taken on the basis of erroneous, misleading or inadequate information there is potential injury to both the individual making such decisions and the general economy. There is injury to the individual, (because less than optimal choices may be made), and to the society, (because economic resources may be allocated to less

efficient uses than might have occurred in the presence of total information).

In this regard, the Commission proposes to continue its ongoing programme of public education and its insistence on material disclosure, publication of accurate information, clarity in representations and inclusion of all relevant information.

A Policy of Pro-activity.

Although some would say that the Commission has been aggressive in its interpretation, application and enforcement of the **FCA** in the almost three years since its inception, the fact is that there is still anti-competitive behaviour that besets the marketplace. The future, therefore, requires that we continue to be proactive, ever vigilant, in order to revolutionize the attitude of those who compete within the Jamaican marketplace.

In carrying out our duties, while we still look to other jurisdictions, we will be ever mindful of the idiosyncrasies of our unique Jamaican environment.