

Unilateral Conduct Working Group Questionnaire

RESPONSE FAIR TRADING COMMISSION, JAMAICA

October 30, 2006

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

Statutory provisions which address unilateral conduct

The provisions governing abuse of a dominant position are set out in Sections 19 – 21 of the Jamaica competition legislation, the Fair Competition Act, 1993 (FCA).

Section 19 defines the existence of a dominant position:-

Section 19 provides:

For the purposes of this Act 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(1), which contains a non-exhaustive list of abusive activities, provides as follows:

20—(1) An enterprise abuses a dominant provision if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, 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 20(2) provides exemptions:

- (2) *An enterprise shall not be treated as abusing a dominant position—*
 - (a) *if it is shown that—*
 - (i) *its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and*
 - (ii) *consumers were allowed a fair share of the resulting benefit;*
 - (b) *by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.*

Section 21 provides for the actions to be taken by the Commission in respect to a finding of abuse of dominance.

Section 21 provides:

- 21.—(1) *Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse had, is having or is likely to have 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.*
- (2) *In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.*
- (3) *For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.*

Objectives:

The FCA does not set out the general purpose of the legislation. There is also no specific objective contained in the legislation relating to abuse of dominance, beyond the prohibition of abusive conduct when such conduct has had, is having or is likely to have the effect of lessening competition substantially in a market.

The stated Mission Fair Trading Commission, the administrative body for the FCA, however, is:-

“To provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices”

Further, the relevant explanatory material emanating from discussions which preceded the enactment of the Law speaks, inter alia, of ensuring that “... all legitimate enterprises have an equal opportunity to participate in the economy; and providing consumers with better products and services, a wide range of choices at the best possible prices.

Given the Mission Statement and the explanatory material referred to above, it is clear that, the working objective of the FTC is to:

- encourage competition in the conduct of trade and business in Jamaica;
- ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy; and
- provide consumers with better products and services, a wide range of choices at the best possible prices.

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

As indicated above, there are no legislated objectives incorporated in the FCA. The FCA incorporates both competition related provisions as well as consumer protection ones. The Mission Statement of the FTC, therefore includes an element of consumer protection.

Further the section of the legislation dealing with Authorization speaks to “public benefit”. There is, however, no statutory definition of public benefit. It seems therefore that there are non-competitive influences included in the legislation.

3. If there are multiple objectives, how are these balanced or reconciled?

While the Mission Statement of the FTC does not explicitly state that the objectives of the law are improved economic efficiency and increased consumer welfare, the general application is in line with achieving such goals. As such, all guidelines incorporate those general objectives. In particular, the objective relating to “ensuring that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy” is

treated in conjunction with the other objectives and is taken to refer only to conduct by an enterprise, that leads to improved efficiency.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

The FCA balances the risk of over-deterrence and under-deterrence by requiring in Section 20(2) of the FCA that any assessment of alleged anti-competitive conduct include an evaluation of efficiency gains and improved consumer welfare. The approach of the FTC is to consider both pro-competitive and anti-competitive effects of a conduct. The conduct will be deemed prohibited only if the anti-competitive effects outweigh the pro-competitive effects.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

With the exception of intellectual property, there are no general exemptions contained in the provisions which specifically address abuse of dominance. Section 20(2) of the FCA states that “*An enterprise shall not be treated as abusing a dominant position ... by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.*”

In addition, Section 21(3) states “*For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.*”

General exemptions and exceptions are outlined in Section 3 of the FCA. The Section states:

3. Nothing in this Act shall apply to —
 - (a) combinations or activities of employees for their own reasonable protection as employees;
 - (b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
 - (c) the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark;
 - (d) the entering into or carrying out of such an agreement or the engagement in such business practice, as is authorized by the Commissioner under Part V;

- (e) any act done to give effect to a provision of an arrangement referred to in paragraph (c);
- (f) activities expressly approved or required under any treaty or agreement to which Jamaica is a party;
- (g) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;
- (h) such other business or activity declared by the Minister by order subject to affirmative resolution.

The Interpretation section of the FCA defines the word “goods” as “...all kinds of property other than real property, money, securities or choses in action” This means that the entire financial sector could be considered exempted from the provisions of the FCA. The applicability of the FCA to the securities sector was successfully challenged early in the existence of the FTC; and the course of action that must be taken to address the resulting erosion of the Commission’s efficacy is yet to be resolved.

Sector-specific exemptions

The FCA does not contain sector-specific exemptions, however a regulated “industry” defence has emerged in two cases thus far. The Appeal Court of Jamaica has found in two cases that the sector-specific legislations have precedence over the more general competition law. The Court has exempted the General Legal Council, the regulating body for the legal profession which is governed by the Legal Profession Act, and the Jamaica Stock Exchange which is governed by the Securities Act.

Section 29, under Part V of the FCA, allows the Commissioners to grant authorization for an agreement or a practice when it is likely “to promote the public benefit.” While such authorization remains in force, nothing in the FCA prevents the enterprise which has received the authorization from engaging in any practice to which the authorization relates.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.

With respect to the exemptions or exceptions, no explanation is incorporated in the provisions of the FCA. In relation to the power granted to the responsible Minister under Section 3(h) of the FCA, there is no guidance provided as to the factors that the Minister must consider in granting the exemption. There is also no requirement that the Minister consult with the FTC before granting an exemption. Generally, when an exemption is granted the Minister does not and is not obliged to provide reasons for such exemption.

Mergers and acquisitions are not included in the provisions of the FCA. One stated reason for such exclusion is the size of the economy; and the need for firms to merge if necessary to compete in the global market place.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

There has not been any revision or amendment to the objectives of, or exemptions or exceptions to, our unilateral conduct rules.

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

No.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

1. Section 20(2) states:

(2) An enterprise shall not be treated as abusing a dominant position—

(c) if it is shown that—

(iii) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and

(iv) consumers were allowed a fair share of the resulting benefit;

The Act however does not provide any guidance as to what constitutes a 'fair share'. This determination is therefore very subjective.

2. There is no statutory threshold for dominance nor is there a safe harbor threshold.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction’s general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., “super dominance”).

Section 19 of the **Fair Competition Act (FCA)** defines the existence of a dominant position:-

Section 19 provides:

For the purposes of this Act 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.

As a guideline, the FTC generally considers an enterprise to be dominant if it has a 50 percent market share or more. This threshold is a guideline only. It does not mean that all firms with 50 percent market share or more will necessarily be considered dominant. Conversely, firms with less than 50 percent market share may be considered dominant. In the assessment, other factors such as the market share of competitors operating in the same market and entry barriers are considered.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present

Yes

- Acquisition or creation of dominance/substantial market power

No

- Attempt to acquire or create dominance/substantial market power

No

- Other (please identify)

Why did your jurisdiction choose these stages?

The FCA does not contain merger provisions; and therefore our rules on unilateral conduct are limited to enterprises that were already dominant when they carry out potentially anti-competitive acts.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”?

There is no provision in the law. However, our guidelines provide thresholds for determining dominance.

Yes

If so, please respond as applicable:

- What is the market share level of the dominance presumption? 50%
- Is the dominance presumption rebuttable? Yes
- What is the market share level of the safe harbour? Not established
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? n/a
- What is the legal basis of the presumption? guidelines
- What is the legal basis for the safe harbor? n/a

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ?

Yes

If so, please explain why and in which circumstances.

As indicated above there are no statutory provisions relating to a threshold on dominance. The investigating Staff/s therefore has the discretion to consider a threshold below 50%. One situation in which this may be done is if it is found that the market shares of closest competitors are substantially less than that of the enterprise under investigation.

5. Does your jurisdiction’s analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?

Yes

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹

- Market share of the firm and its competitors Yes
- Market position and market behavior of competitors Yes
- Durability of market power Yes
- Barriers to entry or expansion Yes
- Economies of scale and scope/network effects Yes
- Buyer power Yes

¹ The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.

- Access to upstream markets/vertical integration Yes
- Access to essential facilities Yes
- Market maturity/vitality Yes
- Financial resources of the firm and its competitors No
- Profits of the firm No
- High prices (at absolute or comparative level) No

Please specify any other criteria that you use to assess single-firm dominance/substantial market power. The length of time the firm has been engaged in the conduct under investigation; whether there is excess capacity; dynamics of the industry (whether changes are taking place) and the regulatory environment.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

- Market share of the firm and its competitors
- Market position and market behavior of competitors
- Durability of market power
- Barriers to entry or expansion

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

All assessments of dominance include market share and entry barrier assessment. Other factors may be considered depending on the case. There is no established weight assigned to the different criteria used in assessing dominance.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

The possession of intellectual property rights does not necessarily give the owners of such rights market power. It is after doing an assessment of the relevant market, in terms of product and geography, market share and entry barriers analyses, in addition to any other relevant criteria that a determination of dominance is made.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?

No

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

In assessing dominance, the Jamaican FTC uses the same set of criteria used by larger jurisdictions. We consider the product market, geographic market, barriers to entry etc. Our assessment takes into account the openness of the economy in assessing barriers to entry. Section 5 of the FCA states that *“For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market, including competition from goods or services supplied or likely to be supplied by persons not resident or carrying on business in Jamaica.”*

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

Sections 19-21 of the FCA, which address abuse of dominance, do not include any specific objective, nor does the Mission Statement single out dominant firms. The objectives contained in the Mission Statement of the FTC are taken into consideration when the Staff carries out any assessment of dominance.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.

I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned², state-controlled³, state-enabled or facilitated⁴, recently privatized and/or liberalized, regional monopolies,⁵ etc.

Airways: The national airline, Air Jamaica, was privatized in 1994. At that time the government retained minority stake. In 2004, the Government of Jamaica reclaimed full control of the airline, which is now a state-owned entity.

Postal Services: Postal services are carried out by the Postal Corporation of Jamaica, which is and has always been a state-owned entity.

Road Transportation: Public transportation is provided by Jamaica Urban Transit Company Limited (JUTC). JUTC is a state-owned entity which was established by the Government in 1998.

Oil refinery: The oil refinery company, Petrojam Limited, is a state-owned company. It was purchased by the Government of Jamaica from a private company in 1982. While Petrojam Limited is a monopoly in the refinery of fuel in Jamaica, it has no monopoly on the importation of fuel. There are at least three companies that import refined products into Jamaica.

² Those undertakings that are 100% owned by the State.

³ The control belongs to the State, without taking into consideration the amount of the % of the State share.

⁴ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

⁵ Includes public/private undertakings that are granted exclusive rights within a certain region.

Ports: In Jamaica, ports can be classified as public (state-owned) or sufferance (private) ports. A sufferance port is given a specific Licence by the Minister of Finance on the recommendation of the Customs Department and the Port Authority of Jamaica, the principal maritime agency responsible for the regulation and development of Jamaica's port and shipping industry. The licence is personal to the owner of the facility and sets out specifically the types of cargo the facility can handle. These cargoes are generally related to the industrial activities of the owner or some nearby factory. Cargo other than that specified in the sufferance licence or for a party other than that which is specified in said licence would not be able to load/offload at these private wharves.

The country's major ports are state-owned. The Port Authority of Jamaica, owns Kingston Trans-shipment terminal, the largest port in Jamaica; the Montego Bay Cruise Ship terminal and the Ocho Rios Cruise Ship terminal.

Horseracing: The country's only horseracing track, Caymanas Track Limited, is state-owned. There are plans underway to privatize the facility.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.⁶

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- **Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?**

There is no "state action defense" or any special exemptions for state-created monopolies included in the FCA. Section 54 of the FCA states "Subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown." This Section is taken to mean that, unless stated in the FCA or some other legislation, the provisions of the competition law apply to state-created entities.

While the FCA, in general, applies to state-created entities there is usually a resistance by these entities to incorporate with the competition agency.

⁶ The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

- **Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.**

In dealing with a number of complaints (consumer related matters) against the Registrar General Department (RGD) the FTC threatened suit but was called to a meeting with the relevant Minister for that government department. A course of action was agreed on – the RGD improved its service delivery and its communication with the FTC.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

There is no difference in the assessment.

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law)?

The privatisation policy of the Government of Jamaica is part of a wider strategy to liberalise the economy, along the way creating a more competitive and market-driven environment that will facilitate broadening the ownership base as well as competition in the local economy.

The Jamaican privatisation programme began in the early 1980s with the divestment of public services and small entities which were a burden on fiscal resources. Through its privatisation policy, the Government of Jamaica is attempting to reduce its role in commercial activities and focus on activities that bring greater efficiency to the economy. The programme encourages creative entrepreneurship, fosters economic growth, and frees central government from burdensome commercial activities.

In 1991 a new privatisation programme was established, guided by Ministry Paper #34. It outlined the rationale for privatisation and identified principles and procedures to govern the programme.

The National Investment Bank of Jamaica was designated the central implementing agency, charged with administrative and operational responsibility for effecting divestitures in accordance with the broad objectives and principles of the programme.

The policy is aimed at streamlining the public sector to:

- Make the bureaucracy more responsive to developmental needs (by removing excessive ‘red tape’)

- Result in greater efficiency in the operations of the enterprises
- Reduce the drain on Government's fiscal resources
- Secure improved access to foreign markets, technologies and capital.

6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

The primary objectives of the privatization and liberalization of state-created monopolies are:

- secure greater efficiency in the operations of the enterprises;
- reduce the drain on government's fiscal resources;
- optimize the use of government's management resources;
- secure enhanced access to foreign markets, technologies and capital;
- widen the ownership base and direct equity participation in the economy.

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

The competition law of Jamaica does apply to privatization transaction to the extent that there may be conducts that could be offensive to competition. The FCA however, does not contain provisions relating to mergers and acquisitions. The FTC does get involved in any privatization activity that it thinks could be of competitive significance.

8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- **What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?**
- **To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.**

Section 54 of the FCA ensures that certain activities of the Government should conform to the objectives of the FCA. It states that "Subject to any provision to the contrary, in or under this or any other Act, this Act binds the Crown". At this time, the Government is not obliged, nor does it always seek the FTC's opinion on drafting privatization and/or liberalization proposals. Our successful advocacy effort with government has been limited to the drafting of Bills. Specifically, in December 2005 the FTC learned, through a local newspaper, of a Bill being deliberated in Parliament that included a clause that would authorize the Jamaica Dairy Development Board (JDDDB) to set the price of farm gate milk. The FTC asked to be included in the deliberation in Parliament before the Bill was passed and successfully argued for the removal of that clause. Since 2000, we have

been arguing against clauses in the 'Fishing Industry Bill' which could adversely affect competition within the local conch industry.

The FTC was consulted on the privatization of one of the country's international airport, rail service and motor vehicle examination department.

D. General

1. From among the following, how would you characterize your jurisdiction:
developed / *developing* / transitioning?
2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.