

Virtual Meeting with Corporate Counsel

“Competition Law in Challenging Times: Updates and Considerations for Corporate Counsel”

Presented by: Ms. Krystle S. Maharaj, Senior Legal Counsel

Thursday 27th October 2022



AGENDA



- Work of the FTC
- Issues/Concerns encountered by FTC in its merger analysis
- Ensuring Compliance with the FTA (Complaints and Investigations)
- The Cost of Getting it Wrong
- Designing an Effective Compliance Program
- Questions and Comments



Which scenario below is an example of an anti-competitive practice?

- A. Exchanging (directly or indirectly) with a competitor information on individualized intentions concerning future conduct regarding prices or quantities (e.g future sales, market shares etc.).
- B. Entering into an agreement that fixes the price at which you and your competitors will buy or sell products or services to customers.
- C. Dividing the market i.e. customers or geographical locations that you and your competitors will and would not do business with. This includes allocating particular customers or geographical locations to particular companies.
- D. All of the above



The Work of the FTC



MERGER REVIEW



**ADVOCACY AND
OUTREACH**



MARKET STUDIES



**INVESTIGATION OF
COMPLAINTS**



The Work of the FTC



- ❑ A Guide to the Fair Trading Act is presently being developed

It will serve as a useful guide for legal practitioners, Government Ministries, business enterprises and consumers alike.



Stakeholder Sensitization Sessions/Meetings



- Judicial Education Institute of Trinidad and Tobago
- Corporate Counsel, Private Organizations
- State Counsel, Government Ministries and State-Owned Enterprises
- Pharmaceutical and Health Care Industry
- Construction Industry
- Energy and Energy Services Industry
- Food and Beverage Industry
- Shipping and Maritime Sector
- Merger Guidelines

Complaints and Investigations



- To date there has been no formal complaint nor any FTC initiated one.
- Presently no investigations are taking place.

Market Research/Sectoral Studies



- Cement
- Pharmaceuticals
- Transport



MERGER REVIEW

Merger Number	Sector(s) Involved	Status of Merger
Merger 1	Information Technology and Communications	Approved
Merger 2	Energy (oil and natural gas division)	Approved
Merger 3	Business/Commercial Properties	Approved
Merger 4	Pharmaceuticals/Health Care	Approved
Merger 5	Transportation	Approved
Merger 6	Construction	Approved
Merger 7	Aviation	Approved
Merger 8	Pharmaceuticals/Health Care	Approved
Merger 9	Aviation	Approved
Merger 10	Energy and Energy Services	Approved
Merger 11	Real Estate/Commercial Properties	Approved
Merger 12	Transportation	Approved
Merger 13	Merchandising	Approved
Merger 14	Information	Approved
Merger 15	Energy	Approved
Merger 16	Energy	Approved
Merger 17	Insurance Sector	Referred to a Regulatory Agency
Merger 18	Food and Beverage: Manufacturing and Distribution	Approved
Merger 19	Business/Commercial Properties	Approved
Merger 20	Power Generation	Referred to a Regulatory Agency
Merger 21	Energy and Energy Services	Approved
Merger 22	Aviation	Approved
Merger 23	Food and Beverage: Distribution	Approved

of Merger Applications: September 2020 to Present



FTC's considerations in its merger analysis

Certain quantitative, legal and economic conceptual constructs will be undertaken by the FTC in its analyses to reach a decision as to whether, a merger is likely to substantially/significantly prevent or lessen competition. These may include, but are not limited to:

- Market Definition and Market Share
- Market Concentration
- Competitive Effects
- Barriers to Entry and Expansion
- Efficiencies
- Failing Firm/Exiting Assets
- Counterfactual
- Presence of overlaps
- The actual and potential level of competition in the market
- Views of competitors, consumers, regulatory authorities, other Competition Agencies (where applicable)



Data Gathering Techniques in Merger Control Analysis

- Interviews
- Surveys
- Focus group discussions
- Co-operation with sector regulators
- Field missions
- Call for comments/stakeholder sessions
- Desk research
- Mystery shopping



Challenges encountered by the FTC in its merger analysis

- Data on the relevant market/sector under review is often limited or unavailable.
- Small human resource complement compared to the rate at which merger applications are received.
- Corporate Counsel in their correspondence to the FTC are often presumptive of what situation constitutes a “merger”.
- Companies often go to the media first to announce the merger instead of the FTC.



Addressing these Challenges-Merger Application

In your interactions with your clients, please ensure the following before making an application with the FTC:

- Ensure that the threshold value exceeds TT50 Million;
- Submit as much documents and information to support the application for example:
 - The rationale for the instant acquisition (including but not limited to the benefits of, and/or investment case for the acquisition) future plans for the acquired company following the acquisition;
 - Copies of any documents (including planning documents, due diligence reports, strategy documents, minutes of meetings, customer research, pricing studies, reports, presentations, surveys, analyses, industry/market reports and recommendations) in the parties' possession which have been prepared exclusively for the intended acquisition;
 - A copy of the agreement prescribing the terms and conditions of the acquisition or in the alternate the terms and conditions in contemplation;
 - Confirmation of whether there is any intention post-amalgamation to discontinue any of the present products and services offered by the Target and if answered in the affirmative, the details of same.



Addressing these Challenges-Merger Application continued

- Confirmation of whether there is any intention post-acquisition to expand product and service offerings in Trinidad and Tobago and if answered in the affirmative, the details of same;
- Copies of the Acquirer and Target's latest Annual Information Form for Trinidad and Tobago or any document which highlights a description of its lines of business, the products and services offered, a breakdown of gross premium revenues and fees as well as other revenues for ancillary services of these lines of business for the years ended December 31, 2021 and 2020 in Trinidad and Tobago;
- Whether to date there has been any shareholder dissent with respect to the proposed acquisition. If answered in the affirmative the nature and outcome of same;
- Whether the acquisition will trigger any changes or terminations for staff of the Target and if answered in the affirmative the details of same;
- If the merger before you involves a foreign company who has enlisted financial advisers. Whether there are any specific objections from financial advisers with respect to the proposed merger;
- Confirmation of whether the Target has other potential businesses in Trinidad and Tobago as options in the event this acquisition is not successful and if answered in the affirmative the details of same.

***This checklist is not exhaustive**

***The FTC places trust in Corporate Counsel that the documents and information submitted are accurate**



Pre-merger due diligence considerations when advising your client

- Companies must be vigilant of the risks of sharing information with a competitor before and during merger negotiations. A concern that remains until the merger closes.
- Effective protocols should be designed and maintained to prevent anticompetitive information sharing.
- If competitively sensitive information must be exchanged for diligence and integration planning purposes, parties should employ third-party consultants and other safeguards that limit the dissemination and use of that information within the parties' businesses.
- Counsel should fully analyze potential competitive issues raised by the proposed transaction as early as possible. This will allow counsel and clients to articulate a sound business rationale for the merger.
- Anticipate and address customer/competitors' concerns. Impact on employees of target company.
- Identify the regulatory approvals/permits/licenses that may be required (local and/or foreign).
- Compare the post-merger outcomes with and without the deal.



Future Work



- Meetings with Corporate Counsel on a frequent basis to discuss relevant issues including guidance on the merger review process for proposed applications .
- Future Merger Regulations- possible amendments to the merger threshold value, implementation of merger filing fees.
- Through the use of stakeholder meetings and the feedback received, the FTC continuously examines the merger review process.



FTC-Treatment of Complaints

Making a Complaint to the FTC

To assist the FTC in assessing the matter, a Complainant should submit any information that it has or has access to, and is encouraged to provide as much of the following information as possible:

- A description of the relevant facts regarding the conduct the Complainant is concerned about;
- Information on any documents that relate to the conduct including copies of those documents where possible;
- Information about the business enterprise or individual(s) involved in the conduct, including their contact information where known;
- Specify the nature and scope of the business activities pursued by the business enterprise or individual involved in the conduct;
- Indicate if a relationship exists between the legal entity or natural person submitting the complaint and the subject(s) of the complaint (e.g. customer, competitor, etc);
- Where necessary, a description of the Complainant's position on the market, i.e. a list and description of the customers buying/selling the product or service, the suppliers thereof and the rivals active on the same level of the distribution chain;
- Submit statistics or other data in your possession that relate to the facts set out, in particular where they show developments in the marketplace (for e.g. information related to prices and price trends, barriers to entry to the market for new suppliers, etc.) to support the allegations complained about; and
- Copies of statements/complaints which have been submitted to the Complainant by external parties, employees, agents, witnesses, who have been affected by the conduct complained about.



***Complaints may be made by telephone, e-mail, post, in person at the FTC's office, or via its Complaints Form by visiting the FTC's website. There are no costs associated with filing a complaint at this time.**





FTC INVESTIGATIONS

Competition Issues that can be investigated



- **Price fixing** – this involves competitors agreeing not only to the price to charge third parties for their products, but also agreeing to the components a price will include, the levels of price increases, discounts or rebates, the timing of price changes and any other price-related matter(s).
- **Agreements to limit or withhold supply or production** – these involve firms agreeing to restrict the availability of a product or service in order to push prices up.
- **Market allocation or customer sharing** – this involves competitors agreeing to focus on different product or geographic markets, or different customer groups.
- **Bid rigging and Collusion**-this involves competitors agreeing in advance which of them will win a particular contract

Competition Issues continued



- **Disclosures and exchanges** – whether direct or indirect of competitively sensitive information to facilitate cartel conduct and are therefore also treated as very serious infringements of competition law.
- **Cartels**—agreements where competitors in the same market agree to fix prices, share markets, rig bids or limit production or supply and to also keep existing and potential competitors from entering a market or from reaching their full potential
- **Anti-competitive mergers**

Types of Documents to be Examined by the FTC



- Agreements/Contracts
- Annual Reports and Financial Statements
- Bid Documents
- Calendars, Appointment Books, Travel Records,
- Communications with Competitors
- Contact/Meeting Documents
- Correspondence to Competitors and Customers
- Documents Referencing Geographic Areas
- Expense Records, Telephone Logs, Passports
- Identifying Information on Officers, Directors, and those Responsible for Pricing Decisions
- Invoices
- Market Studies
- Payments from Customers
- Price Lists/Announcements
- Pricing Documents
- Social Media Posts

*This list is not exhaustive



Tips: FTC's execution of a search warrant



- Check** whether the inspection is being conducted under a warrant.
- Ensure** that the FTC officials are accompanied at all times.
- Contact** IT and all on-site personnel and inform them of investigation, or importance of cooperation, and remind them to ensure that IT systems do not destroy or delete any documentation during the investigation.
- Check** any documents requested by the FTC to ensure they are within the scope of the investigation and to determine whether they are covered by legal privilege or are commercially confidential.
- Mark** confidential documents as such and withhold privileged documents. Take a note of all files and documents examined by the FTC and retain copies of all documents copied or taken by the Commission.
- Designate** a computer expert to assist the FTC's Investigator in relation to all electronic records.
- After the search**, hold follow-up meetings to decide what further steps should be taken, such as whether further explanations or documents should be provided to the FTC.

DESIGNING AN EFFECTIVE COMPLIANCE PROGRAMME

Key Elements of an Internal Competition Law Compliance Document

- Management Leadership and Accountability
- Assessment of Risk
- Prevention and Detection Procedures
- Communication of Policies and Procedures
- Training of Personnel and
- Assessment of Effectiveness.



Forms of Competitor Contact include:

- Direct contacts with competitors (phone and one-to-one)
- Market Research
- Personal Life
- Connections through previous employments
- Trade/Industry associations

Information that should not be shared

- X Information on prices, price formulae, costs, business strategy, rebates, discounts, volumes, productivity levels
- X Information on customers, suppliers, marketing strategy, sales volumes and targets
- X Future strategy and plans

Information that can be shared

- ✓ Published industry statistics
- ✓ Annual reports
- ✓ Legislative developments
- ✓ Historic cost and sales data
- ✓ Information in the public domain
- ✓ Aggregated data



Competition Compliance: Due Diligence Questions

- Do your client's employees have contact with their competitors at industry events or otherwise?
- In the relevant market, do your client's employees move frequently between competing businesses and do they have people who have recently joined from competing businesses?
- Do your client's employees seem to have information about their competitors' prices or business plans?
- Are your client's customers also their competitors?
- Do your clients work in partnership with their competitors?
- Are your clients entering into exclusive contracts for long periods (five years or more)?
- Do your client's agreements contain joint selling and purchasing provisions with its competitors?
- Do your client's agreements contain requirements to share commercially sensitive confidential information, or to collaborate, with its competitors?



Example: Compliance Checklist

Risks	People	Processes	Documents
General	Is the company operating in a market where most, if not all competitors are known?	Are there any partnerships with competitors, or is there any cooperation planned?	Does the company have joint selling and purchasing agreements with any competitors?
Horizontal restraints of trade among competitors	<ul style="list-style-type: none"> - Are the customers also the competitors? - Is the sales staff in contact with competitors (e.g., at trade events / association meetings)? - Do staff frequently move between businesses within the sector? 	<ul style="list-style-type: none"> - Are prices / production / output limitations or territories discussed with competitors? - Is (sensitive) information shared with competitors? - Have there been any cartel investigations or lawsuits alleging cartels in the market where the business operates? 	<ul style="list-style-type: none"> - Are there any agreements (orally / in writing) with competitors about prices / quantities / territories? - Are there any agreements regarding bid rigging (e.g., not to / withdraw a bid)? - Are there any agreements or cooperation agreements (express or implied)?
Vertical restraints of trade among non-competitors	<ul style="list-style-type: none"> - Are products sold through independent dealers? - Are there any exclusive distributorships? - Are there any customer and territorial restrictions? 	<ul style="list-style-type: none"> - Are there any significant differences in sales prices between one country and another? - Are there any private import / export restrictions? 	<ul style="list-style-type: none"> - Are there any agreements imposing resale restrictions (e.g., on prices or territories) on retailers? - Are there any exclusive distribution agreements?
Abuse of market dominance	<ul style="list-style-type: none"> - Are customers treated unequally (e.g., business conditions) without reasonable justification? - Does the company refuse to deal with certain customers (sale or purchase)? - Do certain customers profit from loyalty programmes? - Are there discriminations against customers if they contract with any competitors? 	<ul style="list-style-type: none"> - Does the company have persistently large market shares (e.g., >40%) in the relevant market? - Has the company recently broadened its activity recently? - Is an expansion of business activity in the pipeline? - Does any refusal to deal exist (e.g., refusal to supply or to purchase goods) without objective justification? - Are different prices or terms offered to similar customers (without justification)? - Are any (non-cost relevant) discount systems in operation? 	<ul style="list-style-type: none"> - Do strategies exist that are directed against competitors (e.g., refusal to deal with similar customers or to deal with them using different prices)? - Are there customer loyalty programmes in place?

Relationship between Competition Law and ESG

- While individual companies are certainly free to pursue their ESG priorities as they see fit, risk can arise when competitor companies work together, particularly because implementing ESG-related product changes may affect product prices, output, and features.
- ✓ Non-binding agreements where individual undertakings determine their own contributions and the way in which they wish to realize them.
- ✓ Agreements aimed at removing less sustainable products from the market, provided these do not appreciably affect price and/or product diversity.



Why does compliance with the FTA matter?



- Further to its powers which are set out in several provisions in the Fair Trading Act, the FTC can take to Court any business or individual who it believes is guilty of anti-competitive conduct and has failed to take corrective measures, after being instructed by the Commissioners.
- The possible consequences of in cases of violation of the Fair Trading Act include:
 - Fines (up to 10% of global turnover)
 - Lengthy investigation and loss of management time
 - Reputational damage
 - Entire Contracts (or parts thereof) may be null and void

The Cost of Getting it Wrong

October 2022

The AdC, Portugal sanctioned three supermarket chains: Auchan, Modelo Continente and Pingo Doce as well as their common supplier of wines and spirits Active Brands/Gestvinus, and a manager of this company, for having participated in a scheme of price fixing on retail prices. A fine of circa €5.7 million was applied.

September 2022

- The Australian Competition Authority filed a civil lawsuit against an architecture company and its former managing director over alleged bid rigging (ARM Architecture)
- The Brazilian Competition Authority fined six firms and 35 individuals for anticompetitively exchanging information on hiring practices in the healthcare industry
- An Australian Federal Court ordered two roof tiling businesses and their directors to pay \$420,000 in fines for conspiring to rig bids (First Class Slate Roofing / RAD Roofing Specialists / Scott Barton / Damian Hand)
- The Portuguese Competition Authority fined three supermarket chains and their alcoholic beverage supplier €5.6M for price fixing (Auchan / Modelo Continente / Pingo Doce / Active Brands)





Treasure Chest of Competition Law Resources



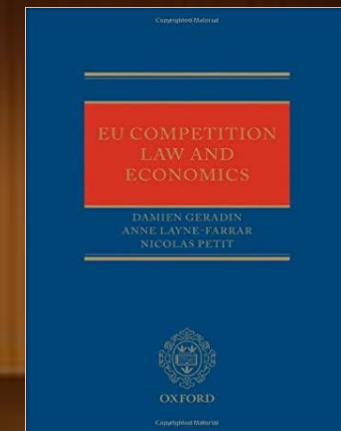
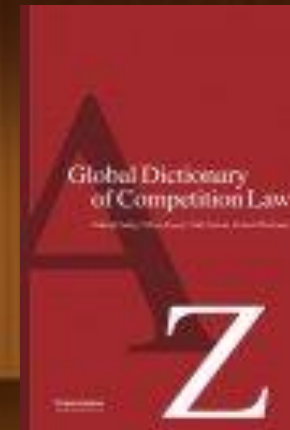
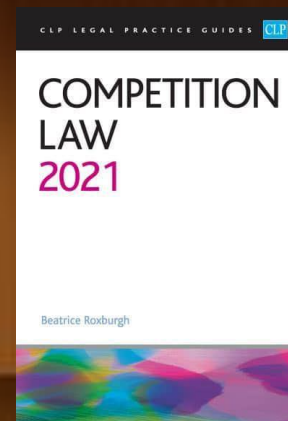
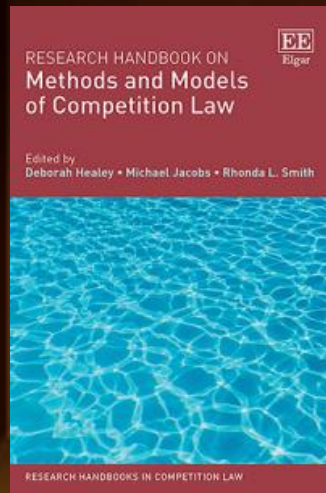
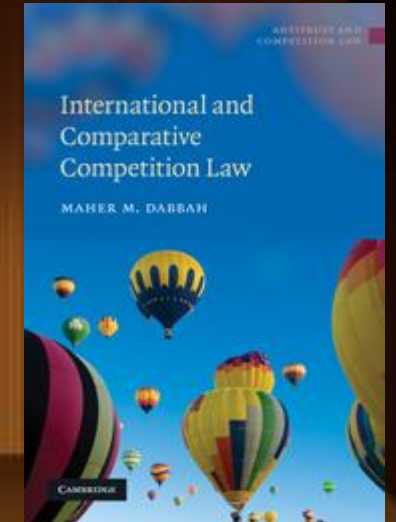
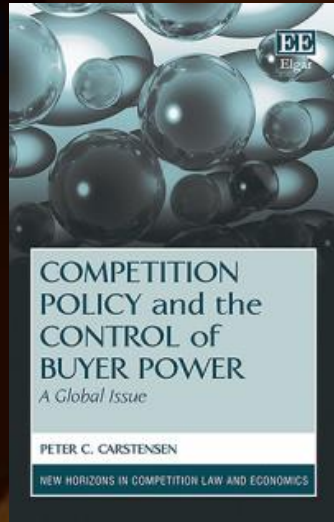


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Hungarian Competition Authority - August 2021

8 JUL 2021 **CARTEL - EUROPEAN COMMISSION FINES FOUR GERMAN CAR MANUFACTURERS (BMW, VOLKSWAGEN, AUDI, PORSCHE)**
Alain Rotziano - N° 2-2021

8 JUL 2021 **(...) Audi, Porsche) 101477 ALERTS - CARTELS - EUROPEAN UNION - GERMANY - FINES - CARTEL - AUTOMOBILE - LENIENCY - ENVIRONMENTAL (...)** Porsche - 875 million for a **cartel** involving the cleaning

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