THE FAIR TRADING ACT[1]

Fair Trade and Fair Competition Finally Here

After many years, the long-awaited Fair Trading Act (Chap. 81:13 of the laws of Trinidad and Tobago, the **FTA** or the **Act**) has finally been brought fully into force. The Act was first partially proclaimed in 2007. While some sections were proclaimed in the intervening years, all remaining sections of the Act were finally proclaimed by Parliament on Monday February 10, 2020. This isn't to say that all questions surrounding the Act and how it will be implemented have been answered, but this may be an appropriate time to revisit the Act and remind readers of some of the implications.

As discussed in our earlier articles[2], the FTA restricts or prohibits three main categories of anti-competitive activity:

(1) Anti-competitive practices and agreements

Any concerted practice of an association of enterprises which prevents, restricts or distorts competition is considered an anti-competitive practice and is prohibited under the FTA, along with all anti-competitive agreements. Horizontal and vertical agreements (i.e. agreements between competitors, and agreements between customers and suppliers respectively) may also be captured by the FTA and, in specific circumstances, can be considered anti-competitive.

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- **Anti-competitive practices and agreements**
- **Abuses of monopoly power**
- **Anti-competitive Mergers**

[1] Chap. 81:13 of the laws of Trinidad and Tobago - This Act was first partially proclaimed in 2007 and was brought fully into force on February 10, 2020.

[2] See: *Fair Competition Coming*, Hamel-Smith Forum, Vol. 9 Issue 7, March 2017; and *Fair Competition is Coming - Will it Ever Reach?* Trinidad Guardian, August 4, 2019.

Any agreement that:

(i) fixes prices directly or indirectly (other than where reasonably necessary to protect the interests of the parties concerned and which are not detrimental to the interests of the public);
(ii) limits or controls: (a) markets; (b) technical development or (c) investment;
(iii) shares markets or sources of supply;
(iv) applies dissimilar conditions to equivalent transactions and thus places some trading partners at a disadvantage to others; or
(v) makes contracts subject to extraneous conditions,

is considered under the FTA to be an anti-competitive agreement.

(2) Abuses of monopoly power

An enterprise has monopoly power in a market, if, by itself (or together with an interconnected body corporate - parent and subsidiary having same parent company), it occupies such a position of economic strength that it would be able to operate in the market without effective constraints from its current competitors and/or potential competitors. An enterprise which has monopoly power abuses that power if it impedes the maintenance or development of effective competition in a particular market.

Where the Fair Trading Commission (the **Commission**) has reason to believe that an enterprise (which controls 40% or more of the market share of a product or service it provides) has abused or is abusing monopoly market power, the Commission will issue a notice to the enterprise and investigate the matter. If the enterprise fails to comply with a request from the Commission to cease the abusive practice, the Commission may apply to the High Court for sanctions, including, but not limited to, an asset divestment order or restrictions on share transfers – see further below under "Consequences of Breaching the FTA".

(3) Anti-competitive Mergers

The FTA seeks to regulate mergers that are 'anticompetitive' - those which restrict or distort competition in a market; and mergers that will result in an entity having too dominant a position within the market due to its total combined assets post-merger. The FTA defines a merger as the cessation of two

or more enterprises from being distinct whether by: (i) purchase or lease of shares or assets; (ii) amalgamation; (iii) combination; (iv) joint venture; or (v) any other means through which influence over the policy of another enterprise is acquired. Enterprises with combined assets exceeding 50 million dollars (intending to operate locally post-merger) may not enter into a merger unless they obtain prior permission from the Commission. Any proposed merger that restricts or distorts competition, or which would be detrimental to the consumer or the economy, will not be granted permission. As such, parties seeking to enter into a merger or amalgamation must first seek the approval of the Commission.

Subject to certain threshold conditions, the FTA also provides that where a director serves on the board of two or more competing companies, and the director is viewed as being likely to weld together the policies of those companies in a way that would reduce or eliminate competition between them (referred to as an interlocking directorship), the companies for which he serves as director must apply to the Commission for permission to merge.

What Does it Mean to Carry on Business?

As mentioned above, one of the thresholds which will require a company to obtain pre-approval from the Commission (when it is seeking to carry out a merger with another company) turns on whether at least one of the entities *carries on or intends to carry on business in Trinidad and Tobago*. A strict interpretation might suggest, at least in earlier times, that such a company would only be required to obtain consent to carry out an amalgamation or acquisition if one of the entities has a physical place of business in Trinidad and Tobago and sells goods or service with a degree of regularity to persons through or by that business to persons in the country. However, in the age of digital selling, the need for a physical place of business is often no longer necessary and as such, that requirement might no longer be viewed as necessary.

If a physical place of business, either existing or planned, is not a pre-requisite for a business to be captured by the Act, this opens up the possibility that the legislation may have extra-territorial effect where one of the entities in a proposed merger does (or plans to do) business either directly with person(s) in Trinidad and Tobago on a regular basis or indirectly through a subsidiary or an affiliate.

In a situation, for example, where a company that is part of a large group of companies in the USA is acquiring an entity in Canada, and the US Company happens to have a Trinidad and Tobago subsidiary company that sells furniture here, it is not clear whether the US and Canadian companies would need to obtain the permission of our Fair Trading Commission (as well as the US and Canada competition authorities among others) before carrying out that acquisition. One can imagine how such requirements can significantly drive up the cost of an acquisition. It might be the case that such consent would only be required where the US or the Canadian company sells directly to persons in Trinidad and Tobago, or it could also capture where they sell to an independent distribution company in Trinidad and Tobago that acts as its agent.

How and When is the Asset Test Measured?

One of the other thresholds that determines whether consent to merge is required turns on the value of the assets of the merging entities. The Act provides that consent must be obtained, *inter alia*, if the assets of the merging entities exceed fifty million dollars. As the Act refers to if "their" assets exceed fifty million dollars, the likely interpretation suggests that it means where the combined assets of the two entities exceeds that value (which would obviously capture a situation where the assets of one of the merging entities exceed fifty million by itself).

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What is not clear, particularly where the value of the assets of each merging company individually do not exceed that amount, is when the value of the assets must be determined. Is it at the time of the application? Or perhaps at the time of the last audited financial statements of the companies? And what if the company does not have audited financial statements, particularly in the case of private companies? Would the date of the latest management accounts be acceptable? In a case where one of the merging companies assets are recorded in a foreign currency (or where it holds foreign assets), at what date and at what exchange rate would the value of the assets be required to be converted into

Trinidad and Tobago dollars. Is an official exchange rate to be used or perhaps some published average of official exchanges rates on a particular date?

All of these are questions that will have to be addressed by the regulators and ideally be published in regulation or guidelines. But, given that many businesses need to be able to carry out merger activities quickly and on a regular basis, these are questions that need to be promptly addressed. In these challenging economic times, businesses ought not to be delayed by being unable to determine whether they are captured by the legislation or by lengthy delays in obtaining permits when they clearly fall within the ambit of the Act. We understand that the Commission plans to issue guidelines on their website in the very near future which we look forward to with anticipation.

Consequences of Breaching the FTA

In order to enforce its powers under the FTA, the Fair Trading Commission may apply to the High Court for an Order. The High Court can make a range of Orders, including Orders to:

- prohibit or restrict a transfer of shares;
- prohibit an agreement, practice or decision from being made or carried out;
- terminate an agreement or practice;
- prohibit the acquisition of the assets of one company by another company;
- require a company to divest specified assets or shares; or
- disqualify persistent offenders from serving as company directors;

Additionally, the High Court can impose significant fines of up to ten percent of the annual turnover of an enterprise.

What Should You Do?

Considering the above prohibited categories of anticompetitive activities and the requirement for consents to mergers, the implications of the FTA are far-reaching. Save for certain excluded industries (such as telecommunications, banks and financial services companies that are already separately regulated under sector-specific legislation with some similar provisions), and other specific exceptions (including arrangements for collective bargaining, activities of employees for their own protection and agreements which relate to the use and

licensing of identified intellectual property rights), the Commission's jurisdiction in relation to the policing of anti-competitive behaviour (and particularly mergers) is quite broad.

Companies operating locally and foreign companies with local subsidiaries as well as prospective investors should seek advice to both ensure that their current practices and potential investments/deals are compliant with the Act, and to avoid possible fines or penalties.

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