

Law Notes

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FTC'S POWER TO REVIEW MERGERS & ACQUISITIONS

Contributed by Kelly A. Akin

Companies considering a merger with or acquisition of a competitor in their market should consider whether that transaction may run afoul of the Competition legislation. Such a transaction could potentially represent a breach of the provisions of the Fair Competition Act ("FCA" or "the Act"), if it is deemed to substantially lessen competition within the meaning of the Act. The Fair Trading Commission ("FTC" or "the Commission") has the power to seek an order from the court that could lead to penalties, including a fine, for the participating entities, in addition to which the breaching transaction will be of no effect.

The Fair Competition Act

One of the functions of the Commission under the FCA is to carry out investigations or inquiries in relation to the conduct of business in Jamaica to determine whether any enterprise is engaging in business practices in contravention of the FCA and the extent of those practices. In addition to the ability to investigate such transactions, the FCA gives the Commission the power to institute proceedings against the breaching parties in the Supreme Court. The Commission's investigative function should be considered along with Section 17 of the FCA, which makes unenforceable any agreement or provision within an agreement that has the effect of "substantially lessening competition in a market".

A merger may be generally defined as the acquisition, in any manner, of control over or significant interest in, the whole or a part of the business of another person or the amalgamation of competitors. It is therefore possible that a merger between competitors in a market may be investigated by the Commission to determine whether or not the entities engaged in this transaction are engaging in conduct which is likely to substantially lessen competition in the market.

The Commission has provided detailed guidance on the factors that may be considered to determine whether a proposed transaction would substantially lessen competition in the market. Generally speaking, this includes:

- a) Whether the parties engaging in the proposed transaction exercise market power. If together parties do not exercise market power, it is likely that the FTC will not consider the transaction to substantially lessen competition;
- b) How the agreement is structured;
- c) What is the "market" covered by the agreement; and
- d) How this agreement could possibly affect entry by a third party to the market.

Each transaction is considered on a case by case basis based on the relevant factors in each case.

Fair Trading Commission and M&A

A merger or acquisition that is found to substantially lessen competition in the market place may be deemed unenforceable under the FCA. The Commission may make this determination even if the transaction has already been approved by another government entity, e.g. a sectoral regulator.

In the case of *Fair Trading Commission v Digicel Jamaica Limited*, the Commission successfully argued before the Supreme Court that it had jurisdiction to review the acquisition of Claro by Digicel. The Supreme Court stated that the intention of the legislature was to "give the [Commission] jurisdiction in all cases which resulted in the lessening of competition. Section 17 was intended by the legislators to prevent uncompetitive practice". On appeal, the Privy Council agreed with this conclusion and upheld the Supreme Court's decision. The Privy Council found that, while the legislation does not specifically speak to the review of mergers and acquisitions, section 17 is sufficiently broad to include these types of transactions in circumstances where such a transaction would substantially lessen competition in the market place.

To avoid an unpleasant surprise, the parties to a proposed merger or acquisition, or other transaction that is likely to result in conduct prohibited by the FCA, may apply to the Commission for an authorization of the contemplated transaction. The Commission may grant such an authorization in circumstances where it is satisfied that the proposed agreement or provision is likely to promote the public benefit.

In contrast, if a transaction is deemed to be anti-competitive, the Commission could challenge the agreement and it appears, seek injunctive relief from the courts or unwind the transaction. As the aftermath to the Digicel case shows, it is unclear what the consequences or penalties are when a transaction is deemed to be anti-competitive after it has already occurred. However, at the very least, the purchaser company may find itself embroiled in expensive and time consuming litigation with the Commission.

Final Note

The Fair Trading Commission has the power to review any transaction, including any merger or acquisition, which is likely to substantially lessen competition in the market. Companies contemplating M&A transactions, in particular those falling within the circumstances outlined, are urged to seek advice about the applicability of the FCA to the specific transaction, how best to structure the agreements and the transaction itself and, if the FCA is applicable, to request authorization from the Commission. Potential regulatory roadblocks may be avoided by applying for prior authorization from the Commission; however if this authorization is granted, it will be subject to the provisions of the FCA.

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TAX CUTS MAY BREATHE LIFE INTO PROBATE PRACTICE

Contributed by Francine Derby

It is common knowledge that death and taxes are the only two certainties in life. It is also known that the obligation to pay taxes does not stop after death. Your personal representative (whether an executor or an administrator) will be required to use monies from your estate to pay two sets of taxes, commonly referred to as death duties. The first tax is stamp duty and the second is transfer tax on death.

Stamp duty must be paid before an application can be made to the Supreme Court for a Grant of Probate or Letters of Administration. Stamp duty was calculated on a graduated scale, with estates valued at above \$40,000,000 paying \$25,000 at the higher end. In addition, transfer tax on death must be paid before the deceased's estate can be transferred to the beneficiaries. In order to determine this tax, the personal representative has to submit documentation to the Tax Audit & Assessment Department itemizing particulars of all real estate and shares in the deceased's estate as well as their respective values, as at the date of death.

The tax is calculated at 1.5% of the value of any real estate or shares owned by the deceased as at the date of death.

Death duties are payable within the year following the deceased's death.

Effect of the Tax Cuts

Effective April 1, 2019, the burden of death duties has been eased significantly, due to the tax cuts announced by the Minister of Finance and Public Service on March 7, 2019.

Under the old tax regime, only estates valued at less than \$100,000 were exempt from paying transfer tax on death. Effective April 1, the exemption threshold was raised to \$10 million – a far more realistic and reasonable figure when one considers the average value of property today. The tax will still be calculated at a rate of 1.5% of the value of any real estate or shares owned by the deceased as at the date of death.

Before April 1, transfer tax would be payable for all estates valued at over \$100,000 at a rate of 1.5%. For example, if a deceased owned a home valued at \$8 million and had \$1.5 million in shares, the transfer tax payable would be \$142,500. Under the new tax regime, no transfer tax would be payable for this estate, as its value is less than the new \$10 million threshold.

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Additionally, taxpayers will benefit from significant changes as it relates to stamp duties. Under the old system, an estate valued at more than \$20 million but less than \$30 million would attract \$15,000 in stamp duties and an estate valued at more than \$30 million but less than \$40 million would attract \$20,000 in stamp duties. \$25,000 would be payable for all estates valued at over \$40 million.

As of April 1, transactions valued under \$500,000 attracts stamp duty of \$100, while all transactions valued at over \$500,000 will attract a flat rate of \$5000, based on a revised announcement made in Parliament on March 20, 2019.

This reduction in death duties has positive implications for beneficiaries of estates, as previously, the taxes were often prohibitive and served to delay transfers of property after death. The delay only led to further expense as interest would begin to accrue at a rate of six per cent per annum one year after the deceased's death. Some estates have never been dealt with due to inability to pay death duties.

The tax cuts may also lead to a resurgence of probate practice in Jamaica. With more accessible death duties, families of deceased persons are likely to feel more encouraged to have the estates dealt with, which ultimately would lead to more applications being filed in the probate section of the Supreme Court.

The process of dealing with an estate after a loved one has died, apart from being emotionally stressful, is often tedious and burdensome. The reduction in death duties will help to make the process a bit easier. For personal representatives and beneficiaries that have been delaying initiating the process, or have abandoned it, now may be an opportune time to finally get it done.

This article is intended to provide general information only and is not to be relied on in place of legal advice.

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BUSINESS DEVELOPMENT TIPS

INVEST IN RELATIONSHIPS

Meet more people in their work place. Identify new people in their organization you'd like to meet.

STAY VISIBLE

Identify which category of people you want to be in front of. Determine where they congregate and what communities they belong to.

REFINE YOUR FOCUS

Take a comprehensive look at your contact list and prioritize your relationships.

Develop a fresh context for reaching out to your "A" list.

Learn what is important to them and find out how you can help.

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