**Unclassified** **DAF/COMP/GF/WD(2005)15**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **14-Jan-2005**

**English - Or. English**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

**DAF/COMP/GF/WD(2005)15**
**Unclassified**

# Global Forum on Competition

## ABUSE OF DOMINANCE IN REGULATED SECTORS

**Case submitted by Jamaica**

**-- Session III --**

*This case is submitted by Jamaica in view of its discussion in Sub-Session 2 on Friday 18 February 2005 (from 9.30 am).*

**English - Or. English**

**JT00176941**

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**JAMAICA'S CASE STUDY**
**REFUSAL OF ACCESS TO PORT FACILITIES**
**NOVEMBER, 2004**

## 1. Introduction

1. In February 2002, the FTC received a complaint from a stevedoring company, Shipping Services Stevedoring Limited (SSL Limited) who sought the Commission's assistance in resolving the following issue: Kingston Wharves Limited (KWL), who owns berths 1-9 Port Kingston/Bustamante (hereafter referred to as Kingston Wharves) and who also operates a stevedoring company, issued a notice on December 11, 2001 which effectively denied independent stevedoring companies access to the port facilities which the latter deemed to be necessary to carrying out their commercial interest.

2. The Staff of the FTC was concerned that the refusal to grant access to the required facilities would allow KWL to extend its dominant position from one market to a neighbouring but separate market. Due to a 2001 Court ruling however, which prevents the FTC from holding hearings and thus from issuing directives, the Staff advised SSS Limited to take the matter directly to the Court under Section 48 of the Fair Competition Act (FCA). Under Section 48, any person who engages in conduct which is in contravention of the FCA is liable in damages for any loss caused to any other person by such conduct. The Staff also offered to provide an expert witness for the Court hearing; and committed to providing the parties to the dispute with a market delineation report.

## 2. Legal and factual context

### *2.1 Legal Context*

3. The Staff examined the matter under Sections 19 and 20 of the FCA. Section 19 of the FCA defines the existence of dominant position:

> "For the purposes of the 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".

4. Section 20(1) of the FCA states that "an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market." Under Section 20(2)(a), "an enterprise shall not be treated as abusing a dominant position if it is shown, *[inter alia*], 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."

5. Therefore, once dominance is established, the conduct in question should be assessed to determine if it is anticompetitive. Where it is deemed to be anticompetitive, the Staff has to assess whether or not the conduct contributes to, or was exclusively directed to improving the production or distribution of goods, or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit. If the conduct is found to be indispensable to the attainment of the above objectives, then KWL would not be treated as having abused its dominant position.

### *2.2 Factual context*

6. There are two public multi-purpose ports in Jamaica: the Port of Kingston/Bustamante and the Port of Montego Bay (by road, there is a distance of 170km between the two ports). The Port of Kingston/Bustamante is divided into two separate facilities: Kingston Container Terminal (KCT), a dedicated container terminal; and Kingston Wharves (KW), a multi-purpose facility. The former is owned by the Government and operated by a private firm on a management contract, while the latter is owned by a public liability company which is listed on the Jamaican Stock Exchange.

7. There are several commercial activities taking place at any one port: infrastructure provision (the provision of the physical infrastructure necessary for port operations); stevedoring (the loading and unloading of cargoes from ship to the wharf); receiving, delivery and unloading (the receiving, assembly and storage of export cargoes in warehouses or holding yards, and the unpacking of imported containers; towage; and pilotage.

8. Each of the above activities represents different functional levels in the interlocking chain of activities which are required to run a port. While the strong complementarities which exist between the activities suggest that they can be supplied as a bundle, this does not mean that each of the functional levels cannot exist as a separate product market. Given the existence of single product suppliers of the different port activities in Jamaica the Staff took the view that each port activity is a separate functional level in the vertical supply chain.

9. Based on the complaint it was necessary to define two related markets. The first would be the market for the supply of access to whatever is in question, in this case, cargo freight infrastructure. The second would be the market for the good or service for the production of which access is needed, in this case stevedoring services. In defining the first market, the question was whether the relevant market included all types of cargo freight infrastructure (air and sea), or all ports, or whether it was confined to only those facilities provided by KWL. The relevant market therefore depended on the demand and supply substitutability between the different types of cargo freight infrastructure. The Staff found that given factors such as specialized cargo needs, topography and prohibitive transportation costs the market could be defined as the provision of public port facilities for non-containerized cargo in the Port of Kingston/Bustamante. With respect to the second market, the Staff held the view that stevedoring was a distinct product market which was geographically confined to or near the KWL infrastructure.

10. Given that KW handled all the non-containerized cargo in the Port of Kingston/Bustamante, the existence of high entry barriers (lack of suitable port locations in the metropolis area, etc.) and the absence of countervailing buyer power, KWL was considered to be a dominant player in the first market under Section 20 of the FCA. As a dominant port operator, KWL has the ability to engage in anticompetitive practices aimed at driving out its existing or potential competitors in ancillary markets such as the stevedoring and towage markets. KWL's notice, which if allowed would bar independent stevedores from its port facility, is an example of its ability to abuse its dominant position. If it is not prevented from barring independent service providers from using its facility, KWL, in the absence of regulation, will be in a position to charge the port users such as shipping operators, exporters and importers excessive prices for all port-related services.

11. While the Staff holds the view that a dominant undertaking has the right to advance its own commercial interest, such behaviour is not acceptable under Section 20 of the FCA if its actual purpose is to strengthen its dominant position and abuse said position. Further, the Staff did not accept the arguments advanced by KWL in justification of its action. According to KWL, its action was geared towards improving the efficiency of port operations and ensuring KW's financial viability. For KWL's conduct to qualify for an exemption under Section 20(2) of the FCA, it should impose only such restrictions that are

indispensable to the attainment of the named objective(s). It was the view of the Staff that the objectives of increased efficiency and financial viability could be attained via less restrictive means. The Staff therefore opined that KWL's conduct would not qualify for exemption and would therefore be in breach of the FCA.

## 3. Action taken

12. In 2002, the Supreme Court having heard agruments from both parties in the case, issued an interim injunction in which it ordered KWL not to implement the notice issued in 2001 or take "any steps calulated to prevent, hinder or deter the Plaintiff from engaging in stevedoring business, shipping agency business and/or ancillary operations in or with repect to berths 1-9 …..". The interim injunction which allowed for the maintenance of competition in the market for the provision of stevedoring services, is still in effect as the judge has yet to issue a final decision.