

## **SESSION IV – OECD Global Forum on Competition**

### **HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

#### **Contribution from the Fair Trading Commission, Jamaica's competition agency**

#### **1. Introduction**

1. Economic development refers fundamentally to the sustainable growth of a country's production, improved standard of living, increased per capita income, poverty alleviation and the reduction in unemployment. The benefits of competition are lower prices, better products, wider choice and greater efficiency than would obtain under conditions in which there is no or very little competition. The benefits of competition therefore are increased consumer welfare and improved productivity of a country's firms. There seems to be a natural link between fostering competition and achieving economic development. The issue therefore is: what are the most appropriate policies which should be pursued to achieve the benefits of competition/economic development?
2. The Fair Competition Act (FCA), Jamaica's competition legislation has as its mandate the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view of providing consumers with competitive prices and product choices. To achieve its mandate the FCA covers two categories of prohibitions: consumer protection related prohibitions and anti-competitive prohibitions. The main consumer related prohibitions are misleading advertising and sale above advertised price. Tied selling is also established as a consumer related offence under the FCA. The main anti-competitive prohibitions relate to agreements which substantially lessen competition and abuse of a dominant position. The abuse must actually or potentially lessen competition substantially. Other prohibitions are bid rigging and collusive tendering, price fixing, exclusive dealing, market restriction and tied selling. The FCA does not contain merger control provisions.
3. Due to the failure of the legislation to provide a clear distinction between the function of the Staff as investigators and the Commissioners as adjudicators, fortified by a Court of Appeal ruling, that the legislation makes for a breach of natural justice, the agency has not had any formal hearing and therefore any prosecution under the provisions which deal with anti-competitive practices. Under the FCA, the Commissioners are authorized to investigate and adjudicate matters relating to agreements which lessen competition, abuse of dominance, market restriction, exclusive dealing and tied selling. The other prohibitions are adjudicated by the Supreme Court. The Court is the only authority which can impose a fine on a company found to have breached the provisions of the FCA; and that fine is limited to a maximum of Jamaican \$5 million dollars (approximately US\$83,000).
4. Notwithstanding the problems with the legislation and the inability of the agency to effectively carry out the mandate of the FCA with regard to some anti-competitive conducts, significant strides have been made in curtailing anti-competitive behavior in the

various markets. The method which has been used by the agency is, to investigate all complaints which are deemed to have merit. The Staff, having completed its investigation would present the findings to the Respondent. Where a breach is found, the Staff would recommend that the Respondent enter into discussion with the Staff with a view to agreeing on the most appropriate remedy to correct the effect on the market.<sup>1</sup> If the Respondent decides not to co-operate, the Staff would have no choice but to recommend to the Commissioners that the matter be closed. Matters are closed with the caveat that Commission may re-open them if circumstances so warrant. The process generally culminates with a Consent Agreement which is signed between the Respondent and the Commissioners.

5. The rest of the paper will highlight a few of the cases investigated by the FTC, along with their outcomes.

## **2. Cases investigated**

### **▪ Joint Venture among Shell, Esso and Texaco**

6. In May 1998, the Staff learnt of a joint venture among the three international petroleum companies operating in Jamaica. A local newspaper had reported that Shell, Esso and Texaco had entered into an agreement to jointly build and operate a storage facility in the western region of the island. An investigation was launched into the matter under Section 17 of the FCA, which renders void agreements which substantially lessen competition. Subsection 17(4), however, exempts agreements which the Commission is satisfied contribute to the improvement of production or distribution of goods and services while allowing consumers a fair share of the resulting benefit.
7. At the end of the investigation, it was concluded that the joint operation of a storage facility contributes to a reduction in operating cost of the companies concerned. It was viewed as efficiency enhancing, which should ultimately benefit the consumer through lower prices at the pumps.
8. It should be noted that while the FCA does not cover merger control provisions, the Staff had investigated the matter under the provision dealing with agreements which lessen competition.

### **▪ The Banking Industry**

9. The FTC having received a number of complaints regarding the “reader-friendliness” of banks’ documents, entered into discussions with the Bankers Association of Jamaica. The discussions resulted in an agreement which covers the following area:

#### *(i) Clarity in banking documents*

It was agreed that a fact sheet in layman's language would be attached to the face sheet of all loan documents for individual consumers. The fact sheet would contain

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<sup>1</sup> While the FCA does not authorize the Commissioners to impose fines, it authorizes them, in matters relating to abuse of dominance, to direct the offending company to take such steps as are necessary and reasonable to overcome the effects of the abuse in the market concerned.

information that the average person would consider material and could understand. The sheet would detail, at the very least, the effective interest rate, whether or not there are prepayment penalties and the total amount of the loan.

(ii) *Posting of exchange rates*

It was agreed that the banks would indicate whether the exchange rates posted were opening rates only. In other words, the consumer should be put on notice if the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate posted is the set rate and he should be entitled to obtain foreign exchange at that posted rate.

(iii) *Advertising of interest rates*

It was agreed that where "add-on" rates are used, they will be designated as such. It was generally agreed, however, that it would be more useful to state the effective rate of interest when advertising, as the add-on rate is deceptively lower. This would minimize confusion and the consumer would be better able to compare rates among banks.

▪ **Bank of Jamaica – Central Bank**

10. In November 2000, Tangent Limited, a local software developer, complained to the FTC that the Bank of Jamaica's and Intrashare Systems' refusal to release the specification of the Central Bank eGate system, which was developed by Intrashare System, has given Intrashare Systems an unfair advantage over other developers of software for cambios. According to Tangent Limited this specification is necessary to develop an interface to facilitate communication (automatic interface) between its program for cambios and the Central Bank's system. Tangent Limited alleged also that Intrashare Systems, which is a software developer based in the United States, is active in the local market with a product that is similar to Tangent's product. Intrashare Systems advertised on its website that its software has an automatic interface with the Central Bank's system.
11. The Staff investigated the complaint with respect to Section 20 of the FCA, which deals with abuse of dominance. During the investigation the Bank of Jamaica informed the Staff of the FTC that the Bank's system would be configured to facilitate access via a dial-up method only or by an interface system which would be provided by the Bank. That means that no program would be able to communicate with the Bank's system without going through the interface provided; and therefore, Intrashare Systems' product would not have an advantage over other products in this respect. The Bank informed the FTC that its reason for not releasing the technical specifications to all developers relates to security concerns.
12. The Staff was satisfied with the method which the Bank chose to deal with the issue of interface of its program with those of cambio operators. The Staff was satisfied that no program designed for use by the cambio operators would be discriminated against. The Staff also felt that the Bank's reason for not giving the technical specification to all developers was justifiable. Accordingly, the Staff recommended to the Commissioners

that the matter be closed. The company which had complained was also satisfied with the outcome. The matter was closed in April 2002.

13. The result of the FTC's intervention is that no software developer of programs for cambio operators, is excluded from providing such programmes. Customers, cambio operators, would have choices and be able to select the product that best suit their circumstances.

▪ **Red Stripe Limited**

14. Through newspaper reports, the Staff became aware of exclusive sales and promotional arrangements between Red Stripe Limited and several distribution outlets. The Staff therefore initiated an investigation into these arrangements. The contractual arrangements which were investigated related primarily to terms prohibiting the promotion of competing products at selected outlets; demanding supply of sales data on competing brands; prohibiting sales and promotion of competing products at sponsored events; and recommending that competing alcoholic products be sold at premium prices at sponsored events. The investigation also covered clauses relating to post-term preferential treatment.

15. The issues were investigated in relation to abuse of dominance. The Staff concluded that the company has abused its dominance in the market for beer in Jamaica. Red Stripe is one of two breweries in Jamaica; and has over 90% market share. The company disagreed with the findings of the Staff. It claimed that, among other things, the market definition was flawed and that the market should have been defined to include all alcoholic beverages and not just beer. The company agreed, however, to enter into a Consent Agreement with the FTC. There was no admission of a breach of the FCA. In that Agreement, Red Stripe Limited agreed that, inter alia:

- With regard to agreements relating to sponsorship at events:—
  - No agreements shall exceed three (3) years in duration, or provide for an option to renew and/or rights of first refusal; and
  - The required notice period for termination without cause in such agreements shall vary, depending on the amount of sponsorship contribution made, in accordance with agreed ranges.
- With regard to promotional arrangements with outlets:—
  - D&G may execute exclusive promotional agreements with a limited number of outlets only, which number has been agreed with the FTC;
  - No exclusive promotional agreements with outlets shall have a duration of more than twelve (12) consecutive months. None of these agreements shall provide for an option to renew and/or rights of first refusal. All agreements may be terminated with a reasonable notice period, which period has been agreed with the FTC; and
  - None of these exclusive promotional agreements shall restrict or limit non-Red Stripe products from being normally displayed for sales purposes.

▪ **Blue Cross of Jamaica – health insurance**

16. In January 2002, the Association of Medical Practitioners complained to the FTC that Blue Cross of Jamaica (BCJ) in collaboration with Advance Integrated Systems (AIS), had introduced and implemented an electronic claims processing system, referred to as PAS, to replace BCJ's manual claims system. The Association alleged further that BCJ was requiring that providers pay to AIS a transaction fee of 1.75% of each claim adjudicated through PAS and that all providers sign on to PAS by June 2002; with the result that the manual system would have been phased out by June 2002. It was claimed also that BCJ had not provided any alternative to PAS. Blue Cross of Jamaica is largest of three health insurance companies in Jamaica. AIC is a software development company.
17. The Staff had concerns about the potential impact of BCJ's conduct on competition. Specifically, the Staff was concerned about the following:-
- The mandatory use of PAS may have resulted in significant cost to Providers. This cost relates to the necessary acquisition of computer, printer and software and the recurrent payment of a transaction fee.
  - Competition in the market for the development of alternative system would be inhibited. In the absence of competition in this market there would be no constraint on the BCJ's behaviour with respect to the cost associated with PAS.
  - The exclusion from the BCJ's Provider list, of Providers who are not able to install PAS was likely to result in a reduction of the customer base for such Providers and significantly affect their ability to compete and expand in the market for the provision of health services. Customers/subscribers of the BCJ's (i.e. purchasers of the health insurance from the BCJ) form a significant part of the revenue base of health service providers.
18. Before a full investigation was launched, BCJ agreed to make some concessions to its proposal. A Consent Agreement was entered into between BCJ and the FTC. The terms and conditions relate to the following:
- *Provision of alternative system*—BCJ will make available to Providers either an Internet based system or some other system for which Providers will not be required to pay a transaction fee.
  - *Transition period*—BCJ will retain the existing manual system for an 18-month period after it has provided an alternative system to PAS and one which has no transaction fee attached.
  - *Retaining the manual system*—BCJ will retain the manual system to facilitate Providers who do not have access to fixed-line telecommunications services or who have only a small number of BCJ claims.
  - *Third party developers*—BCJ will make the relevant technical specifications available to any party who wishes to develop an alternative claims processing system which is compatible with its own.

### **3. Concluding comments**

19. The benefits of competition are not always apparent. The effects of the remedy imposed by a competition agency to address an anti-competitive activity might not be realized immediately and in most cases cannot be quantified. The agency believes, however, that a market which is unrestricted and devoid of anti-competitive activities delivers the best outcome for both suppliers and consumers. This has been witnessed in at least two industries in Jamaica: telecommunications and cement. The incumbent telephone service provider has increased its mobile customer base significantly since it was exposed to competition. There have been improvements in its profits also. The sole cement manufacturer has also experienced significant growth in revenue and profits during the periods when it faced the most competition from importers of cement. Consumers also benefited from shorter delivery time, lower prices, and better cement quality.
20. We at the FTC have recognized that some firms are ignorant of the effect of their actions on the market and consumers. The job of the agency therefore is to constantly educate the business community and where possible make recommendations that will correct the effects of anti-competitive conducts in the markets concerned. When the law is amended the agency will have the ability to more effectively enforce the competition law for the benefit of all.