JAMAICA'S EXPERIENCE IN COMPETITION LAW ENFORCEMENT: A SNAPSOT

1. INTRODUCTION

In his introduction to Silvio Meli's 2006 work, *Judgements of the Malta Commission for Fair Trading*, Professor Richard Whish makes the observation that "A successful competition law regime depends on a number of factors" **(PAGE 15**) and lists in the number one position "... a well-drafted law that is internally coherent and that establishes rules that capture the mischief that is intended to be addressed while at the same time providing reasonable certainty to all the relevant stakeholders ...". Listed in the second position is the requirement that civil society understand the purpose of the law and accept (my emphasis) even if reluctantly, the need for a law of the kind.

The third requirement cited is the State's ability to provide the physical, financial and the intellectual resources needed to make the law work. Professor Whish speaks too of "... *robust, independent institutions that are capable of reaching decisions ... in a timely fashion ...; that meet the modern standards required by human rights considerations; ... and that are easily accessible to the entire constituency of stakeholders."* Comprising this constituency are, among others, the competition authority, the Courts, firms-private and public, academia and of course, the consumers, who must be the ultimate beneficiaries of all enforcement efforts.

2. STRUCTURE OF PAPER

Pursuant to the specific request of the Ministry of Trade and Industry this presentation seeks to address the following:

- the procedures used to initiate an investigation at the inception of the Jamaica Fair Trading Commission
- a case conducted in the early years, demonstrating positive steps taken by the Commission in the conduct of the said case
- a case conducted in the early years, illustrating challenges in respect of collecting evidence
- lessons learned from each scenario
- the importance of co-operation in competition matters, particularly in light of co-operation at the regional/international level

Each of these matters will be discussed in turn, under individual sections of the paper.

3. INITIATING AN INVESTIGATION

Section 5 of the Fair Competition Act (FCA/The ACT) sets out the functions of the Commission as being, among others, "... *to carry out on its own initiative or at the request of any person such investigations or inquiries ... as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices".*

This is an extremely important provision. It allows the Staff of the Commission to initiate an investigation based on its own observations of what is/might be happening in the market. The media becomes a rich source of information.

Under Section 6 *"the Commission shall obtain such information as it considers necessary to assist it in its investigation* ...". and Sections 42-44 create criminal liability for obstructing or impeding an investigation in any manner, including, but not limited to refusing to produce records; destroying or altering documents; and giving false or misleading information to the Commission.

There are powers of entry and search under Section 10. The Section provides that an authorized officer may obtain a warrant for said purpose.

The Early Years

For the greater part of the first ten (10) years of the life of the Fair Trading Commission it focused on consumer related offences, of which Section 37, which speaks to misleading advertising accounted for a steady 80% - 95% of the number of complaints received. Nor is the work undertaken during those years to be sneezed at. Indeed the Commission's Mission Statement charges it to carry out its mandate as the competition authority *"... with a view to providing consumers with competitive prices and product choices"*; and experience has demonstrated the value of nurturing the consumers as allies. Not only do they comprise the largest group of stakeholders; they are the ultimate beneficiaries of the competitive process.

For the majority of cases, the investigation would begin with a complaint from an aggrieved consumer. The complaint was/is required to be in writing; and persons who walk in "off the road" would be required to complete a complaint form, if necessary, with the assistance of a complaint officer. A complainant must support his allegations with relevant documentation, such as receipt, warranty document and where applicable, written terms and conditions of the

relevant transaction. In due course the Staff acknowledges the complaint and communicates the allegations to the person/firm against whom/which the complaint is made (the Respondent); and solicits a response to the allegations. In the meantime it conducts its own research into any relevant law, on the internet or by approaching other Government entities that might have useful information to share. Depending on the nature of the information gathered, the matter could be settled, with the Respondent making amends; or through the Court, whereby a fine could be imposed. Section 37 creates an offence of strict liability, so evidence gathering is a "fairly simple undertaking". At all stages of an investigation, confidentiality is meticulously observed.

Investigations into competition matters may also begin with a complaint or at the instance of the Staff; and of course, a person who brings a complaint must support the allegations with cogent evidence. Over the years the procedures have been developed and refined so that the current course is that: The Staff will conduct a preliminary enquiry to determine whether there is sufficient ground for launching a full investigation. This part of the process requires, *inter alia* that the legal team identify the legal issues; the applicable sections of the Act and the kind of evidence that will be necessary. The final decision as to whether a full investigation is launched takes into consideration a number of factors, including:

- the seriousness of the alleged conduct
- the degree to which it is likely that the conduct will dampen competition
- whether the conduct is widespread in the particular industry
- the jurisprudential value of pursuing the matter
- whether there is likely to be widespread public interest in the matter
- whether the relevant evidence is obtainable by reliable and reasonable means

4. CASE STUDIES

i. The General Legal Council v The Fair Trading Commission (1995)

In 1995 the FTC wrote to the Jamaican Bar Association to say that some of the Canons of Professional ethics which govern the legal profession were inconsistent with the FCA, in that those Canons had the effect of restraining or injuring competition unduly. The FTC cited Section 35 of the Act, which prohibits conspiracy, combination, agreement or arrangement to, *inter alia*, restrain or injure competition unduly.

In response, the General Legal Council (GLC) filed an Originating Summons, seeking, *inter alia*, declarations that:

- in performing its statutory functions and duties under the Legal Profession Act the GLC, established under that Act, is not amenable or subject to the jurisdiction of the FTC
- the Legal Profession (Canons of Professional Ethics) Rules, being subsidiary legislation and/or statutory Rules made under the Legal Professional Act are not governed by the FCA
- said Rules do not constitute an "agreement" within the meaning of the word as used in the FCA
- the FCA does not apply to the Legal Profession and the Canons of Professional Ethics, by reason of the fact that said Rules are made in the public interest to protect the public
    (a) by upholding standards of the legal profession and promoting proper professional conduct by attorneys who are officers of the supreme Court; and
    (b) by preventing the system for the administration of justice from being brought into disrepute by its officers.

The relevant activities authorized by the Canons and enforced by the GLC, which gave rise to the suit related to:

(i) restraining the freedom of attorneys-at-law to advertise, to promote the supply of legal services or to disseminate information about their qualifications;

(ii) restraining the freedom of attorneys to include non-lawyers in partnerships;

(iii) restraining the freedom of attorneys to determine the appropriate fees for their services;

(iv) restraining attorneys who have served as Supreme Court Judges or as Judges in the Court of Appeal from practising as attorneys thereafter.

The FTC submitted that the Legal Profession Act is subject to the jurisdiction of the FCA; and the FCA is intended to cover all aspects of commerce and delivery of all services in Jamaica. Counsel attempted to make a case for concurrent jurisdiction; and held to the argument that the Canons are within the expanded meaning of "arrangement".

The Court rejected the arguments advanced on behalf of the FTC, holding *inter alia,* that the FCA has not repealed, amended or modified the provisions of the Legal Profession Act. His Lordship Mr. Chester Orr, J as he then was, said "... it

follows therefore that the General Legal Council in performing its statutory duties is not subject to the Fair Trading commission."

It was held further, that

(i) the GLC is not an association, nor can the Canons be described as "activities" of the Council;

(ii) the GLC is not amenable or subject to the jurisdiction of the FTC or the FCA;

(iii) the Canons are not governed by the FCA;

The ruling in this case, effectively removed a very important area of professional services from the FTC's jurisdiction. The Commission had got off to a very rocky start when it sought to argue the case under Section 35, of the FCA because this forced it to try to establish the relevant piece of legislation as evidence of a conspiracy/combination/agreement/arrangement.

Despite the fact that the GLC subsequently amended the Code of Ethics to allow individual attorneys to determine appropriate fees for their services; and to advertise in some limited way, the case might have done serious damage to the relationship between the Bar and the FTC. There continues to be more than an insignificant amount of animus and mistrust on the part of the legal fraternity; but the FTC has been making tangible effort to build a productive and mutually beneficial relationship with that constituency, because this is a critical constituency in the scheme of effective competition enforcement. With the benefit of hindsight, it is now clear that this issue could have been far more effectively handled through an advocacy rather than through an adversarial approach. Alternatively, the FTC might have been best advised not to have taken on this issue so early in its life, when capacity had not yet been built to any appreciable level.

(ii) The fair Trading commission v Cable & Wireless Jamaica Limited (C&WJ) (1999)

In December 1996, Answering Service Limited, a provider of telephone answering services complained to the FTC, alleging that Cable and Wireless, the sole supplier of telephone services to Answering was abusing its dominance in the telecommunications market by:

- introducing its own answering services and simultaneously increasing its charges to the complainant's customers, who depended on its leased circuits
- subsidizing its own operations in the answering services market in that it was offering free minutes, and subsidized rates to its cellular customers
- frustrating the economic and financial progress of the complainant, by failing to install in a reasonable time certain telephone facilities (lines) requested by the complainant.

Note must be made of the fact that C&WJ's voicemail service was unilaterally and without solicitation, imposed on its customers' telephone lines, causing disruption in the utilization of their telephone services and to electronic equipment which was attached.

In response to the allegations, C&WJ contended that its conduct in the universal development of "In touch voicemail" as the service was called, was "... *exclusively directed to improving the distribution* of telecommunication services and products; and to *"... promoting technical and economical progress ..."* as contemplated under Section 20 (2) of the FCA. If the Commission is satisfied as to these outcomes from a particular conduct a dominant Company would not be treated as abusing its dominance. The Commission was not thus persuaded. It filed suit against the company, requiring that the Company take a number of actions to correct the breaches. These included:

- removing in twenty-four hours of request, its voicemail service from the telephone lines of customers who so requested
- installing the service only as might be applied for
- preparing and issuing within sixty (60) days a manual outlining the facilities available for inter-connection to its facilities, including all services relating to the messaging market
- publishing within sixty (60) days, minimum time periods for providing services requested by potential entrants into the value added services market
- establishing and maintaining within six (6) months, separate accounts for the provision of basic telephony versus messaging services.

The parties eventually entered into negotiations and a consent agreement was arrived at in the aforementioned terms. The terms of the agreement were endorsed on the Court Records. An amount of J$2.5M was exacted; and this amount included J$175,000.00 as costs to the FTC.

The FTC is particularly proud of the action taken in this matter. It sent a clear and early signal to the encumbent C&WJ that it would not be allowed to abuse its dominance in the market, without consequences. The restorative actions

stipulated by the Commission actually became the backdrop against which the Sector Regulator, the Office of Utilities Regulation (OUR) would establish many of the requirements of the then emerging regulatory framework in which ex-ante rules would govern the conduct of the market participants.

This case provided for the FTC and the OUR, a context within which both agencies were able to co-ordinate their efforts toward ensuring that competition was/is not undermined. The OUR assisted greatly with explaining technical aspects of the relevant transactions between C&WJ and the complainant.

5. CO-OPERATION

Pradeep Mehta says, in his book *Towards A Functional Competition Policy For India*: "As countries integrate more and more into the global economy they become more prone to the anti-competitive practices operating on a global scale" (pg. 75). Such practices include cartel activity, and mergers and acquisitions with anticompetitive outcomes; the former being acknowledged as the most egregious of offences and producing the most devastating results in terms of high prices to the consumer. Anticompetitive practices distort markets and consumers suffer. For this reason competition authorities need to be able to tackle effectively not just challenges to competition from within their domestic borders but increasingly, extra-territorial challenges as well. By and large national competition laws are inadequate to the extent that they address only internal anti-competitive conduct. Admittedly, much can be done by incorporating in one's law, provisions which reflect the "effects doctrine" whereby the Competition Authority could have jurisdiction over any foreign company whose activities produce anti-competitive effects within the victim's borders, but it is not difficult to anticipate the enforcement difficulties that would emerge, especially if such an offending company does not have a physical presence in the relevant jurisdiction.

This is the context in which co-operation becomes an important tool in the armoury of all competition agencies; and especially those of small states.

In light of the Free Trade Area of the America's experience and the World Trade Organization (WTO) negotiations regarding competition at that level, it seems eminently more realistic to think in terms of co-operation as a regional and/or bilateral endeavour. Indeed, Chapter 8 of the Revised Treaty of Chaguaramas stipulates that "Every Member State shall (emphasis added) require its National Competition authority to, among other things:

"Co-operate with other National Competition authorities in the detection and prevention of anti-competition business conduct, and the exchange of information relating to such conduct" .

In contrast to the definitive charge contained in the words of the Treaty, Article 4 of the Competition chapter of the Economic Partnership Agreement between the Cariforum States and the European Community and its Member States, is couched in permissive tones, under which "*The competition authority of one Party <u>may</u> (emphasis added) inform the other party's competition authority of its willingness to co-operate with respect to enforcement activity …".* and *"… each party may inform the other Party's competition authority of any information it possesses which indicates that anti-competition business practices, … are taking place in the other Party's territory …".*

The language says enough about the level of co-operation that can be anticipated; and is impatient of further comment.

It bears noting here, that co-operation is not limited to enforcement matters. There is so much room for co-operation in capacity building in the Caricom region. We may pool our resources to identify and utilize training opportunities as they emerge. Not only does this enhance our capacity to enforce the law; it also facilitates consistency in its application across the region.

The importance of co-operation in competition matters cannot be over-emphasized. All efforts should be made to carry forward the relevant mandate of Chapter 8 of the Treaty, knowing that if competition is undermined in one state within the region, it is the entire region that is affected.

As a footnote to this discussion on co-operation, I mention that an endeavour undertaken by the Jamaican and the Barbadian Commissions to craft a co-operation agreement has been dormant for some time. We should be reviving the process shortly.

CONCLUSION

Competition policy and law provide necessary support in a market economy. It is through competition that firms are forced to make their operations efficient – allowing them to produce optimally. Consumers are thereby provided with choice of goods and services that meet acceptable standards of quality and are made available at competitive prices. It is the duty of competition authorities in this era of a globalized trading system to contribute to the development of international trade and therefore the global economy by rigorously enforcing competition law. Of course, the Laws must be effective.

All competition agencies make mistakes; and I daresay, not just in their early years; but they must use the lessons learned from those mistakes to improve their effectiveness in the market. Co-operation is without doubt, a potent vehicle for building capacity and for preventing firms from exporting anti-competitive practices across borders.

As Trinidad and Tobago joins the CARICOM competition family, I welcome you; wish you well and commit the Jamaican Fair Trading Commission to helping to make your teething pains less excruciating that they can be. I exhort all stakeholders to open their minds to understanding what competition is about; and to co-operate with the T&T competition authority towards a really competitive market.