THE OBJECTIVES OF JAMAICA'S COMPETITION LAW AND THE DESIGN OF THE FAIR TRADING COMMISSION

INTRODUCTION

The aim of this paper is to highlight the ideas and concerns that informed the establishment of a competition regime in Jamaica in 1993. In the absence of empirical data, it is not possible to say with any appreciable degree of confidence, whether those concerns have been adequately addressed by the Fair Competition Act. We would like to believe though that the major objectives of the Act are being realized in some measure.

The paper will also explore the design of the competition agency, the Fair Trading Commission within the structure of the Government, but might fall short of answering the question whether the design is the best or most favourable design that was possible for the jurisdiction.

PRE - 1993 ECONOMY

The economic landscape in the pre-1993 era was marked by an elaborate scheme of Government Regulations which created and enforced barriers to entry in various sectors. These barriers included both tariff and non-tariff restrictions. There were excessive import licensing requirements, and price controls; and Government-owned enterprises operated with little or no commercial pressure. The allocation of resources, in terms of what goods and services were produced; and in what quantities was largely determined by Government.

This era was soon overtaken by an international trend which saw more and more governments of the 1980's relying on the market to set prices and determine the allocation of resources. In keeping with this trend the Jamaican Government undertook a number of structural adjustment programmes, aimed at removing entry barriers created by Government regulations.

These measures included:

(a) tariff reform which eliminated quantitative restrictions; the removal of requirements for excessive import licensing; the significant reduction of tariff levels;
(b) removal of price controls and the deregulation of certain industries e.g. motor vehicle, tourism, banking, air and ground transportation;

(c) privatization/divestment of certain para-statal agencies e.g. media houses, Government printing services, Sugar Redundancy Housing Programme;
(d) subjecting state enterprises to greater commercial pressure.

THE BIRTH OF THE FAIR COMPETITION ACT (FCA)

The emerging economy was characterized by such words as "liberalization"; "deregulation" and "privatization"; and the Government was concerned that without supporting legislation, the benefits expected from the "freeing" up of Government regulation might not be realized; e.g. that possible price fixing activities of private firms would replace price controls. It was concerned too that having been conditioned by a long history of price controls and other regulatory constraints, private firms would be slow to change their behaviour in the market. It was felt that without legislation, the aims of Government's social policy, to ensure that the benefits of deregulation are shared throughout the community, would be defeated.

The 1991 Green Paper on the Proposals for a Competition Act indicates that the Government was mindful of the school of thought that the freeing up of entry barriers through tariff reform displaces the need for competition law. The Paper notes, however, that "the realities of the market place in other countries support the need for the Law" (page 2).

Thus the FCA was promulgated in 1993.

OBJECTIVES OF THE FCA

The Green Paper previously referred to sets out the objectives of the Competition Law as follows:

- to provide for competition, rivalry in markets and to secure economic efficiency in trade and commerce;
- to open markets and guard against undue concentration of economic power; and
- to promote consumer welfare and to protect consumer interest.

With the clear recognition that Competition Legislation may encompass a variety of policies, the first draft of the Act was made available for public review and comment. Private sector interest groups like the Chamber of Commerce, the Exporters Association and the Media Association got an opportunity to make their contribution. Professional and consumer groups also contributed to the process. Much debate centred on features of the Act which had the potential for negative impact on investment in

the newly liberalized economy, viz. the specific treatment of monopolies and mergers; and the accommodation of interlocking directorships.

By February 1992, one year before the Act was passed, it was clear that the Government had been persuaded that monopolies are not inherently bad; that by virtue of their scale of operation they are best suited to maximize efficiency of production which can be beneficial to consumers. Accordingly, monopolies would not be singled out for any special treatment in the Act, but instead would be treated within the context of abuse of dominance.[1] Similarly, it was felt that pressing issues related to mergers could be addressed under the provisions for abuse of a dominant position. Further, it was argued, such issues would be properly addressed in the proposed amended Companies Act and the relevant activities monitored by the Registrar of Companies. Central to this approach was the feeling that given Jamaica's level of economic development small firms should have an opportunity to make themselves more competitive by merging, without being subjected to the strict requirements of competition law. The position articulated in respect of interlocking directorships was that they are not offensive in themselves; rather it is the potential for abuse by directors that gives cause for concern. It was acknowledged that in an economy as small as Jamaica's is it would be impossible to avoid the phenomenon of inter-connected companies and directorships. The Government was satisfied that as in the cases of monopolies and mergers, competition issues could be addressed within the context of abuse of dominance, depending on the relevant market share of such directorships. Issues of insider trading and such securities concerns were considered to be amenable to being adequately addressed in Banking and Securities Legislations.

Thus, the Fair Competition Act as passed in March of 1993, does not contain specific provisions to regulate monopolies or control mergers. Section 2(b) stipulates that "a group of interconnected companies shall be treated as a single enterprise." Against the background of the arguments advanced however, it would seem reasonable to accept that the first and second objectives set out in the 1991 Green Paper have not been compromised in any material respect, by the scheme of the Act.

Commensurate with those objectives the FCA prohibits the abuse of dominance; collusion and agreements which seek to or have the potential to limit competition; exclusive dealing; tied selling; market restriction and bid-rigging.

In keeping with the objective of promoting consumer welfare and protecting consumer interest, the FCA prohibits false and misleading

[1] Cabinet Submission, February 28, 1992

advertising; double ticketing; sale above the advertised price; and advertising at a bargain price, goods which the seller does not have in reasonable quantities.

Together with the right of private action, contained in Section 48 of the Act, these consumer-related prohibitions guarantee that the consumer is provided with full and clear information to influence his decision-making; and ultimately appropriate redress where his rights have been infringed.

DESIGN OF THE FAIR TRADING COMMISSION

The Commission is established under Section 4 of the Fair Competition Act, as a body corporate to which Section 28 of the Interpretation Act applies. This means that the Commission is vested with all the rights and powers which are vested in a natural or juridical person – including the right to sue in its corporate name and the right to acquire, hold and dispose of property.

The Commission may be described as a Statutory body wholly funded from the Government coffers, accountable to the Government through the Ministry of Commerce, Science and Technology. The Commissioners, referred to in the Schedule to the Act as members, are appointed by the relevant Minister of Government and the said appointments may be terminated by the Minister. A member's tenure is for a period, not exceeding three years. It is stipulated that there shall be a minimum of three commissioners and a maximum of five, one of whom the Minister shall appoint as Chairman.

Pursuant to Section 5 of the FCA, the Commission, on its own initiative or at the request of some person, will carry out investigations in relation to the conduct of business in Jamaica to enable it to determine whether the Act is being breached. Accordingly it is authorized to, *inter alia*, summon and examine witnesses; administer oaths; and hear evidence. As such, the Commission is a quasi-judicial body, whose decisions may be appealed to a Judge of the Supreme Court sitting in Chambers, within fifteen days of the date of the relevant decision. The Judge may confirm, modify or reverse said decision, giving reasons.

Other functions of the Commission include carrying out investigations at the request of the Minister; and advising the Minister on sundry matters relating to the operation of the Act.

The day to day operations of the Commission are carried out by an Executive Director, who is supported by a professional staff, comprising

among other professionals, lawyers and economists. The Executive Director is an *ex-officio* member of the Commission.

It must be noted that the Act fails to establish any clear demarcations between the role of the Commissioners and the role of the staff, especially in view of the Executive Director's status; and this has resulted in what the Jamaican Court of Appeal has referred to as the merger of the judicial function of the Commission into its investigative function. The Court observed further, that there was no proper provision for the delegation of the investigative functions of the Commission to the staff or other agencies to be administered independently of the Commission. In those circumstances, the Court found, a determination by the Commission would likely lead to a breach of the rules of natural justice.[1] The Act is currently being amended to correct this inherent flaw. For starters, the Executive Director will be removed as an *ex officio* member of the Commission.

As a general safeguard against the Government itself undermining the benefits of competition Section 54 of the Act declares that "subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown." The Minister is allowed under Section 3(h) however, to exempt from the operation of the Act by order subject to affirmative resolution any business or activity not otherwise exempted. The Minister has exercised this power in a couple of instances, notably in respect of the light and power company. Generally, the utility companies are regulated under various statutes, which are administered by the Office of Utilities Regulation (OUR). In respect of the telecommunications sector, however, consultation between the OUR and the Commission is made compulsory under the Telecommunications Act, 2002. The sector has been opened up to competition and in March of this year it will be fully liberalized.

CONCLUSION

Despite the fact that the Commission is fully funded by the Government; and the Commissioners are appointed by the relevant Minister and therefore the potential for political interference in the operations of the agency is real, this has not been evident. Perhaps due less to the scheme of the Law and the design of the agency than to the personal integrity of the various players in the process, the Commission enjoys a significant degree of independence from political influence. Having said that, I recognize that there can be no gainsaying the value of financial independence; and that the Fair Trading Commission does not have.

[1] The Jamaica Stock Exchange v. The Fair Trading Commission
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