"Striking the Right Balance: Promoting Innovation in a Competitive Environment"

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INTRODUCTION

Every sovereign nation must contemplate, design and implement the means by which its economy is organised. Some of the fundamental economics questions that should be addressed are what goods to produce, how (i.e., the technology by which) these goods are to be produced and the basis on which these goods are to be distributed to the final consumers. The Competition Policy of the nation reflects the philosophical mindset of the nation with regard to the organisation of its economy. A market based policy reflects the view that fundamental economic questions should be answered in a decentralised manner; primarily by suppliers

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and consumers of the goods with minimal influence from the government. Contrastingly, a non-market based policy reflects the belief that the fundamental economic questions should be answered by a central authority with minimal input from suppliers and consumers, should answer these fundamental economic questions. A nation's welfare is inextricably linked to the efficacy of its Competition Policy. It is this that will determine the extent to which the economy will produce the goods in sufficient quantities and varieties to satisfy the needs of the public.

Competition Policy is implemented using various statutes and regulations. Three vital components of the policy are (i) international trade policy- which reflects the nation's attitude toward goods which are traded across national borders; (ii) competition law- which reflects that nation's general attitude toward markets for goods which are traded within its borders; and (iii) sector regulations- which reflect the nation's attitude toward specific industries in the economy. Although each component is implemented under a common umbrella of competition policy, each has distinct objectives or purposes. International trade policies are invariably implemented to protect or shield locally-based firms from competition from foreign based firms. Sector regulations tend to protect firms currently operating within an industry from competing with each other, or from competing with firms

desirous of entering that regulated industry. Competition law tends to protect the process of competition in the market. Since each component is implemented with distinct objectives, it is inevitable that conflicts arise from time to time. Experience in a number of jurisdictions, possibly our own, has shown, that in protecting locally-based firms from foreign competition, competition in the local market for the respective good is likely to be comprehensively destroyed. This highlights the fact that a nation's international trade policy and competition law could be in conflict.

BALANCING COMPETITION AND INNOVATION

It is a truism to say that innovation in the science and technology sector is a key driving force of economic growth and therefore an important factor in generating sustainable economic development. The varying degrees of success, in terms of rates of economic growth, experienced by nations pursuing competition policies suggest that not all competition policies are designed and/or implemented with equal effectiveness. One important factor that may be contributing to the differential economic growth rates across the various nations engaged in implementing competition policies is the level of harmonization across the various statutes and regulations used to support competition policy. That is, the extent to

which competition policy makes provisions for resolving conflicts related to its various components will influence the success with which it can be implemented.

Features of Competition law

A nation's competition law may be defined as "legislation, judicial decisions, and regulations specifically aimed at avoiding the concentration and abuse of market power on the part of private firms, which could use that power to exclude potential competitors."[1] The three main pillars of competition law are prohibitions against (i) conspiracy, (ii) abuse of a dominant position and (iii) mergers.

(i) Conspiracy:- refers to agreements among rival firms to limit the intensity of competition amongst themselves;

(ii) Abuse of a dominant position:- refers to various unilateral actions taken by a firm which enjoys a position of superior economic power in a market, and which have the effect of increasing its extent of market power and lessening competition substantially; and

(iii) Mergers:- refers to arrangements in which at least two hitherto separate legal enterprises become a single entity.

[1] Lahouel, M. and K. Maskus (1999), "Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement", presented at *The WTO/ World Bank Conference on Developing Countries' in a Millennium* Round, Geneva.

Jamaica's competition law, the Fair Competition Act (FCA), was adopted 1993 and fits into this general definition with the major difference being that mergers cannot be scrutinised under the FCA.

Features of Intellectual Property Rights[2]

Intellectual property (IP) includes copyrights, patents, registered designs and trademarks. A registered owner of an IP is granted exclusive rights to use it for commercial gain. In Jamaica the rights associated with the various types of IP are set out under various statutes that are administered by the Jamaica Intellectual Property Office (JIPO). As owner of such rights, such a person may enter into licensing agreements which allow other persons to utilise the IP for commercial purposes subject to the terms of the relevant agreement. IP licensing agreements usually address at least one of the following matters (i) Territorial exclusively; (ii) royalties; (iii) duration; (iv) field of restriction; (v) best endeavours and non-competition (vi) no-challenge consideration (vii) improvements; standards; and (ix) price, terms and conditions

(i) Territorial exclusivity:- gives the licensee the exclusive licence to operate within a predefined region;

[2] This section draws heavily from Whish, Richard (2001), Competition Law (4th Edition), The Bath Press, Great Britain.

(ii) Royalties:- speak to specified amounts to be paid by the licensee to the IP owner for the right to use the IP.

(iii) Duration:- the specified length of time for which the licensee is authorised to use IP.

(iv) Field of use restriction:- The relevant clause limits the way in which the licensee can use the IP property.

(v) Best endeavours and non-competition:- Best endeavour clauses encourage a more intensive use of the IP e.g. by requiring minimum quantities of production. Non-competition clauses prohibit the licensee from competing with the patented technology.

(vi) No-challenge:- This prevents the licensee from challenging the legitimacy of the IP.

(vii) Improvements:- The relevant clause would require the licensee to grant back a licence for any IP acquired through the use of the licensed IP.

(viii) Standards:- Through these clauses, IP owners impose standards for the final product relating to quality, promoting, etc.

(ix) Prices, terms and conditions:- The IP owner would set the price and conditions under which the licensee should sell the goods.

IP rights can have the effect, therefore, of restricting competition in the market especially if the IP rights holder is given exclusive access to an input that is essential to the production or distribution of the good.

On the face of it, IP rights operate in clear conflict with the spirit of competition law that generally proscribes unnecessary restrictions on commercial activities. The FCA, like many laws, contains certain exemptions, which circumscribe its scope in particular ways. One such exemption and one which is singularly relevant to this discussion is Section 3 (c), which provides that the Act shall not apply to "the entering into of an agreement in so far as it contains a provision relating to the use, licence or assessment of rights under or existing by virtue of any copyright, patent or trade mark." Further Section 20 (2) (b) provides a complete defence to a dominant enterprise where it is shown that its anti-competitive conduct occurred exclusively for the reason that it "enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark."

The Jamaican Parliament addressed this inherent conflict between the exclusionary nature of IP rights and the spirit of non-exclusivity of competition law by exempting from the reach of competition law, all activities connected to the exercise of IP rights. It is to be noted, that this specific treatment of intellectual

property under the FCA is not unlike that given under the Swiss Federal Act on Cartels and other Restraints of Competition. This approach at resolving the conflict is consistent with actions taken by policy makers who subscribe to a school of thought within the discipline of *Industrial Organisation* (IO) which holds that a greater level of innovation is stimulated in more concentrated market structures which are largely devoid of the forces of competition. Implicit in this approach is the notion that a competitive environment is inimical to the promotion of science and technology. The debate is, however, far from settled.

Promoting Science & Technology (S&T) under the FCA

The evidence that Jamaica's competition law is designed to support economic development through innovation is palpable. Although Section 17 prohibits "agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market," sub-section (4) allows firms, to give effect to such an agreement if the Commission is satisfied that it

"(a) contributes to-

(i) the improvement of production or distribution of goods and services or

(ii) the promotion of technical or economic progress

while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objective mention in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned."[3]

A competing school of thought in IO, and certainly, one to which the Staff of the Commission subscribes, is that a greater level of innovation is stimulated in less concentrated market structures which benefit from competitive impulses. The United States' competition agency also subscribes to this view. Further, Article 40 (2) of the World Trade Organization (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to which Jamaica is a signatory, states that nothing in that Agreement shall prevent members from specifying in their legislation such licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market."[4] It allows a Member to adopt, consistent with other provisions of the TRIPS, appropriate measures to prevent or control such

[3] The Staff of the Commission interprets "the promotion of technical or economic progress…" to include the promotion of science and technology.

[4] A copy of the Agreement can be viewed at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm/ Last accessed September 26, 2006.

anticompetitive practices. The onus is therefore on sovereign nations to determine how to harmonize IP rights law and competition law.

Indeed, there is precedence for this harmony within CARICOM. Section 16(4) of the Barbados competition legislation states that "An enterprise should not be treated as abusing a dominant position…(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered, design or trademark *except where the Commission is satisfied that the exercise of those rights (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology.*[emphasis added]" and it is these words "…except where the Commission is satisfied that the exercise of those rights (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology..." that make the difference. By contrast, the Jamaican equivalent to the Barbadian abuse of dominance provision, section 20(2)(b) of the Jamaican FCA does not give the Commission the authority to consider whether the exercise of IP rights will have "the effect of lessening competition substantially" in the relevant market.

Proposed Amendment to the FCA

Currently the Jamaican FCA is undergoing extensive review.[5] One of the proposals submitted by the Commission recommends that activities of IP rights holders be treated under the Jamaica FCA as under the Barbados competition legislation. With the economic integration under the CARICOM Single Market and Economy (CSME) scheduled for January 2008, the existing dichotomy could pose problems for Jamaica in the long term. A blanket exemption for IP rights favors the single owner of the IP over the multi firms that may be willing to make use of the IP to generate additional, value-added commercial activities. Under a single economy, regional competition will drive firms to shift the factors of production to territories in which they are allowed greater access to innovate technologies; this is especially so when the IP is essential to the production or distribution of goods and services. If stringent protection of IP rights in Jamaica is allowed to restrict access to, and thereby compromise the competitiveness of local markets, it is likely that there will be flight of capital to territories whose laws are more amenable to promoting a competitive environment.

[5] The FCA was reviewed by the United Nation Conference on Trade and Development (UNCTAD) in November 2005. A copy of the document highlighting deficiencies in the Fair Competition Act can be downloaded at http://www.unctad.org/en/docs/ditcclp20055_en.pdf. Last accessed on September 26, 2006.

CONCLUSION

The stimulation of innovation in Science and Technology is unquestionably a necessary component of any competition policy geared toward generating a level of goods and services that would be sufficient to sustain economic growth. Competition law is no less important, as a competitive environment ensures that society extract the maximum benefits from the use of its productive resources and technologies. Brian McHenry, Solicitor to the Office of Fair Trading, the UK's competition authority, puts it thus: "Competitive markets benefit consumers and make the economy work better. They help promote innovation and root out inefficiencies."[6] As we move closer to regional economic integration, we must ensure that competition policy provide a readily available mechanism for addressing conflicts that arise in implementing the various pieces of legislation within the framework of Competition policy.

[6]McHenry, Brian, "Legal Focus," *Fair Trading*, Issue 38, July 2004, p. 9.