THE FAIR COMPETITION ACT – A POST-DOHA EXAMINATION

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Introduction

With the post DOHA movement of discussions regarding competition policy and law from the purely domestic and regional arenas to the international stage, via the World Trade Organization (WTO) developing countries are now being forced to address a number of issues, which would hitherto not have required our attention. First among these issues is that of whether or not to adopt a competition policy. The popular view is that privatization and liberalization of an economy create a need for competition policy and law. There is evidence however, that competition laws have varied from country to country, depending on each country's particular political and socio-cultural background and economic needs. The issue that countries like Jamaica, which have already established competition law, have to address is the extent to which domestic policies and laws are or ought to be in harmony with the principles which govern the various multi-lateral arrangements to which they may be party. I note here that despite the diverse levels of development and the language differences of the states now engaged in the Free Trade Area of the Americas (FTAA) negotiations, discussions regarding the chapter on competition policy seem to be making reasonable progress. This is a good sign. By all indications, developing countries will ultimately not be able to escape involvement in discussions and negotiations on competition policy and law at the WTO level; and this could prove to be a major challenge, given the disparate histories and levels of economic strength that exist among countries at that level. This paper will focus on the Jamaican experience vis-ă-vis two of the core principles enunciated by the Doha Declaration, viz transparency and procedural fairness. It is not that non-discrimination does not apply to competition enforcement; as a principle it is far more relevant in a discussion on trade policy.

The core principles recognized in the Doha Declaration are considered as under-pinning all agreements within the WTO framework. Thus they are expected to be applied to all issues, including those arising under competition policy and law. It is within that context that all member states of the WTO, developed and developing, need to examine their own domestic competition policy and law.

Even while it is clear that these principles are indispensable to the proper enforcement of any agreement, it is recognised at most, if not all levels, that given the economic diversity of the WTO membership, these principles will have to be applied with flexibility. The Director-General of the Caribbean Regional Negotiating Machinery noted in his presentation at the April 4, 2002 meeting on the WTO work programme on Small Economies that the WTO Work Programme should be a vehicle for obtaining formal recognition of the special needs of small economies, identified to be, *inter-alia*,

1. Lower levels of obligation
2. Asymetically phased commitment to obligations
3. Exceptions
4. Flexibility in applying the various disciplines

5. Technical assistance and training

The extent to which these matters will find favour with the WTO, will depend of course, on how credible a case is made out in each instance.

Flexibility in competition Policy and Law – Jamaica

Unlike most other member states of the Caribbean Community (CARICOM) Jamaica has a competition policy, within which competition law was established in 1993. An examination of that law, the Fair Competition Act (FCA) 1993 will reveal a number of features which indicate that the law was crafted to suit the politcal and economic realities as they were perceived by the stakeholders. It was not by accident that merger control provisions were omitted from the Act, for example.

Whereas, the global market place promises no protection for small markets such markets must seek to protect themselves; and in recognition of the fact that small enterprises are unlikely to be able to compete effectively in the global market place, the Jamaican policy makers thought it appropriate not to impose any restrictions on companies that wished to merge. The presumption of course, is that such mergers as might emerge would result in increased efficiency, which would translate into a higher level of competitiveness at the global level. The question must be however, has that particular exercise of flexibility produced the results contemplated? No studies have been done to determine the answer to that question. Conversely, one must ask as well, what level of harm might have been done to the market in the absence of merger control. Again, there has been no research which would assist. What is clear however, is that absent specific provisions under specific agreements, bi-lateral or multi-lateral, Jamaica's ability to co-operate regarding mergers is severely hampered by the ommission merger control provisions from the FCA. Consonant with an asymetrically-phased commitment to obligations, this aspect of the FCA could very well be considered "ripe" for review.

One of the stated objectives of the FCA *is "to promote consumer welfare and to protect consumer interest".* Thus, the Act contains prohibitions against conduct such as *false and misleading advertising; double-ticketing; Sale at a bargain price, commonly referred to as "bait and switch"; and sale above the advertised price.* With the imminent promulgation of a **Consumer Protection Act**, the efficacy of retaining these provisions in the FCA might well fall to be reviewed, even though there is an abiding view that since the consumer is the ultimate beneficiary of competition policy, the relevant provisions ought to be retained in the FCA.

In the pre-liberalized era of the 1940's and 1950's a number of entities, referred to as commodity boards, were established to control run-away price increases and to regulate distribution of scarce commodities in a significant part of Jamaica's agricultural sector. By way of example, there is a sugar control authority, which is responsible for the development of the sugar industry and the regulation of sugar production. Despite its existence however, sugar continues to be a dying industry in Jamaica. Arguably, these boards are an anachronism in a liberalized market economy but the FTC has neither the financial nor human resource to conduct a cost-benefit analysis of their existence, so as to be in a position to advocate their disbandment, as being anti-competitive in nature. In the meantime, they continue to exist, albeit inactively, in some cases; and similar bodies may be authorized under section 29 of the FCA. The section vests the Fair Trading Commission (FTC) with the Power to grant authorization for

persons to enter into agreements or to engage in practices prohibited by the FCA, where such agreements or practices are "likely to promote the public benefit." It is my opinion that this ability to consider the public benefit must be closely guarded; and developing countries need to maintain competition policies which are reflective of their peculiar circumstances.

THE FCA AND THE WTO CORE PRINCIPLES

TRANSPARENCY

Section 2 (a) of the FCA requires, in relevant part, that the Commission make available-

> *"(i) to persons engaged in business, general information with respect to their rights and obligations under this Act;*
>
> (ii) *for the guidance of consumers, general information with respect to the rights and obligations of persons under this Act, affecting the interests of consumers"*

Section (5) (2) (b) requires that the Commission

> *"undertake studies and publish reports and information regarding matters affecting the interests of Consumers*."

Section(5) (2) (c) enjoins the Commission "to *co-operate with and assist any association or body of pers ons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act."*

The sum effect of these provisions is that all target groups of the competition policy are entitled to be provided with relevant information.

In further support of the principle of transparency, Section 8 stipulates that "Hearings of the Commission shall take place in public…." This is balanced however, by wording that allows the Commission whenever the circumstances so warrant, to conduct a hearing in private.

Section (52) of the FCA allows for the making of regulations… for giving effect to the provisions of the Act. Such regulations may prescribe *inter alia,* the procedure to be followed in respect of applications and notices to, and proceedings of the Commission. Whereas Regulations have been established, setting out certain details regarding the procedure for cases in which a settlement can be reached, there are no regulations in place to guide the administrative procedure for conducting an investigation or for the conduct of a hearing by the Commissioners. In 2002, the Commission submitted instructions for establishing regulations containing such guidelines. Regulations are also being drafted to address the issue of "reasonable quantities" as set out in Section 40 of the Act, which states, in relevant part:

> *"A person shall not advertise at a bargain price, goods or services which he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement"*

Currently, all statutory instruments on competition, together with all findings and decisions of the FTC are available on the Commission's website. Even as I make reference to the various provisions which the FCA contains, in support of transparency, note must be taken of Section 53, which allows the commission to *"…prohibit the publication or communication of any information furnished or obtained, documents produced, obtained or tendered, or evidence given to the Commission in connection with [its] operations"* Accordingly, in all cases investigated, sensitive information obtained from enterprises is redacted before publication.

Subsection (2) of the said section 53 makes it a criminal offence to publish or communicate any such information, documents or evidence the publication of which is prohibited by the Commission. The discussion on transparency would not be complete without the observation that under the **Access to Information Act** (AI Act), which comes into force in August of this year, all Government agencies will be obliged to provide information in appropriate circumstances. It is anticipated that upon the enactment of this Act much time will be spent balancing the requirements thereunder with the FTC's obligation not to disclose confidential and sensitive information.

Like most, if not all other competition statutes the FCA contains exemptions. Among the categories of activities to which the Act will not apply is a category referred to in the relevant Section as *"such other business or activity declared by the Minister by order subject to affirmative resolution"*. The Minister here is the Minister under whose portfolio the FTC falls – currently the Minister of Commerce, Science & Technology. In the face of arguments pointing to the potential for such a provision to undermine transparency, one could repose some confidence in the fact that the Minister's decision must be supported by an affirmative resolution in Parliament. Where the ruling party has a disproportionately large majority in Parliament, however, that confidence could be shaken.

THE FCA AND PROCEDURAL FAIRNESS

Until the Court of Appeal rendered its judgement in The Jamaica Stock Exchange v The Fair Trading Commission (Supreme Court Civil appeal no 92/97) there was no reason to doubt the essential efficacy of the FCA, as an instrument of justice and fair play. The finding by the Court that the Act *"provides no power of delegation by the Commission"* of its investigative powers; and that "Sections 5 and 7 clearly disclose a merger of the investigative and adjudicating functions, which is likely to lead to a breach of natural justice" has not only done severe damage to any claim which the FTC would wish to make regarding procedural fairness, but has also eroded its ability to function in a meaningful way.

The court criticized too, Section 7(2) of the Act, which states *inter alia* :

"The Commission may hear orally any person who, in its opinion, will be affected by an investigation.. and shall so hear the person if the person has made a written request for a hearing…" and found that it would result in the Commission conducting its investigaton "*purely on written documents and without hearing from persons who may be affected."*

Another provision which came in for judicial notice in the Jamaica Stock Exchange case is Section 10, which contains powers of entry and search. Even though the section stipulates among other things:-

- that it is only an "authorized officer" who may carry out the relevant activities

- the specific purposes for which the power may be used
- that a warrant has to be obtained
- that the Justice of the Peace (Notary) issuing the warrant must be satisfied that there is reasonable ground for its issuance
- the length of time for which documents and records removed may be retained

the Court made the observation that in the absence of appropriate Regulations those powers, which are powers of investigation, still rest in the Commission, bringing into further focus the issue of the dual role of the Commission. Legislative amendments are being pursued to address all these fundamental problems.

Even as the deficiencies of the FCA have to be admitted and addressed, it would be remiss of anyone who is interested in an objective analysis, not to make the point that the Act does provide for *"Any person who is aggrieved by a finding of the Commission…[to] appeal to a Judge in Chambers"*. The Judge may –

"a. confirm, modify or reverse the findings of the Commission or any part thereof

b. direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates."

The relevant section goes on to say that the judge shall, *inter alia* "…give the Commission such directions as he thinks just concerning the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration". Judge means a Judge of the Supreme Court. Thus, the proceedings of the Commission may be judicially tested for procedual fairness in its enforcement of the law. As stated in earlier paragraphs Regulations are being drafted to address the Commission's administrative procedures regarding its handling of complaints. It is of significance too that the individual's right to private action is properly preserved in the FCA. Section 48 allows any person who suffers loss caused by the conduct of any other person, in contravention of the Act, to bring a civil action for damages.

CONCLUSION

Transparency and procedural fairness are major principles of just, democratic governance, and together with a number of other elements, form the basis upon which businesses will be constrained to conduct their affairs within the bounds of the law; and all stakeholders will feel confident that their personal and property rights are being recognized and preserved. Where this environment exists at the national level, the capacity of individual countries to fit into a multilateral framework, such as the WTO, is assured. Effective competition enforcement in Jamaica, as anywhere else, goes way beyond having a well crafted law, however. It requires the establishment and maintenance of agencies equipped with the capacity to make the law work. At the policy level, it needs the broadest political support, which should translate into adequate financial support for the relevant agencies. While the benefits of fora such as this cannot be underestimated, much more needs to be done to help enhance the capacity of developing contries to enforce competition law. The strength of any multi-lateral arrangement must ultimately be judged by the strength of its weakest link.