COMPETITION MATTERS

Volume IX, December 2004
Fair Trading Commission

Rule of reason

per se

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FOREWORD

Through the publication of its annual newsletter, the Fair Trading Commission (FTC) highlights its work and explores the myriad competition issues which require attention.

Some conducts although anti-competitive can also have welfare enhancing effects. These conducts are subject to a rule of reason approach. Other conducts are considered to be unlikely to have any welfare enhancing effects and are therefore deemed per se illegal. This edition of **Competition Matters** presents two engaging articles on the issue of per se offences; one with particular focus on tied selling under the Fair Competition Act (FCA).

In recognition of the role that demanding and well informed consumers can play in galvanizing a competitive market, we provide some useful information with which consumers must be armed when they purchase goods and services.

The telecommunications industry has experienced and is still experiencing significant changes with respect to the level of competitiveness, the range of services and the different methods of providing those services. Central to the growth and expansion of that industry is access; and we are pleased to include two very interesting articles which explore the role and nature of access in that fast growing industry.

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Code of conduct for gasoline retailers and marketers

THE Jamaica Gasoline Retailer's Association has for some time now been complaining about the practices of petroleum marketing companies. It is against this background that the Minister of Commerce, Science and Technology issued a Directive to the FTC to carry out research and investigation into the practices within the petroleum industry, with particular focus on gasoline retailing through service stations. The Directive required that the FTC prepare and later implement a Code of Conduct to govern the relationship between marketing companies and retailers. The mandate required that the focus of the Code be the protection of the Jamaican consumers. Given the mandate of the FTC, this was interpreted to mean that the ultimate outcome of the Code is to ensure the lowest possible automotive fuel prices and the widest possible choice of retail outlets for consumers.

Investigation was carried out within the context of the FCA, the objectives of which are to encourage competition in the conduct of trade and business in Jamaica and to ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy. These objectives which are supported by the provisions of the FCA are geared towards ensuring market efficiency, better goods and services and a wide range of product choices at the best possible prices. The focus of the FTC in this matter was therefore to ensure that competition is not being distorted by companies engaging in anticompetitive activities, which ultimately undermine consumer welfare.

Market conduct was investigated to determine whether there was evidence of predatory pricing, price discrimination, price fixing, resale price maintenance and exclusive dealing. While our investigation revealed no evidence of predatory pricing, price fixing or resale price maintenance, it confirmed exclusive dealing to be a main feature of the petroleum industry. This activity can be used to facilitate as well as to reduce competition. Competition may be facilitated through the elimination of free-riding by one supplier on the investment of another; but competition may be undermined when such agreements are used to prevent entry into and expansion of players within a market. Some exclusive contracts were found to be for as long as fifteen years.

To the extent that the differences in the prices charged to retail outlets within the same network are not based on differences in the costs associated with supplying the outlets, there was evidence of price discrimination. We found also that at least one marketing company, in the sale of properties which currently house gasoline retail outlets, is seeking to restrict purchasers from operating such retail outlets on those properties. Apart from restraining trade, this practice will effectively reduce the number of retail outlets.

The provisions included in the Code are those which we believe will stimulate more competition in the industry. Thus we have sought to curtail and/or prevent price discrimination and predatory pricing; to shorten exclusive contracts with respect to retailer-owned property; and to circumscribe the marketing companies' attempts at reducing the number of retail outlets and in effect the level of competition.

The Minister instructed that the focus of the Code be the protection of the consumer. Competition ultimately benefits consumers. We found that in some cases consumers are deprived of information regarding prices of fuels. A significant number of retailers do not display prices on the display boards, and although the prices are on the pumps consumers are prejudiced if they have to wait until they reach to the pump to obtain this material piece of information. They would be required to subject themselves to the inconvenience of having to pull off the road. Such a system does not enure to consumer welfare. The FTC believes that a requirement that prices be prominently displayed will provide consumers with material information in a timely and convenient manner so that they can make informed choices, stimulating price competition within the industry.

Please see the Code on page 41

Airlines must say more in ads

A COMPLAINT to the FTC in late 2002 indicated that after taxes and fees were added to the advertised cost of an airline ticket, the increase in price was by 53%.

The Commission felt that consumers were largely unprepared for such levels of increase over and above the advertised price of a ticket, and were effectively being misled as to the ultimate cost of an airline ticket. Under the FCA, providers of goods and services are prohibited from making representations to the public that are misleading in a material respect. The total amount payable upon purchasing an airline ticket, like any other good or service, is material information; and airlines are therefore obliged, as far as possible, to set out the TOTAL cost of tickets in their advertisements.

Arising out of discussions between the Commission Staff and all airlines operating out of Jamaica, airline advertisements since March 1, 2004, reflect as accurately as possible the TOTAL cost of a ticket. Advertisements now indicate either the range of percentage or dollar figure increase; or the approximate amount of taxes, charges and/or fees which will be added to the advertised price of an airline ticket.

Misrepresentation – Is proof of intent necessary?

THE INFORMANTS complained to the FTC that they purchased townhouses from SHB Holdings Ltd. and Forest Hills Joint Venture Ltd. (the Respondents) after reading advertisements promising, among other facilities, a swimming pool, tennis court and clubhouse. The facilities promised were not provided. In September 2001 the Staff filed a suit against the Respondents in the Supreme Court charging misleading advertising, in breach of Section 37 of the FCA. In their defence, the Respondents claimed that the advertised features were not provided because they did not have the capital to finish the project as the Informants were in arrears and there was a slump in the economy.

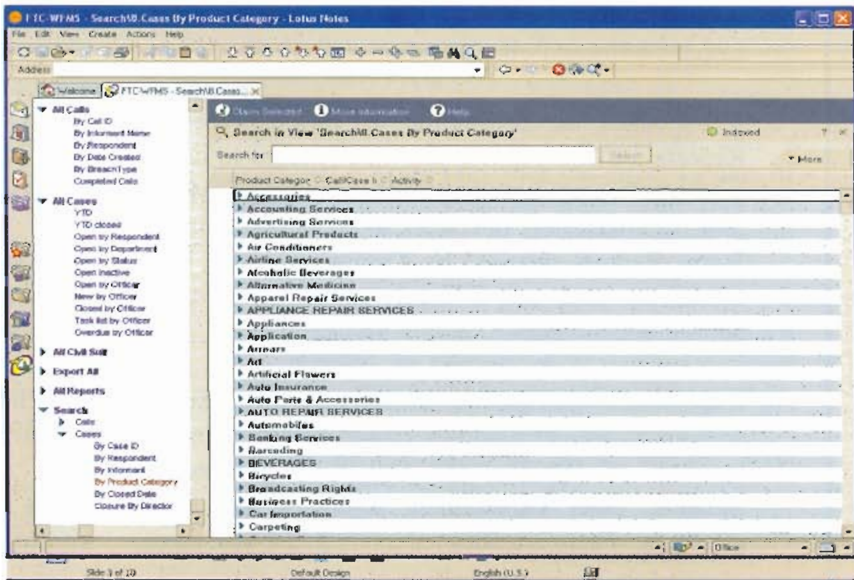
In its Judgement handed down on July 19, 2002, the Supreme Court found that the Respondent had not breached the FCA because at the time of making the representations it had intended to honour them.

The FTC appealed the decision and the majority view expressed by the Court of Appeal, was that Section 37 creates an offence of strict liability. This means that intention was considered to be irrelevant in the construction and/or application of the Section. The Court found that the Respondents had breached the Section and ordered that they pay to the Crown a pecuniary penalty of $2,500,000.00.

This case marks a milestone in the development of competition case law in Jamaica and the Caribbean insofar as it establishes a precedent regarding whether intention should be taken into account when persons or enterprises are charged with the offence of misleading advertising.

CIMS improves FTC's efficiency

A MAJOR PART of the functions of the FTC is to investigate complaints from individuals and companies concerning breaches of the FCA. The FTC handles approximately one thousand cases per year in addition to approximately sixteen hundred (1,600) telephone inquiries that for a variety of reasons do not develop into full investigations.



Up until 2004, the Commission's caseload was managed by a manual process, substantially, supported by an information system originally purchased in 1993. This system did not provide for a maintenance contract and was severely deficient in many major aspects of case management. In addition it had no workflow management capability; very poor reporting facilities and was not designed to allow the full Staff complement to have access at the same time.

In February of 2004, the FTC implemented a new case and workflow management system, called Case Information Management System (CIMS) which was procured with financial assistance from the United States Agency for International Development (USAID) through the New Economy Project (NEP) and sourced through International Business Machines (IBM).

The objectives of the NEP project with respect to CIMS were to establish workflow patterns which will enable the FTC to develop clear business processes for faster and more accurate processing of complaints; and to reduce the time taken to resolve cases/matters relating to anticompetitive practices in trade and business by at least 40%.

CIMS allows for improved workflow processes and the capture and preservation of all information within the Commission's domain. Since its implementation the FTC has achieved the following efficiency objectives:

- A 60% reduction in the time taken to create monthly reports on cases.
- A 60% reduction in the time taken to extract data on a case; and the ability to identify the modifications made since last extraction.
- Through alerts, a 30% reduction in the number of inactive cases that remains open.
- A 50% reduction in the time taken to extract statistical data.

The system also allows the FTC to maintain the integrity of all cases and provide reliable and current information at various stages of the investigative process. Some of the features of CIMS are:

1. It records the number of days of inactivity on each case and sends an Alert to the Assigned Officer and his/her Department Head whenever days of inactivity exceed the norm.

2. Accountability. The History Log of each Case provides in date order, a summary of all tasks which have been performed on each case; and records the name of the task, the date and time at which it was performed and the name of the person who performed that task. This is a fixed record and cannot be amended or manipulated by anyone. Thus, at a quick glance, a User is able to determine what has been done on a Case, when it was done, and by whom.

3. It creates and maintains an electronic copy of each Case, or a mirror image of the Case file docket. This allows for quick and easy access to all information within each Case. It therefore provides another avenue through which information can be dispersed.

4. Information can be transmitted by e-mail internally and externally, again reducing the amount of paper which the Commission uses. CIMS is set up to indicate to Officers, via e-mail, when a Case is their responsibility and when attention is required.

5. It expedites the production of various types of Reports. CIMS reduces the time it takes to create monthly Reports by about 70%. Prior to CIMS, it took approximately one week to create the monthly Status Reports required by Commissioners. With CIMS, the same task is largely automatic and takes approximately ½ day.

6. It facilitates significant reduction in the time taken to prepare Statistical reports required by the Planning Institute of Jamaica, the Statistical Institute of Jamaica, other Government Agencies and news reporters. There is a 50% reduction in the time taken to extract statistical data. Previously, all such information was extracted manually and took an inordinate length of time.

7. It reduces by more than 90%, the time it takes to extract data on any one case and to identify the modifications made since the last extraction. With CIMS, this task takes about a minute to perform. Prior to CIMS, it took at least a ½ hour to perform this task.

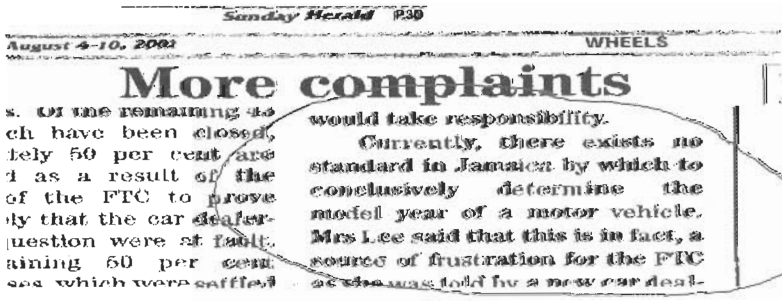
8. It significantly reduces the length of time required for a new Officer to familiarize himself with a Case. A new Officer can quickly and easily determine the status of an investigation and the follow-up activities which should be carried out in order to complete the investigation.

CIMS has truly revolutionized case management and information storage in the FTC.

Agency designated to determine model year of motor vehicles

THE FTC has continued to receive complaints about motor vehicles which are represented to be a particular year model and are later discovered to be another. In fact, since November 2001 the FTC has received more than 70 such complaints. This issue has posed a challenge to the staff because there are no legislated standards in Jamaica for determining the model year of a vehicle being imported into the Country. Despite these limitations, the staff endeavoured to investigate and pursue those cases which contained cogent evidence to prove breaches of the FCA.

The FTC lobbied the relevant Ministries and agencies for the formulation of standards; and on July 1 of this year the Ministry of Science, Commerce and Technology issued the **Amended Motor Vehicle Import Policy**. The Policy addressed several issues, but we were particularly pleased to see that there are now definitive methods of determining model year and a specific Government agency has been designated the official body to make that determination. This should go a far way in assisting the Staff to pursue complaints in this area and establish viable cases for appropriate Court action.



Sunday Herald P30

August 4-10, 2002 WHEELS

More complaints

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would take responsibility.

Currently, there exists no standard in Jamaica by which to conclusively determine the model year of a motor vehicle. Mrs Lee said that this is in fact, a source of frustration for the FTC as she was told by a new car deal-

Fifth Annual Shirley Playfair Lecture

THE FIFTH Lecture in the Shirley Playfair Lecture Series was held on Thursday, November 18, 2004, at the Jamaica Pegasus Hotel.

Guest lecturer, Dr. William Bishop as he delivers his presentation at the lecture.

The guest speaker was Dr. William Bishop, an expert on the economics of Competition Law with over 20 years experience as an advisor to companies all over the world. He lectures in the Economics of Competition at the College of Europe in Bruges; and is Chairman of Lexecon Ltd., an Economics consultancy firm. Dr. Bishop has had Lectureships at the London School of Economics, Oxford University and Universities in Canada, Australia and the United States. He has also made appearances as an expert witness before the Courts of several European countries and the European Commission; the Ways and Means Committee of the US House of Representatives, and the Merger and Monopoly Commission.

The Lecture was well attended by a wide cross section of professionals and Government Officials, members of the business community, as well as students.

Dr. Bishop's presentation was entitled "Antitrust lessons from the Microsoft wars: economics of dominance, regulation and intellectual property". It explored a number of critical questions which competition practitioners must grapple with when dealing with dominant firms, Intellectual Property and essential facilities. These questions are:

1. In what circumstances will one firm be compelled to deal with its rivals?
2. When dealing is compelled, how should the price and terms on which they deal be determined?
3. Should special rules be applied where IP is involved?

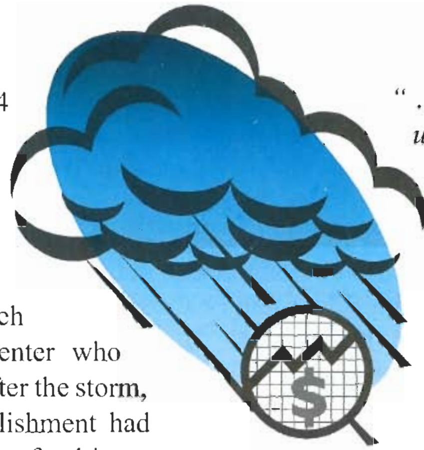
Dr. Bishop(center) speaks with Dr. Peter-John Gordon, Chairman of the FTC and Mrs. Barbara Lee, Executive Director.

What was clear from the presentation is that there are no universal answers to these questions. The treatment will vary depending on the actual situation. One noteworthy circumstance under which dealing is likely to be compelled is when there is a remedy available that could work. This means that a firm may be left to behave anti-competitively if an appropriate workable remedy cannot be found.

The Jamaica Information Service assisted with the promotion of the Lecture.

Minimum resale price maintenance - can we agree?

On September 10, 2004 Hurricane Ivan skirted the southern coast of Jamaica; sparing us, once again, from a direct hit and the level of devastation which would have resulted. The fringe winds, however, have blown-up issues relating to pricing, such as regulatory controls. When the carpenter who removed my ply board makeshift shutters after the storm, expressed his outrage that a certain establishment had substantially raised its prices for a particular food item; and demanded that the FTC take immediate action to address the problem, I gained deeper appreciation of the need for continuing public education, specifically regarding the mandate of the FTC and our role with respect to pricing.



The FTC seeks to encourage competition in the conduct of business so that consumers may enjoy competitive prices and product choices. The FTC does not regulate prices and for the most part enterprises are at liberty to determine the prices of their products. The FTC will become involved, however, when the behaviour related to pricing constitutes anti-competitive conduct, e.g. minimum resale price maintenance.

Section 25(1) of the Fair Competition Act (FCA) states that:

"Any term or condition of an agreement for the sale of goods by a supplier to a dealer is void to the extent that it purports to establish or provide for the establishment of minimum prices to be charged on the resale of goods in Jamaica."

Put simply, this means that any arrangement between a supplier and a reseller whereby the reseller is prevented from advertising, displaying or selling goods below a specified price, is illegal. Note, however, that the FCA does not prevent a supplier from specifying a maximum price for resale. The term 'supplier' includes a person or association (that is, a number of persons) acting on its behalf; and under Section 2 of the FCA agreement includes:

"...any...arrangement, or understanding whether oral or in writing or whether or not it is intended to be legally enforceable".

This means that, even in the absence of formal writing, the existence of an agreement may be inferred if there is evidence of a meeting of the minds, an understanding or intention on the part of two or more persons. In the hypothetical case of Fancy Furniture Incorporated, where a supplier of high quality furniture, forbids Mr. Smallman, a reseller, to discount furniture below prices set by Fancy Furniture Inc., and he agrees, their conduct might be evidence of the sort of 'arrangement' or 'agreement' which we have described.

Minimum prices may be established by direct and indirect means. Direct means would include simply setting a basic price below which prices should not be reduced, setting percentages by which prices should be increased or creating a specific range within which prices must remain. Indirect means would include the use of discounts, as in the above example, or credit terms. So, for instance, it would be illegal for a credit card Company to attempt to prevent businesses from offering lower prices to customers who purchase with cash rather than by credit.

As a corollary to sub-section (1), sub-section (2) makes it illegal to:

(a) include such terms in a contract for the sale of goods;
(b) require such terms to be included in a contract as a condition for supplying goods to a reseller;
(c) notify resellers or publish on or in relation to any goods, a price stated as or understood to be the lowest price that can be charged on the resale of the good.

According to sub-section (3) any such anti-competitive conditions of agreements will be null and void. Note that the anti-competitive provision does not nullify the entire agreement. The rest of the agreement will remain enforceable. The offence of minimum resale price maintenance constitutes a per se breach of the FCA. This means that the conduct is, by itself, sufficient evidence that a breach has occurred and there is no need for an assessment to be conducted to prove a negative impact on competition.

The provision contained in sub-section (4) allows a supplier to recommend prices at which particular goods may be sold. He may not prevent the reseller from charging or advertising below those prices. For example a Company, Pastries and Such Delights Ltd., makes a special type of gourmet potato pudding which it packages and sells to retail food stores. The Company wants to maintain a high price for the product and places a recommended price on each package. One retailer, in order to improve business, advertises a special on these puddings at a price below the recommended price. Pastries and Such Delights Ltd. becomes aware of the special and threatens to stop supplying the retailer unless it complies with the recommended price. If the retailer complies with this demand, then both parties would be practising minimum resale price maintenance. Publishing a list of recommended prices is therefore not illegal, but insisting that persons charge those prices, is.

The main reason why suppliers establish resale prices is that they want to give resellers attractive profit margins or to maintain brand positioning. Minimum resale price maintenance is usually associated with branded goods; these can be identified by the consumer as the products of a particular manufacturer, whose continued sales depend on the customer's good will. Brand positioning refers to that which distinguishes a particular brand in the minds of consumers, relative to its competition. Reducing the price of a certain brand might affect consumers' perception of the value of the brand.

Whatever the motive behind this sort of behaviour, the FCA renders it illegal and members of the public must be vigilant so that breaches of this nature may be brought to the attention of the FTC.

Tying - *per se* or rule of reason?

Introduction

TYING REFERS TO the case where the supplier makes the purchase of one product (the "tying" product) conditional on the purchase of a second product (the "tied" product). Tying can be pure or mixed. Pure tying means that the products cannot be separately purchased at all whereas mixed tying allows for products to be bought separately although on less favourable terms. There are various ways in which tying may be effected:

- Direct tied sales where goods or services are packaged together as one unit;
- Contractual tying where a contract to retail a good or service is made conditional upon the agreement to retail another good or service;
- Discounting whereby the discounts applied to one good or service are made conditional upon the purchase (or sale) of another good or service. This gives incentives to the retailer/customer to sell/buy the related good in order to obtain the discount, which leads to the same 'tied' outcome. Popular cable networks, for example, have been sold in a package at a discount from the single product price. Suppliers use this to encourage cable systems operators to carry multiple networks and achieve cross promotion among networks in the package.

Tying and the Fair Competition Act

Section 33(1) of the Fair Competition Act (FCA) addresses tied selling. The section defines tied selling as follows: -

"tied selling" means –

(a) any practice whereby a supplier of goods or services, as a condition of supplying the goods or services (in this section referred to as the "tied goods" or "tied services", respectively) to a customer, requires the customer to

(i) acquire any other goods or services from the supplier or his nominee; or

(ii) refrain from using or distributing, in conjunction with the tied goods, any other goods that are not of a brand or manufacture designated by the supplier or his nominee; or

(b) any practice whereby a supplier of goods or services induces a customer to meet a condition set out in paragraph (a) by offering to supply the

tied goods or tied services to the customer on more favourable terms or conditions if the customer agrees to meet that condition.

When conducting investigations under Section 33 the Staff of the FTC must show that (a) the purchase of a good was conditioned upon the purchase of another; or (b) the customer was required not to use the good purchased, in conjunction with another good; or (c) the customer was induced to meet the conditions outlined in (a) or (b). If it is shown that an enterprise is engaged in tied selling then Section 33(2) of the FCA empowers the Commission to prohibit that enterprise from so doing.

The problem

As it reads Section 33 makes tying illegal per se, thus putting it in a category which traditionally in antitrust has been reserved for price-fixing and other price-related restrictions. It cannot be disputed that tying arrangements can lead to substantial lessening of competition. Tying arrangements however, have several pro-competitive benefits and often lead to improvement in economic efficiency.

The most fundamental pro-competitive justifications for tying are related to cost. Tying can facilitate a reduction in transaction costs by reducing search and information costs of finding out who to do business with; the bargaining and decision costs of negotiation; and the policing and enforcement costs of agency arrangements. Specifically, tying may produce cost savings with regard to three factors:

- *Economies of scope* – the advantages referred to are cost savings that originate from production or delivery of several products by a single entity rather than separately. Setup costs and supply costs are lowered when there are economies of distribution, including administration and billing. Efficiencies can be gained in areas such as marketing, customer operations, and information technology. It is not uncommon for a multi-product firm to undertake joint marketing efforts. It might, for instance, seek to develop a single brand identity for a variety of products so that expenditures on promotion of the brand might enhance the sales of all the products.
- *Economies of information and transacting* -- this refers to cost advantages for producers when they are searching for trading partners and when several services are sold in one selling effort. Since tying means selling several products together, such economies are achieved when a customer that is already located, i.e. existing customer, is sold many products simultaneously. For firms in the customer relationship business, for example, the up front cost of winning a customer is so great that the challenge is to sell as many products as possible to the same customer, i.e., to tie. Where economies of distribution are present, there may be benefits to selling multiple products to the same customer. It follows that the greater the cost savings from tying, the larger the potential gains to both producer and consumer. Economies of information and transaction refers therefore to selling activities that can be reduced by tying.
- *Economies of time* -- this is a cost concept related to the economies of information and transacting. It refers to long term cost savings in the acquisition of customers. It is more economical to retain existing customers than having to look for new customers. This assumes that the cost of serving an existing customer does not increase proportionally through time. If tying can be used in order to lengthen the relationship with a customer it will reduce the need for resources to be put into acquiring new customers.

The situations mentioned above make it clear that under certain conditions tying is likely to help realize efficiencies and aid in the development of new markets; and that this may offset possible negative effects. Legal hostility to tying of complementary goods can create a bias in the economy toward having the components of "systems goods" provided by different firms, which can result in inefficient incentives for research and development, as the reward for innovation to complementary monopolists is less than the reward to integrated monopolist. A bias toward having separate providers of complementary goods will therefore result in economic inefficiency. It is therefore the Staff's opinion that given the pro-competitive benefits associated with tying, an aggressive enforcement approach as set out under Section 33 can be less than beneficial to consumers.

Treatment of tying in other jurisdictions

The US Supreme Court in 1949 stated that "tying arrangements serve hardly any purpose beyond the suppression of competition" In 1979[2], the European Court of Justice found that:

> *'An undertaking which is in a dominant position in a market and ties purchasers even if it does so at their request by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 [now Article 82] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements - whether the quantity of its purchases be large or small - from the undertaking in a dominant position.'*

The views articulated above led the Courts and competition authorities in the US and the UK to justify a per se prohibition of tying once there has been a finding of market power[3].

Overtime however, the enforcement authorities in both jurisdictions have come to recognize that tying/bundling has several pro-competitive benefits and are now applying what can be called a "structured" rule of reason standard in their analysis of tying arrangements. In his press conference following the EC's ruling on the Microsoft matter in March 2004, the EU's Competition Commissioner, Mario Monti, had this to say: *"I would like to stress that the Commission has not ruled that tying is illegal per se, but rather developed a detailed analysis of the actual impact of Microsoft's behavior, and of the efficiencies that Microsoft alleges. In other words we did what the US Court of Appeals suggested be done: we used the rule of reason although we don't call it like that in Europe".*

The "structured" rule of reason test can be encapsulated in five (5) steps by answering the following questions: -

(i) Are there two distinct products?

(ii) Has the seller required the buyer to purchase the tied product in order to obtain the tying product?

(iii) Does the seller have market power in the market for the tying product?

(iv) Does the tying arrangement affect a substantial amount of commerce in the market for the tied product? and

(v) If yes to all of the above, is the arrangement exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and are consumers allowed a fair share of the resulting benefit?

The move towards a "rule of reason" test for tying arrangements can be justified by what Simon Bishop[4] referred to as the "intuitive" antitrust concern with tying arrangement. This "intuitive" antitrust concern with tying is that a firm that is dominant in one market might be able to "leverage" this dominance into another market, exclude rivals in what would have been a competitive market and thus raise prices above the competitive level in this second market. In other words, the enterprise may be using its market power in the tying good/service market to improve anti-competitively its market power in the tied good/service market. Given that it is dominant in the tying market, it would be able to force an increase in its sales in the other market through offering both goods as a "bundle". Consequently, rivals would be excluded from the tied good market and competition reduced, to the detriment of consumers. Simply put, without market power, tying arrangements will not have a foreclosure effect on the market for the tied product.

Conclusion

Economic literature has been clear on three facts regarding tying:

(i) Tying can lead to substantial lessening of competition, but only if an enterprise has market power in the tying product market.

(ii) Tying often leads to improvement in economic efficiency; and

(iii) Given that tying arrangements can give rise to both anti-competitive and pro-competitive effects, a per se rule is inappropriate for the antitrust assessment of tying.

1. *Standard Oil Co. v. United States, 337 U.S. 293, (1949)*
2. *Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461.*
3. *Note that per se prohibition of tying here differs from the per se prohibition under Section 33 of the FCA. In the US there has to be a finding of market power before the per se prohibition licks in.*
4. *See "Economics of E.C. Competition Law: Concepts, Application and Measurement" pg. 109*

The incredible shrinking per se rule: Is an end in sight?

Diane P. Wood
Circuit Judge, US Court of Appeals for the 7th Circuit

Introduction

MANY YEARS AGO, the Supreme Court confidently stated in *Northern Pacific Railway v. United States* that there are "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[1] Those agreements or practices have been branded *per se* illegal ever since the Court's 1940 decision in *United States v. Socony-Vacuum Oil Co.*,[2] and the idea of *per se* illegality has been around even longer at least since the 1927 decision in *United States v. Trenton Potteries Co.*[3] By the time of *Northern Pacific*, the list of "practices which the courts have . . . deemed to be unlawful in and of themselves" included price-fixing, division of markets, group boycotts, and tying arrangements.[4]

The confidence with which at least some of these practices could be branded as anticompetitive was already beginning to erode in academic circles at the time Justice Hugo Black wrote *Northern Pacific*, in 1958. Nonetheless, the Court did not begin openly to reflect this new thinking in its decisions until two decades later. In 1979, it issued its pivotal decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[5] in which it turned the inquiry inside out. Faced with a practice that the Court itself admitted was literally price-fixing among horizontal competitors (creators of copyrighted music), it wrote that "'price fixing' is a shorthand way of describing certain categories of behavior to which the *per se* rule has been held applicable."[6] In other words, rather than saying that it is enough to identify a practice and then check to see if it falls within the ambit of the *per se* rule, one must identify the essence of what the *per se* rule covers and then ask if the particular arrangement fits the bill. As the BMI opinion put it, "it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label *'per se* price fixing.'"[7] The Court went on to opine, in what now appears to be Pollyanna-like optimism, that this process "will often, but not always, be a simple matter."[8]

This paper examines how the boundaries of the *per se* rule have shifted since the Court gave us the Northern Pacific list of practices that were then thought to be unlawful in and of themselves. The picture that emerges is one of a *per se* rule that is much more sharply focused on practices that current economic thinking is confident in condemning without much ado. The administrative simplicity that the Court once hoped would attend the *per se* approach is largely gone. Complexity is tolerated for several reasons: because of the importance of accuracy, because of a greater appreciation of the costs of inadvertently banning neutral or pro-competitive practices, and because of an institutional sense that judges and lawyers just might not understand exactly what lies behind complex business practices.

Hard-core price-fixing

The area in which the *per se* rule continues to be invoked most often, and continues to have real bite, is that of the hard-core cartel. By the term "hard-core cartel," antitrust lawyers normally mean an agreement between horizontal competitors (*i.e.* producers of substitutes, not complements) to fix prices or to engage in equivalent behaviors, such as allocation of geographic markets, allocation of customers, or bid-rigging. The agreement, moreover, must be one that becomes profitable to the participants only when output falls. If the agreement is necessary to create a new product or service, or if it promises greater efficiencies in production (i.e. cost reductions, and presumably output increases), then the epithet "hard-core" is no longer appropriate and the applicability of the *per se* rule becomes questionable at best.

Hard-core cartels are so obviously anti-competitive, and so plainly forbidden by the Sherman Act, that the Department of Justice often chooses to pursue them under the criminal aspect of the antitrust laws. In a criminal case, of course, the prosecution must prove its case beyond a reasonable doubt. The Supreme Court decreed in *United States v. United States Gypsum Co.* that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element."[9] It rejected specific intent, however, and held that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects" was enough to support a finding of criminal liability.[10] Even this more general intent standard, however, does not fit well with the idea of a *per se* violation. For present purposes, therefore, we will assume that the concept of a *per se* rule is primarily relevant to civil enforcement of the statutes. (The *per se* concept, insofar as it defines what kinds of defenses are cognizable, need not be limited to civil cases. A criminal defendant could not justify naked price-fixing by claiming that it was for the noble purpose of preventing ruinous competition, or to encourage people to make safer products, or as a way of achieving reasonable prices.)

Many criminal prosecutions, however, are followed by civil cases against the same hard-core cartels. In those cases, the *per se* rule still applies with full force. Indeed, if the criminal case ended with a verdict of guilty, the plaintiff will litigate with the benefit of a *prima facie* case of liability. The *per se* rule is still important, therefore, in private litigation challenging a hard-core price-fixing cartel, such as the one condemned in the *Vitamins* litigation, or the fax paper cartel, or the lysine/citric acid cartel. Much the same can be said of bid-rigging cases, which really just present a variation on the methods used to fix a price.

The Court continues to apply a strict rule in these cases, despite the efforts of parties to push them over to a rule-of-reason model. Thus, in *National Society of Professional Engineers v. United States*,[11] the Court rejected the professional engineers' effort to squelch price competition through "ethical" rules on bidding practices, even though the rules were justified as a way of deterring unscrupulous firms from cutting corners and designing unsafe structures. Similarly, in *FTC v. Superior Court Trial Lawyers Association*,[12] the Court refused to allow lawyers to band together to fix prices for the representation of indigent defendants, merely because more lawyers would be willing to serve this important function in the judicial system if the hourly rate were higher. And in *Arizona v. Maricopa County Medical Society*,[13] the Court applied the *per se* rule to a horizontal maximum price-fixing agreement among doctors who were not affiliated in partnerships, clinics, or otherwise, despite the need serious then as now to contain medical costs.

The greatest problem in applying the modern *per se* rule against horizontal price-fixing, however, is "knowing it when you see it." At one time, it seemed that the only thing a lawyer had to know about an arrangement was whether the participants were competing in the same line(s) of business, and whether they had agreed on some kind of price-fixing formula. In other words, to know the type of practice was to know whether or not a per se rule applied. That relative simplicity went out the window in 1979 with the Supreme Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[14] Although the language in that opinion is familiar to most antitrust lawyers, it is worth repeating here:

> But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a short-hand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. . . . Literalness is overly simplistic and often overbroad. . . . Thus it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing."[15]

In other words, only conduct that *ought* to be condemned out-of-hand should be branded *per se* illegal. But the label should not be applied until one is sure that the particular practice, as the Court put it, is one that "facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive."[16] This spelled the end of the *per se* rule as an administrative short-cut, at least in all but the most obvious cases. It heralded an era where the *per se* rule does not even apply to all price-fixing or market allocation arrangements, much less other practices that were once thought to be off-limits. An assessment of the actual or likely market and efficiency effects of the practice now must precede final characterization.

Vertical price arrangements (RPM)

The lingering exception to the proposition stated above that a practice will not be condemned as per se illegal if there is a possible efficiency, output-enhancing explanation for it is the rule forbidding resale price maintenance, or a manufacturer's act of requiring its wholesalers or retailers to charge a specific price or to maintain a particular price level. This rule originated in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[17] and while its demise has often been predicted and its scope has been restricted to the practice of fixing *minimum* resale prices, it is still the case today that the setting of minimum resale prices is *per se* illegal.

Until 1997, the same was true of ceilings on resale prices. In that year, however, the Supreme Court decided *State Oil v. Khan*,[18] a case brought by a gas station operator against the State Oil Company, which had a policy under which the operator could charge any amount he wanted for his gasoline, but if his prices exceeded State Oil's suggested retail price, he had to rebate the excess to State Oil. The operator sued, claiming that this was a *per se* violation of the Sherman Act, but the Supreme Court (overruling several earlier cases) said that it was not. It explained that its decision to abandon the *per se* rule for maximum resale price fixing was "informed by several of our decisions, as well as a considerable body of scholarship discussing the effects of vertical restraints. . . . [and] by our general view that the primary purpose of the antitrust laws is to protect interbrand competition."[19] In the light of those factors, the Court concluded that one could not say that "vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation."[20]

The same scholarship and the same argument from the purpose of the antitrust laws could easily be used to come to the same conclusion about minimum resale price fixing namely, that it is not so nefarious as to warrant *per se* condemnation, but that it should still be evaluated under the rule of reason. The Court has not taken that step, however, even though it might have done so on at least two occasions: in the 1984 decision in *Monsanto Co. v. Spray-Rite Service Corp.*,[21] and in the 1988 decision in *Business Electronics Corp. v. Sharp Electronics Corp.*[22] In *Sharp*, however, the Court effectively drew a distinction between the scope of the *per se* rule in horizontal price-fixing cases and its scope in vertical cases. An arrangement that merely affects prices, while enough to satisfy the horizontal rule, does not satisfy the vertical rule. As the Court concluded, "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels."[23]

Market allocations

The *per se* rule against horizontal allocations of markets among competitors remains just as strong today as its price-fixing counterpart. Leading cases illustrating this point include *Timken Roller Bearing Co. v. United States,*[24] *United States v. Sealy, Inc.*,[25] and *United States v. Topco Associates, Inc.*,[26] none of which has been overruled by the Supreme Court despite academic speculation from time to time about the demise (especially of the latter two). Indeed, for those who wondered whether the Supreme Court was ready to take a more nuanced approach to horizontal market allocations, at least where intellectual property was involved, the decision in *Palmer v. BRG of Georgia, Inc.*[27] put all doubts to rest. In that case, the two main providers of bar review courses in Georgia (BRG and HBJ) entered into an agreement that gave BRG an exclusive license to market HBJ's materials in Georgia and to use HBJ's trade name there. The agreement also provided that HBJ would not compete with BRG in Georgia, and that BRG would not compete with HBJ outside of Georgia. Without even ordering full argument on the merits, the Supreme Court held (in a *per curiam* opinion) that this was a *per se* illegal arrangement to allocate territories.

Vertical market allocations that is, a manufacturer's decision to use exclusive territories or customer allocations for its dealers have been judged under the rule of reason ever since *Continental T.V., Inc. v. GTE Sylvania Inc.*[28] There was a brief period of about ten years, between the decision in *United States v. Arnold, Schwinn & Co.*[29] and *Sylvania*, when the *per se* rule applied to these kinds of arrangements, but that period is now nothing more than an historical footnote.

Group boycotts

Collective refusals to deal, or group boycotts, stand in an odd position today. On the one hand, a collective decision by competitors not to deal with an outsider is one of the practices mentioned in the *Northern Pacific* list, and the Court has never specifically disavowed that classification. On the other hand, it has drained the per se rule of much of its meaning here, as an examination of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*[30] will show. In that case, competing office supply retailers in the Pacific Northwest region combined to create a purchasing cooperative. Members of the cooperative were entitled to favorable prices and to the use of certain warehousing facilities. When one member, Pacific Stationery, was kicked out of the cooperative for violating a rule that prohibited the practice of selling both to retailers and to wholesalers, it sued, claiming that this was a *per se* illegal group boycott. The Supreme Court rejected its argument, even though it acknowledged that group boycotts were often "listed among the classes of economic activity that merit *per se* invalidation under § 1."[31] That was the beginning, however, not the end of its analysis.

It described earlier cases to which the *per se* rule had been applied as those that "generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle."[32] But that was not all: "[i]n addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive."[33] One is tempted to speculate that no one knew at the time that any such justifications would have been entertained, but that is neither here nor there at this point. The Court went on in *Northwest Stationers* to craft a "*per se*" rule that applies only if the group possesses market power or if it has "exclusive access to an element essential to effective competition."[34] Absent such a showing, the Court instructed the lower courts to apply a rule of reason analysis.

Although the Court did not apply a *per se* rule in *Federal Trade Commission v. Indiana Federation of Dentists,*[35] decided the next Term, it did have some useful additional observations on the scope of the *per se* rule in boycott cases:

> Although this Court has in the past stated that group boycotts are unlawful *per se*, . . . we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the per se rule. As we observed last Term in *[Northwest Stationers]*, the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, . . . and in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *[Broadcast Music]*.[36]

This passage suggests the wisdom of a cautious approach to the *per se* rule in any case dealing with the professions, although *Maricopa* stands as a reminder that the professions cannot expect an entirely free pass.

Tying arrangements

Finally, tying arrangements are another area in which a vigorous *per se* rule once applied and only a weakened version remains. In *Jefferson Parish Hospital District No. 2 v. Hyde,*[37] the Court wrote that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "*per se*."[38] But, just as it is no longer possible to look at an agreement relating to price between competitors and condemn it out-of-hand, without resorting to the *Broadcast Music* characterization process, it is not possible to observe that Product (or Service) A is tied to the purchase of Product (or Service) B and leap to the conclusion that the requirement of buying both together is *per se* illegal. Immediately after writing the sentence quoted above, the *Jefferson Parish* Court acknowledged that "every refusal to sell two products separately cannot be said to restrain competition."[39] The "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."[40] The Court drew a distinction between arrangements designed only to enhance the price of the tying product, which were not necessarily unlawful under the Sherman Act, and practices designed to restrict competition in the tied product market. It concluded that "*[p]er* se condemnation condemnation without inquiry into actual market conditions is only appropriate if the existence of forcing is probable."[41] The latter condition is satisfied when the seller has market power over the tying product. Thus, we come once again to the point where an economic assessment of the arrangement is necessary before we know whether something like a *per se* rule will apply. It is interesting to note that Justice O'Connor, joined by three other Justices, would have overruled the cases holding that tying arrangements are *per se* illegal and would have applied a rule of reason to all tying cases.

The Court has had later opportunities to revisit this issue, notably in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[42] but it has been content to leave matters where *Jefferson Parish* put them. Interestingly, the D.C. Circuit, in its opinion in *United States v. Microsoft Corp.*,[43] specifically declined to apply the *per se* rule to the allegation that Microsoft had tied its web browser to its Windows operating system, despite the court's earlier finding that Microsoft had overwhelming market power over the Windows operating system (the tying product). The court considered this to be one of the emerging business areas that justified the more precise rule of reason approach, given the complexities of the technologies involved. While no one should read anything substantive into the Supreme Court's decision to deny *certiorari* in that case, the case stands as the law in the D.C. Circuit. There, at least, the court has signaled its willingness to take a broad approach to the "new technologies" exception to *per se* liability.

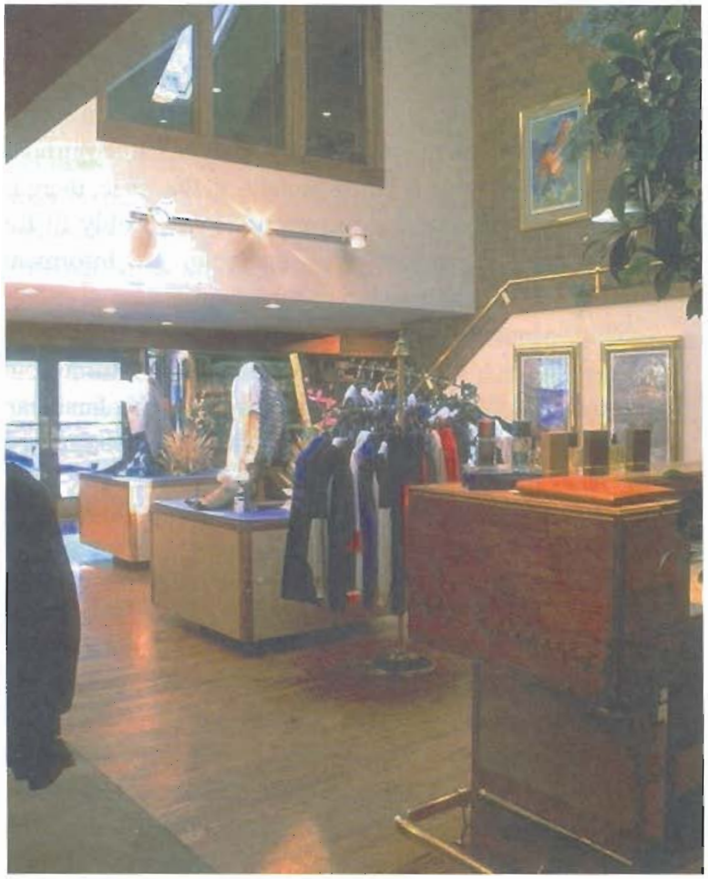
Conclusion

This overview of today's *per se* rule suggests that it still exists, but that its scope has shrunk considerably in some areas (group boycotts, tying arrangements, resale minimum price maintenance) and that it has become more complex to apply even in the hard core areas of horizontal price-fixing and market allocation. This paper has not considered other doctrines that also affect the application of the rule in practice, such as the need to find an agreement between at least two independent players, the increasingly stringent rules used for inferring agreements from circumstantial evidence (which require evidence that tends to exclude the possibility of independent action),[44] the rules for antitrust standing and antitrust injury, and the rules forbidding lawsuits by indirect purchasers. While those rules have a practical effect on the force of the *per se* rule, they do not address it head-on. The shifts described here, in contrast, go to the heart of this traditional part of American antitrust law. One can speculate endlessly about why the change has taken place greater experience with the law, a greater willingness to rely on economists, a reluctance to condemn business arrangements too rashly in a world where international competition is strong, or swings of the political pendulum. Whatever the reason, the *per se* rule in 2004 continues to exist, but it is no longer much of a short-cut for lawyers hoping to avoid expensive pre-trial discovery, and it is no longer particularly easy to apply in any but the most obvious cases. Those cases still arise, however, despite the best efforts of antitrust counsel and government prosecutors. With any luck, you will know them when you see them, and you will shape your litigation strategy accordingly.

"This article was originally delivered at the 2004 Spring Meeting of the American Bar Association's Section of Antitrust Law, on April 1, 2004, and was included in the materials furnished to the Spring Meeting participants."

1. 356 U.S. 1, 5 (1958).
2. 310 U.S. 150 (1940).
3. 273 U.S. 392 (1927).
4. 356 U.S. at 5.
5. 441 U.S. 1 (1979).
6. Id. at 9.
7. Id.
8. Id.
9. 438 U.S. 422, 443 (1978).
10. Id. at 444.
11. 435 U.S. 679 (1978).
12. 493 U.S. 411 (1990).
13. 457 U.S. 332 (1982).
14. 441 U.S. 1 (1979).
15. Id. at 9.
16. Id. at 19-20 (internal quotations omitted).
17. 220 U.S. 373 (1911).
18. 522 U.S. 3 (1997).
19. Id. at 15.
20. Id.
21. 465 U.S. 752 (1984).
22. 485 U.S. 717 (1988).
23. Id. at 735-36.
24. 341 U.S. 593 (1951).
25. 388 U.S. 350 (1967).
26. 405 U.S. 596 (1972).
27. 498 U.S. 46 (1990).
28. 433 U.S. 36 (1977).
29. 388 U.S. 365 (1967).
30. 472 U.S. 284 (1985).
31. Id. at 293.
32. Id. at 294 (internal quotations omitted).
33. Id.
34. Id. at 296.
35. 476 U.S. 447 (1986).
36. Id. at 458-59.
37. 466 U.S. 2 (1984).
38. Id. at 9.
39. Id. at 11.
40. Id. at 12.
41. Id. at 15.
42. 504 U.S. 451 (1992).
43. 253 F.3d 34 (D.C. Cir. 2001). cert. Denied, 534 U.S. 952.
44. See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752. supra; Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Consumer empowerment



THE MANDATE of the FTC is to provide for the maintenance and encouragement of competition with a view to providing consumers with competitive prices and product choices. There is however no substitution for consumer self-empowerment. The consumer is still his own best defense against deceptive practices that do occur in the marketplace. Ultimately, it is left up to the consumer to equip himself with sufficient knowledge in order to identify and protect against the various forms of exploitation.

Below is a brief summary of the common terms and phrases, which if properly understood, can make the difference between being saddled with goods of inferior quality and getting value for money. The information contained in this summary does not constitute any form of legal advice, it is intended to serve as a guide for everyday transactions.

No refund signs

The FCA requires that merchants provide the consumer with material information. Any information which could influence the consumer's purchasing decisions is considered to be material. Thus merchants are required to establish a refund policy, which sets out in clear terms how the issue of refunds will be treated. As such, a no refund policy, without more, is inadequate and therefore illegal. We require that:

1. The refund policy be displayed prominently in business places; and
2. The policy contains important information such as:
   - Length of time within which a claim for refund must be made;
   - Whether refunds will be in cash or by credit notes;
   - What the customer will need to present in order to obtain a refund; and
   - Whether any deductions will be applied and why.

No cash refund signs

This means no cash will be given on return of the item. Refunds may be in the form of a credit note or a cheque. A credit note entitles the customer to select goods representing the value of the refund amount. It is important that consumers seek clarification from the merchant as to what the sign means, before making a deposit.

Casual returns

Many consumers complain that merchants are unwilling to give refunds for goods which are not defective and are returned simply because of a change of mind. Our policy at this time supports the view that where there is no defect, the consumer is not entitled to a refund. It is a matter left to the seller's discretion.

Receipts

At times complaints are received that merchants are not providing receipts for purchases. It cannot be stressed enough that a receipt is in most cases the only tangible proof of payment and can mean the difference between a refund and being stuck with faulty merchandise. Consumers should at all times request a receipt and report delinquent merchants to one or other of the relevant consumer protection agencies.

Proforma invoice/quotes

Invoices and quotes should be examined carefully for phrases such as "prices subject to change" and/or "conditions may apply" and special care should be taken to make sure that the quotation given accords with the information requested. All too often people complain about being quoted one price and being charged a higher price. The FTC's position on the matter has usually been to reserve action unless a deposit had been made as a result of the representation. Consumers are urged therefore, to make sure the quotation is mistake-free before making a deposit.

Warranty

A warranty is an undertaking provided to a purchaser by a seller that if a product is found to be defective he will repair or replace that defective product or any of its parts without charge. At times some conditions may have to be observed before the warranty can be fulfilled. For example, if the merchant makes it a condition of the warranty that no one but himself attempt to repair, the warranty would be voided if there is evidence that the product had in fact been tampered with by some other person.

According to Section 37 of the FCA, the importer of an article is responsible for any representation made in respect of that article when it is offered for sale.

An extended warranty goes beyond the manufacturer's warranty and would normally be in writing. The consumer should retain all information regarding the terms and conditions of this agreement.

A warranty is usually implied where the merchant fails to provide an express warranty on a new product. Almost every purchase is covered by an implied warranty.

The two most common types of implied warranty are "warranty as to merchantability" and "warranty as to fitness for the purpose." Warranty as to merchantability means that the seller promises that the product is of an acceptable quality; an acceptable standard of workmanship.

A "warranty as to fitness for the purpose" means the seller is promising that the product will do what by common usage, it is supposed to do; but there is no implied warranty as to fitness for a particular purpose unless the consumer informs the merchant of the particular purpose for which the article is being bought. In that case, there is an implied warranty that the article is reasonably fit for that particular purpose. For example, an Informant complained that he purchased a particular type of motor vehicle because he was assured by the merchant that it was strong enough to handle the Jamaican terrain. It turned out that the vehicle was not strong enough for the Jamaican terrain and as such, the Staff of the FTC deemed the merchant to be in breach of the implied warranty as to fitness for the particular purpose. Consumers must read the warranty document before they buy.

Discounts

Discounts are a form of price competition and are always welcomed in the marketplace. There have been complaints however, that consumers have been advised that a discount would be applicable to their purchases but were later denied the discount. In these complaints, it was found that the consumers did not satisfy the special conditions which needed to be met in order for the discounts to be applied. In some of these cases, the merchant had not made enough effort to disclose the relevant conditions to the consumers before purchase. It is the view of the FTC that failure by a merchant to provide relevant and sufficient information to the consumer before a transaction is completed amounts to a false and misleading representation under the FCA.

Rebates

Rebates are basically partial or full reimbursements after purchase has been made. Like discounts, they can be seen as a form of price competition; however what the consumer is unaware of is that in order to get the rebate, he has to first pay the full cost of the good. There are a number of schemes in the marketplace which persuade consumers to purchase items because of the attractive rebate percentage offered. Consumers need to know that there is scarcely a rebate policy which does not come married to special terms and conditions, which if not observed, could result in the rebate being denied. It is therefore important to retain a copy of the rebate contract, complete all forms accurately and observe deadlines, otherwise one will forfeit his money. There have been complaints that merchants have denied rebates on the basis that proper payment schedules were not observed although the payments were actually made ahead of schedule. Rebates are sometimes jokingly called "RE BAITS"

Bargain Price

When is a sale a sale? Special attention needs to be paid to terms like "quantities limited"; "confirm availability" or "while stocks last". The FCA makes it an offence for a merchant to advertise a product at a bargain price and at the same time not supply it in *reasonable* quantities. Consumers can protect themselves by first calling ahead to check on the details of the sale and find out whether the same good is offered elsewhere for less. There have been countless complaints about items purchased at "sale" prices and then seen elsewhere for much less. The consumer must always keep in mind that a sale price isn't always the best price and that if he really does not need something then maybe it isn't a deal after all.

Restocking fees/ Cancellation fees

These fees are becoming increasingly popular among used car dealers and hardware merchants. They see restocking fees as a means of retaining some money from a sale, if a refund is provided. Merchants are required to disclose whether these fees apply and the relevant amounts, before accepting payment and consumers are expected to ascertain this information for their own protection. In some cases it is as easy as reading a contract before signing.

Display items

These items are usually for demonstration purposes and may therefore be shop worn. If the consumer insists on buying them, he must be absolutely clear on the terms of purchase. The price might be discounted and usually a special type of warranty may apply to such items and the merchant might not have maximum liability in such cases. *Display items = risky business.*

Sale items

Unless specified by the merchant, sale items are expected to conform to the standard and level of performance expected of a new item. The rights of the consumer are not diminished because he might have benefitted from a deal.

Lay away

This is an easy way to make purchases that might otherwise tax one's budget. It professes to be a means of making life easier but unfortunately, some merchants have managed to make this "easy-pay" consumer friendly tool into another mode of exploiting consumers.

Many complaints have been received about lay away plans. The complaints can be divided into two categories: misunderstandings and scams.

The FCA requires that merchants disclose material information to consumers. Merchants either fail deliberately to disclose such information or are simply not aware of the requirement. In either case, the elements of a proper lay away agreement need to be discussed. Below is a copy of an actual lay away agreement/receipt, which provides the perfect example of an inadequate plan. The Company's name has been changed to preserve confidentiality.

LAY AWAY LIMITED

QTY.	DESCRIPTION	AMOUNT
1	20" Apex T.V. $	9680
	Dep. $4400	
	Bal $5280	

Goods on layaway will be sold if not collected within 90 days of the first payment. No exchange without receipt. All exchanges within 7 days.

NO REFUND TOTAL

Missing are the elements essential to assisting the consumer to make an informed purchasing decision. These include: cancellation and refund policies; storage charges; the location, availability of layaway merchandise.

Cancellation and refund policies must be disclosed in writing in clear direct words. If the merchant offers full or partial cash refunds; if layaways are not completed; if the merchant gives credit toward future purchases, then the policy, whatever it is, must be stated. If full refunds are not entertained then it must be clearly stated just how much, if anything, will be charged for the incomplete layaway transaction. If a storage fee is charged then this too must be communicated to the consumer in writing before accepting his deposit.

A matter for serious consideration is the increasing number of complaints that goods are not available for delivery at the end of the lay away period. At times, customers who buy items on layaway expect that the items will actually be "laid away"separately from the stock which is made available for sale. In a few complaints, it was alleged that the relevant goods were sold to other customers. Some merchants relocate without informing customers, whose goods they have on layaway. Telling customers about plans to relocate or when the goods will become available is therefore an important requirement. Such information could be included on the layaway sales receipt.

As is where is

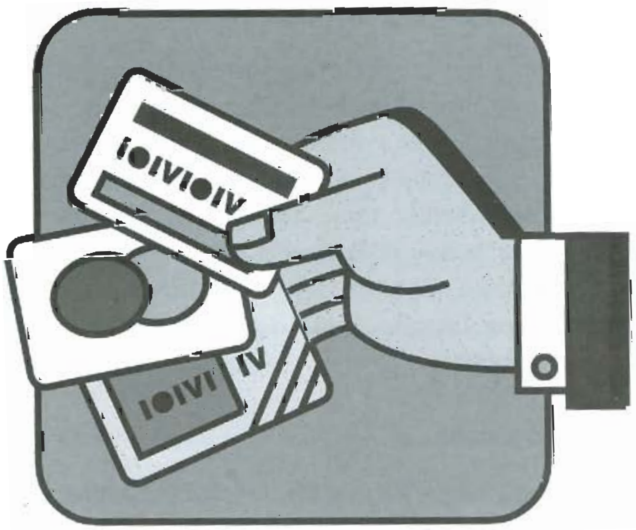
Merchants sometimes use this phrase to contract out of implied warranties. The FTC requires that merchants disclose this term of sale to consumers before accepting their money. There have been many situations in which consumers have signed an "as is" agreement and have thereby signed away their rights to the protection of a warranty, without reading through the terms of the contract. Consumers should act wisely; read before they sign.

As seen on TV

A popular style of advertising is one in which a merchant professes to sell a product which was previously promoted on television by a foreign firm. The importer of such a product, who advertises the product as seen on TV, is deemed to be making all the representations made about the product in the commercial aired in the foreign media.

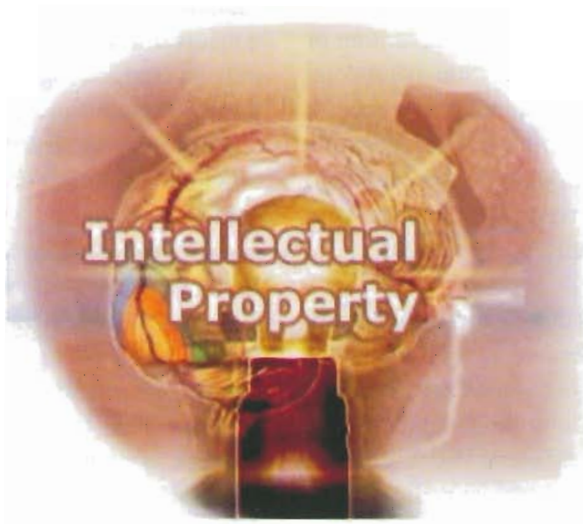
An individual transaction has to be viewed as more than an isolated event. Each transaction represents an economic vote in favor of a particular product or mode of manufacturing. Consumers are important players in the overall functioning of the marketplace because their spending habits ultimately determine which goods are produced and the prices at which those goods are sold. It is important therefore for consumers to empower themselves in order to make their contribution to the economy. The terms and phrases featured above are only a few examples of the kind of information which the consumer needs to assist him in making rational purchasing decisions.

Consumers, the power is yours!



Intellectual property and competition policy

TODAY'S ECONOMY IS increasingly based on knowledge and innovation and driven by rapid advancements in information and communication technologies. New technologies create economic, cultural, social and educational opportunities for people to put ideas to work in innovative ways that increase productivity and create employment and wealth. Adequate protection of intellectual property (IP) plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy. In this context, IP becomes a valuable asset that firms can use strategically to lessen or prevent competition.



IP laws and competition laws are two complementary instruments of government policy that promote an efficient economy. IP laws provide exclusive rights within a designated market, to produce and sell a product, service or technology that results from some form of intellectual creation. These inventions and creations are protected by patents, copyrights, trademarks, trade secrets, or *sui generis* forms of protection. Thus, Intellectual Property Rights (IPRs) designate boundaries, within which competitors may exercise their rights.

Competition regulation aims at curbing attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent tension between competition and IPRs. Structured properly, however, the two systems complement each other in striking an appropriate balance between needs for innovation, technology transfer, and information dissemination.

The agreement for TRIPS envisions a clear link between strengthened protection of IPRs and the need to control anticompetitive uses of IPRs. Under TRIPS, countries must adopt minimum standards of protection for IPRs such as the provision of pharmaceutical product patents, limitations on the issuance of compulsory licenses; designation of a protection system for plant varieties; recognition of copyrights for computer programs; protection of well-known trademarks; security of trade secrets and confidential information from revelation by competitors and governments, and a comprehensive system of enforcement. In response to concerns that such protection would invite unwarranted exploitation of market power, Article 40 of TRIPS provides considerable discretion to WTO member states in specifying licensing practices or conditions that may constitute an abuse of IPRs. The Article goes on to specify three examples of potentially abusive licensing practices; these are (i) exclusive grant-back conditions, i.e. where the licensor of an innovation requires its licensee to grant the rights on product improvements back to the original licensor; (ii) conditions preventing challenges to the validity of an IPR, and (iii) coercive package licensing i.e. to condition the licensing of one patent upon the acceptance of another. This list is not exhaustive however, and read broadly, the Article could cover any potential abuse of IPRs, including, monopoly pricing (where a monopoly deliberately restricts its production in order to make more profit by selling less and charging more); refusals to license; effectuating horizontal cartels through patent pooling (a patent pool is an agreement between two or more patent owners to license one or more of their patents to one another or third parties); and exclusive vertical arrangements. Agencies normally treat a relationship between a licensor and its licensees as vertical when they are in a complementary relationship, for example when the licensor's primary line of business is in research and development, and the licensees are manufacturers. They presume that with the exception of exclusive dealing arrangements that forestall competition, nonprice restrictions will not harm competition.

IPRs and competition laws therefore overlap, in that the scope of exclusive rights granted by the former determines the degree of potential market power. It is therefore important for countries such as Jamaica to define and implement minimum standards for IPRs that are dynamically procompetitive and consistent with TRIPS requirements. For example under TRIPS, patents must apply for a minimum of 20 years; however, countries may exclude inventions from patent eligibility for purposes of maintaining national defense, (e.g. where an invention or discovery is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon), ethical reasons (e.g. inventions which have a negative impact on animal or human health e.g. pharmaceuticals) and environmental protection (inventions which have a negative impact on the environment e.g. chemicals).

Article 30 of TRIPS provides that member states may issue compulsory licenses of patented inventions under certain circumstances. In general, a compulsory licence is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state. Compulsory licenses may be divided into four categories:

(1) "worked in the country" requiring that a patent be exploited within a licensing country in practice;
(2) public interest government policy standards requiring patent licensing for the benefit of all its citizens;
(3) adequacy of supply involuntary patent licensing to increase market supply to satisfy demand;
(4) dependent patents forcible licensing of one patent for the use of a subsequent improvement patent.

Article 31(f) of TRIPS provides that production under such compulsory licensing must be predominantly for the domestic market. This does not help those poorer countries that do not have a manufacturing base since the Article does not appear to allow export to them. The WTO General Council however waived this provision to allow the export and import of pharmaceutical products made under compulsory licenses, provided certain conditions are met. This approach is of great benefit to countries in the Caribbean as few of them have the resources to manufacture pharmaceuticals locally.

In this connection, another problem may arise. For instance, drug companies can, and have an incentive to act like discriminating monopolists, charging higher prices where the consumer surplus is higher, and/or where they can extract more of the consumer surplus. Some European countries have policies that offset these monopolistic powers: given the large role of government in the health care sector, they can effectively exercise their monopsonistic (*i.e. one powerful buyer*) powers. It is thus conceivable that consumers in less developed countries may be charged higher prices for drugs than consumers in far richer countries. (In doing so, it is the consumers in the less developed countries that, in effect, are paying the fixed cost of research; consumers in the more developed countries are partial free riders.) Within the United States, such price discrimination (not *fully* justified by differences in transactions costs) would probably be illegal. But there is no international competition policy which protects the poor country. Well-designed (not "excessively strong") intellectual property regimes can provide some protection. It is not clear the extent to which effective competition policies *within a country* might provide safeguards: presumably a country could apply the trade principle of "non-discrimination" i.e. no firm, enjoying the benefit of intellectual property protection, could charge the consumers of that country a higher price than the price charged for the same good elsewhere in the world. Anti-dumping laws could also address the problem.

As for trade secrets, Article 39 requires laws or judicial mechanisms aimed at preventing unfair acquisition of confidential information, but leaves undefined the acts that are deemed unfair. As there is no universal view of what is "unfair" in this context, this leaves the Article open to subjective determination. It should be mentioned here that Reverse Engineering (RE), the process of taking something (a device, an electrical component, a software program, etc.) apart and analyzing its workings in detail, usually with the intention to construct a new device or program that does the same thing without actually copying anything from the original, is generally considered to be an honest form of competition that promotes dynamic efficiency and learning.

Trade mark protection can be valuable in developing countries like Jamaica, as it provides incentives to develop local crafts, clothing, and foods, among other goods and services. There is little effective market power associated with all but well-known international marks. To the extent that trademark owners impose unreasonable or anti-competitive commercial conditions on licensees, recourse may be had to competition policies. It may be useful therefore for countries like Jamaica, to grant jurisdiction over such rights in their competition laws.

Regarding copyright protection, countries may adopt a fair-use doctrine permitting the unauthorized use of copies for purposes of achieving social objectives. It is acceptable to allow limited copying for educational and research purposes and many countries permit a single "private use" exception. Wholesale copying of computer software must be prohibited, but as stated earlier, TRIPS allows for reverse engineering by honest means. In this context, programs that deliver essentially similar functional performance as original software are legitimate forms of competition.

Under TRIPS therefore, countries have flexibility in defining the conditions for protection of IPRs which should be reflective of procompetitive policies. As a party to TRIPS, Jamaica would benefit from a review of its competition law to assess its strength in protecting against abuses of IPRs.

Jamaica has made great headway in fulfilling its obligations to increase the protection of IPRs under the World Trade Organisation (WTO) Agreement on Trade-related Intellectual Property Rights (TRIPS), to which it is a party. In so doing, it has revised and modernized its IP laws with the introduction of the Trademarks Act, 1999, the Copyright Amendment Act, 1999, the Patents and Designs Act, 2001 and the Protection of Geographical Indications Act, 2001. Conversely, the Fair Competition Act, 1993 of Jamaica (FCA) exempts from its application *"the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trademark"*. Essentially, from a competition perspective, this means that the Jamaican market is exposed to the exploitation of IP by IPR holders. As IPRs become more prominent in the conduct of business in Jamaica, we must consider the value of reforming competition laws to include IPRs, in keeping with the broader vision of TRIPS.

Chat online with FTC

www.jamaicaobserver.com www.jamaicaobserver.com

NEWS

FTC delivers draft code of conduct for petroleum trade

A code of conduct designed to curtail unscrupulous practices within the petroleum industry improve the working relationship betwee

Companies charged for false advertising

NEWS | www.jamaica-gleaner.com

New rules for airline ticket ads

THE FAIR Trading Commission (FTC) has laid down new rules dictating how airline companies operating out of Jamaica should advertise the price of airline tickets.

Acting on complains that airline passengers were being charged up to 53 per

ADDITIONAL CHARGES

Charges which apply to airline tickets

In complying with the new regula "advertisements will indicate either of the percentage or dollar figure

The Fair Trading Commission (FTC) has warned pharmacies that they must inform customers when they charge a prescription fee

FTC wants more funds to handle increase in complaints

Fair Trading Commission rules in bookies' favour

ACTING ON a March 2003 complaint from Track Price Plus Limited regarding the opening restriction on Licensed Bookmakers, the the report of the Staff's finding. The 23-point report pointed had this to say about the restrictive provision:

Section 19 states that the

FTC should reconsider opening hours findings

Richard Ashenheim
Contributor

AS A result of the kindness of Jimmie, I have received a copy of the letter dated 27th January 2004 from Mrs. Barbara Lee, executive director of the Fair Trading Commission to Mr. Xavier Chin, Chief Executive Officer of Track Plus Price Ltd., together

to deal in detail with only two of the grounds in this case. In the case before him, Mr. Justice Orr held firstly that in-order for statutory provisions (in that case the Canons of Professional ethics promulgated under the Legal Profession Act) to contravene the provisions of the Fair Competition Act, it is necessary that there should be a conspiracy or combination or agreement with another person to restrain or

Lotteries Act is a special Act, applying only to betting and gaming transactions. Mr. Justice Orr therefore applied the well known provision of statutory interpretation that a general enactment does not impliedly repeal an Act dealing with a special topic.

Consequently, he held that the Fair Competition Act does not repeal, amend or modify the Legal Profession Act. He therefore concluded that there was no intention that the Fair Competition Act was

would take responsibility.

Currently, there exists no standard in Jamaica by which to conclusively determine the model year of a motor vehicle. Mrs Lee said that this is in fact, a source of frustration for the FTC

Look out for bogus FTC officers

www.jamaicaobserver

FTC reports faulty dashboards on

TECHNOLOGY minister Phillip Paulwell has urged consumers and businesses to utilise the "private right of action" provision under the Fair Competition Act (FCA), to resolve disputes

www.jamaicaobserver.com

FTC asked to probe operations of Drug Serv pharmacies

BY INDI MCLYMONT
Observer staff reporter

THE Fair Trading Commission (FTC)

30-40 per cent lower. It did not say some. The hint there is that we the private pharmacies are overpricing our goods," Mordie told the *Observer*.

Health Corporation of Jamaica, which runs the Drug Serv pharma the advertisement place the claim that the

Misleading ads dominate complaints to FTC

Misleading advertising dominate the complaints against merchants lodged at the Fair Trading Commission (FTC), the consumer watchdog agency has revealed.

"Misleading advertising is pretty wide-scale, consumers have been misled with respect to prices, with respect to features and capabilities of

want a level playing field.

But we are also wary of attempts to create environments that are so protective of the so-called "little guy" that we stifle initiative, entrepreneurism and business expansion.

In other words, we hamper the capacity of companies to create economies of scale, the capacity to grow and to create wealth and jobs.

It is against this backdrop that we note that the Fair Trading Commission (FTC) has delivered the long-argued code of conduct for the petroleum sector to act as a benchmark for the relationship between the petroleum

BUSINESS | www.jamaica-gleaner.com

Fair Trading Commission slams bid-rigging corruption

Procedures at the FTC

THE EDITOR, Sir:

THE STAFF of the Fair Trading Commission (FTC) refers to the letter titled 'FTC: all bark, no bite?' contained in your newspaper dated October 26, 2004. We think that persons who take complaints to the FTC need to be made aware of the following:

- An individual complaint simply provides the Commission with a signal that something might be happening in the market that could be detrimental to competition; and could require our intervention.
- The Commission is an impartial fact-finder; it must consider

"Consumers Say Thanks"

You are to be congratulated. You are the exception.

MAY 19, 2004

FAIR TRADING COMMISSION
52 - 60 GRENADA CRESCENT
KINGSTON 5
JAMAICA W. I.

I HAPPILY TAKE THIS MOMENT TO THANK THE STAFF AT THE COMMISSION, FOR THEIR ASSISTANCE IN RETRIEVING MY DIPLOMA FROM THE COMMUNITY SCHOOL OF COSMETOLOGY.

IT GAVE ME SUCH A SENSE OF PRIDE TO KNOW THAT YOU CARE. I WISH FOR YOU AND YOUR TEAM CONTINUED SUCCESS.

THANKFULLY

I'm quite certain had I not called the FTC I would not have gotten any redress.

It is with sincere gratitude that I write expressing thanks for your prompt assistance. If it had not been for your intervention I would still be experiencing great difficulty in … Thanks again for your kind assistance and may you continue to offer a helping hand to those in need.

"I write to express my gratitude to you and your organization for the assistance given regarding the issue with Key Motors Limited. The dashboard was fitted on April 29, 2004. Please continue your vigilance in serving the consumers of this country."

"Continue to make the consumers' business your business."

"Thank you very much for your speedy response to my complaint. I followed your instructions and the matter was resolved without malice. Continue your hard work in making sure that consumers are dealt with fairly. May God continue to richly bless you all."

"Thanks for your intervention in the matter. Thanks for all the help that you have given me to retrieve my money back. God's blessings and my regards."

"I recently wrote to you to file a complaint about my problems with … and provision of service. I am happy to inform you that the service I have contracted has been provided. I would like to take this opportunity to thank you for assistance in this matter."

Dear Sir/Madam thank you very much for your help.
I am
thankful

"With the intervention of your representative … the works were completed to our satisfaction. We are certain that this situation would not have been ratified in such an efficient and effective manner without the assistance of the Fair Trading Commission; and our family would personally like to commend your organization on the excellent work.

Special aspects of competition policy in small economies

Introduction

WILLIAM KOVACIC, writing in the Chicago-Kent Law Review makes the point that discussions about competition policy in emerging markets, which suggest that the only options are no competition statute or competition policy bureau on the one hand and immediate adoption of competition law with the full array of provisions found in wealthy market economies, ignores a number of intermediate options that might be desirable for a number of countries.[1] The learned writer sees this "all-or-nothing" approach as obscuring important intermediate possibilities.

This comment provides a particularly meaningful backdrop for the issues which this paper will explore. Central to the discussion, of course is a determination as to what the word "small" means in the present context. Various indicators have been advanced, ranging from population size to geographic size to level of the Gross Domestic Product to level of vulnerability to the effects of natural disasters as well as the vagaries of foreign markets. The expression "emerging" has also been used in this context. In the absence of an official definition of small economies, it could be agreed that these are economies, which by virtue of their population size and perhaps therefore, the sizes and economic strength of their firms, have a comparatively low GDP and are rendered vulnerable to the vagaries of foreign markets.

Aspects of small economies

Most small economies are characterized by low levels of economic development. As such, they require easy and predictable access to export markets. Conversely, they want to be able to attract foreign investment to boost their economies, without running the risk of having their markets flooded with foreign imports. This is especially critical, given the fact that those imports might be coming from more efficient markets and disproportionately larger firms. Local producers of goods and services could easily be ousted from the local market. The implications of such a development are obvious: unemployment levels would rise and social dislocation would ensue.

Competition policy must therefore perform the balancing act of expelling inefficient enterprises from the market while at the same time not contributing to the utter demise of local enterprise. Whereas the global market does not find itself catering to the protection of small markets, such markets inevitably must take their own initiatives to try to chart their own course. Someone observed recently that if seven of our local banks should merge, that merged entity would rank no higher than fortieth in the world of banks. That is a very graphic representation of how unbalanced the scales are between small and large developed economies. It is beyond dispute that small enterprises, are to a large extent, inefficient because of their size; and small inefficient firms as they exist in most small economies cannot compete effectively in a global market. It was against this background that the architects of the Jamaican Fair Competition Act, 1993 (FCA) opted for omitting from the Act, anti-monopoly provisions as well as specific provisions for merger control. Section 29 of the FCA also provides for the authorization of a prohibited agreement or practice, where the Commission "is satisfied that the agreement or practice ... is likely to promote the public benefit ..."

Competition policy must also reflect a healthy appreciation for the objectives of trade and investment policy in a small economy. Where local industry cannot support the domestic demand, a fortiori, an export market, competition policy has to make room for liberal trade policies, which will bring development into the local marketplace. It is clear from the 1991 Green Paper on the Proposals for a "Competition Act" that the Jamaican policymakers did not intend for competition policy to deter foreign investment. In support of this position, Section 3(f) the FCA exempts from the reach of competition law, all trading arrangements arising out of treaties to which the Government of Jamaica is a party. One approach to accommodating foreign investment while preserving local industry is for foreign entities to bring in technology into the local economy while labour is supplied by the local market. Ultimately, local enterprise can be developed and this could lead to the growth of technology in the local market providing improved efficiencies. This will have implications not only for the local market itself, but will help to make the local producers competitive elsewhere as well.

In recognition of the value of technology in the development process of Jamaica as a small economy, Section 17 (4) the FCA stipulates that an agreement, whose provisions would be unenforceable as having or likely to have the effect of substantially lessening competition, would be enforceable if *inter alia,* it contributes to the promotion of technical or economic progress. Similarly, under Section 20 (2) of the FCA an enterprise might not be considered to be abusing its position of dominance if it is shown that "its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress ..."

Small economies are usually replete with informal enterprises which operate outside of the formally established regulatory framework. Admittedly, they are a source of employment, with all the attendant benefits, but it is a fact that their existence raises special competition issues. Often their operations are migratory, making it extremely difficult for any competition agency to enforce competition law against them. The goods which they bring into the domestic market are in many cases, sub-standard; and passing off finds fertile soil in the sector. Without being subject to competition law, their wanton disrespect for fair trading practices serves to distort the marketplace and leave consumers without appropriate redress in cases of defective goods.

One of the practices that makes the problem even more difficult to address in Jamaica is that whereby the informal sector sells to the formal sector; which in turn sells to the ultimate consumer. As has happened, when there is a case of false or misleading representation or failure to honour the terms of a warranty; and the competition agency approaches the formally established enterprise as seller of the relevant goods, it points to some nebulous "informal commercial importer" as being the importer of the goods. Section 37(4) of the FCA states, in relevant part, that where the person who caused a representation to be expressed, is outside of Jamaica, "... the representation shall be deemed to be made ... by the person who imported the article ...". While it is acknowledged that competition rules ought to apply to the informal sector, perhaps some form of regulation might be more easily enforceable.

In addition to the several economic factors which define small economies, there is a host of human resource factors which must enter the equation, when we explore the many facets of competition policy in these economies. It is almost trite to observe that it is not enough to establish a competition regime; that without effective enforcement of the relevant competition law, the benefits of competition policy are but an illusion. And it is human beings operating at all levels of the systems, who will make it succeed or fail.

(i) Recruitment of professional and technical staff is a particular challenge. There is as yet no educational institution in the Caribbean Region, which produces graduates trained in Competition Law and Competition Economics. The competition agency in a small economy will therefore have to grapple with the problems of obtaining affordable and relevant training for its personnel. This often means seeking technical assistance from one donor agency or another; and it is no secret that these sources are not as fertile as they used to be. In the absence of well-trained personnel, a competition agency cannot enforce competition law, with any measure of confidence or effectiveness.

The problem is exacerbated by the high turnover experienced by many agencies turnover which is due not only to people's efforts to improve their knowledge base, but also to the fact that financial remuneration in many competition agencies is wholly uncompetitive, given that most are fully government funded. When trained staff leave the agency resources of all kinds go with them; the cycle goes on; and instead of growing, competition agencies in small economies seem to do a constant shuffle unable to undertake weighty matters which could help to cement their place in the market. as a force, truly to be reckoned with.

(ii) At the pinnacle of any effective system of Government is its legal system. It is the legal system which must guarantee that breaches of the various laws are punished and the injured obtain redress. The FCA endorses this principle not only can the Fair Trading Commission apply to the Courts to have its directives enforced; persons who are aggrieved by a finding of the Commission may appeal to the Courts. Further, where a person is injured by the anticompetitive conduct of any other person, where that conduct constitutes a breach of the FCA, the injured person may bring an action for damages before the Court.

It is important, therefore, that the Courts be equipped to adjudicate upon competition matters. The judicial system in most small economies is chronically undermanned and under equipped in long-established areas of the Law.

Resource material is in short supply. It is not surprising therefore, that material in respect of competition law is virtually non-existent. Further, judges are unfamiliar with this new discipline; and very few lawyers are any better informed than judges are. Applying precedents set in foreign jurisdictions, whose laws might be quite different from one's domestic laws can be a non-productive and even dangerous exercise. In this environment the development of jurisprudence in competition law is severely hampered.

Conclusion

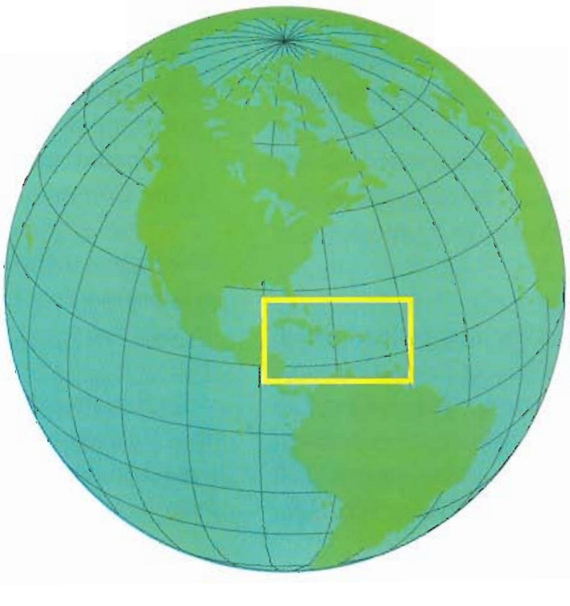
It could be said that the quality and efficacy of a State's Competition regime dictates to a large extent, that State's readiness for and/or compatibility with globalization. Small States, used here advisedly to refer to small economies, are faced with difficulties at every stage of the implementation of a competition regime. Very often policy is established without proper consultation among the players at all levels of the society; and without sufficient understanding by the policy makers themselves, of what they are getting into. This is often followed by the selection/appointment of leadership from a small homogenous network of persons whose only qualification for such appointment might be their status in the society. Personal relationships in small economies can have major implications for the leadership of important institutions. In the Jamaican context, persons are suitable to be appointed as commissioners of the Commission if they are considered to "have attained the highest status in their professions."

In some cases competition agencies are established with funding from donors and with some amount of initial and rudimentary training being provided. At the end of these projects, agencies are left to flounder as they attempt to enforce competition law on meagre government funded budgets.

The effective administration of a competition regime requires, among other things, a policy and law suited to the needs of the particular state; highly trained and properly skilled human resources; advanced telecommunications systems for timely and accurate information gathering; and a reliable and well-equipped judicial system. Unfortunately, small economies seem to score low in all these areas, suggesting that these economies can only be pawns rather than real players in the process of globalization.

It has been said, in reference to transition economies and may well apply to most small economies: - "... there is a significant mismatch between national implementation capabilities and the demands of new competition laws ..."[2] This mismatch has to be addressed if small economies are to realize the benefits of competition.

1. Chicago Kent Law Review Volume 77 Number 1 2001 "Institutional Foundations for Economic Legal Reform in Transitional Economies" Page 298 D
2. Chicago Kent Law Review Volume 77 November 1, 2001 "Institutional Foundations for Economic Legal Reform in transition Economies". Page 314



The role of international agencies in fashioning Jamaica's telecommunications policy

THE ROLE of multilateral agencies in fashioning policy making in telecommunications has been well documented (International Telecommunications Union, 1997). Indeed, since the 1980s multilateral agencies (The World Bank, The International Monetary Fund (IMF), The ITU, and The World Trade Organization (WTO)) have exerted enormous power and influence in the areas of policy formulation and implementation. Greater private sector involvement in the ownership of key infrastructure, the elimination of political interference in the regulatory process, and demonopolization in the provision of services are just some of the key principles underpinning the policy positions of these agencies. Indeed, the philosophical outlook of each of these agencies is quite similar, notwithstanding the fact that they are quite dissimilar in focus and scope. On one hand, The ITU which is a branch of The United Nations acts as the international regulator of standards in the areas of communications equipment, spectrum use, and the compensation regime among international telecommunications carriers. On the other hand, The World Bank and The IMF influence policy, primarily through the loan conditionalities of their various structural adjustment programs. This in turn allows both institutions veto power over domestic policy and by extension allows them to shape the economic and political agendas of sovereign nations. The WTO for its part exerts its influence and power through its body of rules governing the global trading system.

The typical process of reform in the telecommunications sector is usually a two-stage process. The first involves the privatization of state-owned public telephone operators (PTO's). This is followed by policies aimed at opening up the market to multiple operators and providers. On the issue of privatization The World Bank and The IMF have had the biggest impact (Dunn, 1994; Adam et al, 1992). For example between 1984 and 1997 547 telecommunications companies globally have been privatized, amounting to US$357 billion in revenue for various governments. This radical shift to private ownership attests to the success which the multilateral agencies have had in shaping policy agendas during the decade of the 1980s.

The debt crisis of the 1980s and the increased dependency of developing countries on external capital forced many governments in developing countries to sign up to various forms of structural adjustment programs of The World Bank and The IMF. These programs imposed stringent fiscal targets on borrowing nations and demanded roll back in government ownership of key industrial enterprises (telecommunications, transport, water and sewerage, and electricity). In many instances transactions leading to the sale of these state enterprises were hurriedly put together and without due regard to appropriate regulatory frameworks (Dunn, 1994, Adam et .al, 1992). The net effect was that many privately owned telephone companies engaged in self regulation without any government oversight. This allowed them to frustrate entry into key markets, most notably the supply of customer premises equipment.

By far one of the most active players with respect to liberalization in the telecoms - sector is The WTO. The WTO has over 125 countries as signatories and therefore represents the most powerful trade body in the world. Unlike its predecessor (General Agreement on Tariffs and Trade) its tentacles extend to trade in goods as well as services. The power of The WTO to influence and fashion policies, lies in the fact that it can sanction member countries for non compliance. In furtherance of the principle of free and fair competition in telecommunications The WTO and The World Bank, along with other multi laterals are also active in the areas of technical assistance and development support. This is usually to enhance and facilitate the participation of developing countries in the negotiation process, establish regulatory institutions, and build local regulatory capacity.

The Uruguay Round of trade negotiations placed free and open trade in telecommunications under the global trading system. Attached to the Basic Agreement on Trade in Services is a Reference Paper on key regulatory principles to be implemented by member states. By so doing The WTO sought to harmonize telecoms policies globally with the sole purpose of creating a competitive environment. Signatories to The WTO have no choice but to translate these principles into local legislation and policies. As a result many countries, like the United States of America have either completed; or like the European Union, are well underway to completing their liberalization process. At the regional level several

Caribbean nations are seeking to integrate many of The WTO policies and principles into law (GoJ, 1998). Most Caribbean countries have either commenced or completed implementation of the legislative framework for the introduction of competition in telecommunication services. In most instances the legislation makes provision for multiple operators to provide services in both international and domestic service markets.

Even countries that are not signatories to The WTO Agreement are not immune from the influence of the organization. The experience has been that non-signatories to The WTO have adopted policies and principles similar to those of The WTO because they engender regulatory certainty and serve as a pull factor for foreign direct investment (ITU, 1997). Indeed, it has been posited that several nations that joined the negotiations did so because they expected to reap significant gains from competition in telecommunications. Signing the agreement for example would send the correct signals to the investing community and provide them with a sense of security they would not otherwise have had. Like Jamaica, many countries see themselves as pressured by various international agencies to comply with international policies, but only time will tell whether the promised benefits will be realized.

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Convergence & competition issues on internet access in Jamaica

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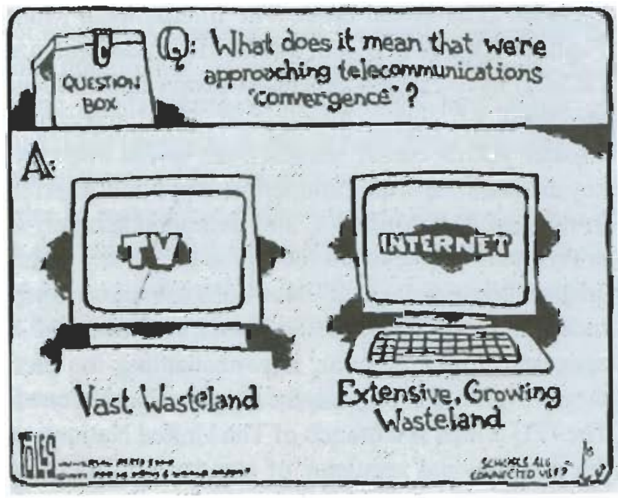

Introduction

JAMAICA COMMENCED the liberalisation of its telecommunications sector in 2000. The aim was to keep pace with global trends where the sector has been transformed from monopoly to competition. The management of the transformation raises some critical issues for the regulators. Some analysts say let the market decide while others insist that it is regulatory framework that shapes the market structure. One thing is certain however. It is that competition is the essence of a liberalised telecommunications sector. Competition determines the number of players in the market as well as the variety of products and services. In this context the regulator must consider and deal with all those issues which impact on access.

The key issues which impact on competition in this sector are those relating to dominance, interconnection and pricing. These issues determine the *accessibility* to the network and in turn impact on the availability of products and services to the end-users. This paper will focus on the inter-relationship between competition law and communications law. It will examine briefly, the ways in which the regulation of Communications sector interacts or could interact with the institutional framework that regulates competition.

The context of communications regulation

Convergence forced the liberalisation of the telecommunications sector. In the context of convergence it is no longer accurate to speak of telecommunications but communications. Communications regulation epitomises the meaning of convergence in a real sense. Convergence is largely the product of the emergence of the Internet Protocol (IP) suite. It enables voice, data and media services to be carried over the same network. The network may be public or private. This paper will focus on public networks; the largest and most commonly known one is the Internet. IP is the underlying technology that makes the Internet what it is. It enables the running of a variety of applications and hence services. In this context the traditional sector specific notions of regulation have been challenged. Regulation must now take into account the various disciplines that derive communications and it must do so in the right proportions.

Convergence is a multi-faceted concept in fact and in principle. First, there is a convergence of disciplines. It is an amalgam of law, technology and economics. Law sets up the framework within which service providers operate. Technology determines the types of services that are available and economics through the instrumentality of competition law determines the market context within which it operates. Of this group, it is competition which is the essence of a vibrant communications sector. It determines whether stakeholders operate in a monopolistic model, a quasi liberalised model or a fully liberalised model. It concerns itself with the issues of access, dominance, interconnection and pricing.

Second, convergence also impacts on networks particularly as it relates to the underlying technology of these networks. Technology determines the type of services that are available for sale or re-sale. In terms of IP networks information, communications and entertainment are now available on the same network. This influences the value of networks to carriers and service providers and the variety of products that are available to the end-users. This should guide the policymaker and the competition regulator in terms of how competition rules are brought to bear on the sector for the purpose of ensuring non-discriminatory terms to service providers and lowering barriers to access.

Third, convergence also impacts on institutions. In the Jamaican context, five (5) legal or regulatory institutions impact on the framework for communications regulation. These are the Ministry of Commerce, Science and Technology (MCST), Office of Utilities Regulation (OUR), Fair Trading Commission (FTC), Spectrum Management Authority (SMA) and Broadcasting Commission (BC).[1] This paper is restricted to a consideration of three of these institutions, MCST, OUR and FTC because save for the SMA these three institutions have the greatest impact on regulating access to the Internet and with it the creation of a competitive marketplace where all the players interest are equally balanced. What then is the Internet?

Internet Access -What?

The Internet is everything, to everyone from everywhere. It is neatly summarised by Nicholas Economides as a "multipurpose, multipoint, digital, interactive, continuously evolving, worldwide telecommunications network."[2] Dissecting this characterisation produces interesting results and underscores the importance of access to the Internet for end-users.

Multipurpose speaks to the variety of content and applications that run over the Internet. The Internet is a medium for rapid communications via electronic mail. It enables users to chat and exchange ideas and to create their own little soap boxes. Since 1995 it has also been used for commercial voice services. In an era of globalisation, the Internet is a new commercial centre for trade and electronic commerce. There is much talk of an E-transactions bill; careful consideration must be given to issues relating to access. If this is not done the proposed Act will create a secure environment, but secure for whom, as without access or accessibility the environment will be secure, paperless and "people-less". Even government has moved into cyberspace and there is much talk and fanfare at this time about paperless processing at the customs department.

The multipurpose character of the Internet therefore creates an incentive to regulate access to it. This is to ensure that it is available for all purposes, to all persons on fair and non-discriminatory terms. In economic terms the policymaker or regulator must recognise that these are competing goods and services in their various categories, it is a competition for content/space on the Internet. It means keeping pace with not only the knowledge based economy but with a global marketplace. The important point however is that whenever there is a differentiation of goods or services there is an opening for opportunistic behaviour. When opportunism raises its ugly head regulators have to be vigilant because it has an impact on access. This is because those with or in control will want to determine access so that they can capitalise on the benefits to be derived from being able to control outputs. They determine who gets what, where and when, they will create scarcity, they will in essence engage in monopolistic behaviour.

Monopolistic behaviour is bad for access; it is bad for the Internet when examined against its multipurpose characterisation. The multipurpose nature of the Internet is influenced by the fact that it is a multipoint network. This is because the more points that there are, impact on the number and quality of the competing applications and content on the Internet. This can only occur if the Internet is truly multipoint in nature. Whether or not it is multi-point is governed by issues of access and accessibility. These two terms have been introduced from the outset it is time to make clear their importance. Access means that the Internet is available, while accessibility determines availability how, to whom and on what terms. There are two essential requirements for Internet access. The first is access to the local loop (the final point of entry into the customer's premises) and second access to the Internet itself. In this context the concern for the regulator and end-users should be who controls access or how is access determined?

Access to the local loop has two aspects: Competitive entrant's access and end-user access, i.e. their ability to connect to the local loop.

Multi-point and Access -Local Loop

The everyplace, everyone everywhere con-ceptualisation of the Internet means nothing unless people can have access to it. Everyone relies on the local loop. This is the physical infrastructure that was put in place by the incumbent, pre-liberalisation. It is the final point of access into the customer's premises. It truly defines whether Internet access is multi-point. It determines who can be reached and where as it is the most complete network that enters the customer's premises. It is therefore an essential facility or a bottleneck facility because it is essential to competitive survival. It means that whoever owns it, controls access to the Internet. Because it is a bottleneck it must be regulated in the interest of *open* access so that competitive entrants can have access to it on fair/reasonable and non-discriminatory terms including pricing.

Multipoint and Access-tele-density

Access is also constrained by the availability of telephone lines or the ubiquity of wireless communications technologies. In Jamaica the local loop is not as ubiquitous as would be desirable. There are three points to be made in this context. First, it impacts on accessibility; second, it demonstrates the dangers of a monopoly model for the market; and third, the importance of a robust, vigilant and fully equipped competition tribunal. Jamaica has a population of 2, 607,632[3] people. Yet on the eve of liberalisation on the 28th of February 2000 only 19.6% of its population, i.e., 510,000 persons including businesses had access to telephone lines. At this same time, taking into account the fact of duplication only 350,000 persons had access to mobile phones and fixed wireless (the wireless local loop (WLL) was virtually unknown). Four years later in 2004 there is a decline in wire line services to 480,000 that is 18.4% the population, a phenomenal increase in wireless mobile phones from 350,000 to 1,700, 000, that is an increase of over 485% and a less than impressive uptake of fixed wireless phones, from 0 4000 in 2004.

For access these figures clearly pose significant issues. First, it is clear that the Internet is *inaccessible* to the majority of the population notwithstanding the availability of *access*. Second, competition in the mobile market has been credited with the phenomenal increase in mobile take up. The rapid uptake demonstrates that there was a demand for the services. It is clear that the demand was constrained and determined by the pre-liberalisation environment in the mobile telecommunications sector. This is a scarcity model. In a model that thrives on scarcity only the dominant player benefits usually at high prices which impact on affordability and hence accessibility.

It demonstrates how competition can impact on accessibility because mobile phones were now available to everyone at more affordable prices. The lesson is that the market for Internet access can benefit from this kind of regulatory insight. The question is, are we there yet? If not, is the current legal and regulatory environment charting a course for universal Internet access?

The Telecommunications Act
Access to the Internet- Who?

Internet access has been defined as "access to the

Internet or any similar global system for linking networks together using as the basis for communications, transmission protocols or Internet protocols..."[4] The first point of access to the Internet for end-users is an Internet Service Provider, assuming access to the local loop and the requisite computer equipment.

Typically Internet services are "e-mail, FTP and WWW."[5] However, since 1995 IP telephony, a voice service, developed rapidly to become a controversial commercial service.[6] IP telephony has been recognised in our Act as a voice service. However, Internet Service Providers (ISPs) are not allowed to offer that service in Jamaica by the terms of their licence. The commercial contracts for Internet or local loop access *follow* the law.[7] Together, they determine how the Internet accessed.

Access to the Internet -How?

Two different regimes govern access to the Internet. First, from a regulatory perspective each ISP requires a licence. Second, commercial contracts are required to gain, access to the local loop and access to the Internet backbone itself. In Jamaica both access to the local loop and terrestrial Internet bandwidth are essential facilities. It is in the context of the commercial contracts that the FTC has a role to play in regulating access. Can it be said however, that the regulatory framework for access under the Telecommunications Act (TA) constrains its ability to act? Is this an area in which the policymaker could look for support for an argument that there is a need for a single regulator for the communications sector? While recognising that the FTC is a multi-sector entity, it certainly demonstrates how asymmetrical regulation between sectors can hamper the development of the liberalisation process. In that context it does appear to be a strong argument for a single regulator. The single regulator would be able to discern the impact of the various pieces of regulation and policy issues on the different sectors. This would enable him to take steps to minimise the rate at which the sector is transformed from monopoly to competition. An empirical analysis of some of these issues will illustrate some of the weaknesses or opportunities for arbitrage or other anti-competitive behaviour associated with the current regulatory regime.

Typical ISP Licence

The typical ISP licence continues to include a restriction on voice services. This is so, notwithstanding that the Minister is mandated to remove it by virtue of s. 78(6) of the TA. This refusal has paved with the way anti-competitive behaviour on the part of the incumbent.

Typical Commercial Contract

An ISP is required to sign three (3) contracts, so called service schedules with the incumbent. These contracts relate to: (1) a service schedule for dial-up access; (2) a service schedule for national leased circuits; and (3) a service schedule for access to the Internet node.

In the context of competition in communications, how do these agreements stand up to the principles of dominance, access, interconnection and pricing?

The Internet: dominance, access, interconnection and pricing

- Each of these schedules provide for unidirectional access, although currently the ISP pays $36,000.00[8] that is $6,000.00 more than service providers who do not compete with the incumbent. The latter also has bi-directional access.
- Each of these schedules sells network elements as services, although the Act makes a distinction between facilities and services. It means that they are selling network access or Interconnection without reference to the principles governing interconnection.
- The incumbent now sells a *new* voice product at a higher price to carry IP voice notwithstanding that the *old* voice product had the same utility. The new voice product is classified as a service even though it is in effect access to a network. As at 2003 the incumbent was selling a full T1 for Internet bandwidth including the local loop for US$8, 800.00 while CW-US was selling the same T1 for between US$300 - US$600.

In the case of access to the Internet we see that the ISP requires access to the local loop. Access to the local loop is required for two reasons: (1) for the ISP's to reach customers; and (2) for the endusers to gain access to the Internet.

The ISP's also require access to the Internet node. As indicated before these are essential facilities. To what extent are they regulated in the interest of all stakeholders?

Competition Law and Communications Law

> The application of...competition rules to the communications sector is an indispensable complement... *The continued presence of [the] incumbent with strong market power and control of essential network assets raises many competition issues.*[9]

There is interplay of communications and competition law under the TA, as recognized in Sections 5 and 35. It is however, in the area of Interconnection that the TA appears to constrain the work of the FTC. The principles underlying interconnection are: openness/transparency; non-discrimination; reasonableness; and costs based charges. These principles are incorporated in Sections 30 and 33 of the TA.

The competition agency operates on these same principles and has an independent jurisdiction to investigate complaints under Sections 17 - 21 and 33 of the Fair Competition Act (FCA) without a referral from the OUR. However, aspects of the licensing regime under the TA as described above impacts on its ability to act decisively on issues that may arise in this context. The same consequence arises from the extensive treatment given to Interconnection under the TA. One of the problems with the TA's handling of Interconnection however is that it focuses on wired telephony to the exclusion of Internet or wireless access. It may be very well be that the time has come for the regulators to resign themselves to the fact that with convergence we are now dealing not so much with sector specific networks as with *electronic communications networks*.[10]

The absence of this kind of framework enables an incumbent able to retain the current model for retailing Internet access. The issue assumes especial importance when it becomes clear that the Act separates services from facilities -the physical from the intangible. The dominant carrier is allowed to sell network elements as services because the licence restrictions allow and encourage it. It is also encouraged by the inaction on the part of the policymaker in terms of Section 78(6). The hands of the communications regulator under Section 5 of the TA and the competition regulator under Sections 17 20 and 33 of the FCA are tied by these sections.[11]

Against this background it is important to accept and note that:

> [T]here is a need to supplement [the] regulatory framework by the application of competition rules in many areas (e.g. access) where issue-specific regulation alone would not achieve full liberalisation. Effective implementation of competition rules should also ensure that the benefits of liberalisation are not undermined by collusion between operators or inefficient consolidation through mergers and acquisitions... The ongoing convergence of telecommunications, media and information technology sectors is also a significant factor in applying competition law to these sectors.[11]

The effect: interconnection, dominance and pricing

Perpetuating the foregoing regulatory and institutional framework continues current anomalies such that basic Internet service excludes Voice while basic Telephone Service is Voice. More importantly in market and competitive terms ISP's are unable to compete effectively in offering various choices to their customers in terms of different pricing and product options. For example, to the extent that IP voice is a *substitute* for wired voice they are unable to offer voice/Internet service bundle to their customers. In economic terms this results in the inability of ISP's to offer value to their customers, to expand and hence for more consumers to gain access to their network. The ISP market is currently stagnant and the ISP's are margins apart from each other in terms of prices not giving much in terms of options to consumers in their choice of ISPs.

The regulatory regime: fixing the problem

The problem of interconnection, dominance and pricing

The TA is said to be technology neutral. However, the definition of interconnection under the Act does not comport with the technology neutral theme under the Act. It does not take convergence into account. Under the Act "interconnection means the physical or logical connection of public voice networks of different carriers. A converged network such as the IP network/Internet network cannot properly be described as a public voice network, *it is service neutral.*

The Act, by confining interconnection regulation to voice networks, gives leverage to the incumbent to refuse to interconnect for the purpose of offering voice services over any other network. It enables the incumbent to monopolise the converged network and to sell only on such terms as are acceptable to it. This may form the basis of an analysis for the forgoing agreements.

To the extent that interconnection pricing is essentially the province of competition law, the competition regulator is constrained in its ability to force the incumbent to offer Internet access on more favourable terms and in keeping with the principles underlying interconnection above referenced and to find that the agreements in issue breach the FCA.

The effect: stakeholders - consumers

Decisive action needs to be taken to minimise the impact of the current regulatory regime on consumers. The current impact may be characterised as:

- Increased costs to consumers because of the duplication of networks as distinct from the sale of unbundled elements on non-discriminatory terms.
- Inability to choose between ISPs on the basis of price and quality of service (since most ISPs purchase from the incumbent.
- Affordability and hence accessibility.
- Even end -users are not allowed to carry voice over their networks -ASDL contracts.

Accelerating access - competition

Regulate contextually. Recognize the special case of small states such as Jamaica is. There is a lack of capital in so far as banks may be cautious in dealing with the unknown in terms of funding investments in the industry. In these circumstances the traditional method of opening up the market to vibrant competition in the area of satellite communications may not be a viable alternative as in the developed world or large states. It is imperative that the policymaker comply with the Spirit of the Act, for example by granting licences without the current restrictions. Another method implemented in the European Union is to separate the regulatory and operational functions of the incumbent. The functional equivalent in Jamaica would be to separate the wholesale and retail divisions of the incumbent. This is only an overview of the some of the issues that are relevant in this area and is by no means an exhaustive or authoritative view on the subject.

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1 The MCST has oversight function for the sector and the Minister is responsible for granting licences to persons wishing to operate in the sector; FTC is a competition agency; SMA deals with wireless communications; and BC regulates uni-directional communications such as cable, radio and television.

2 The Economics of Networks, online: <http://www.stern.nyu.edu/networks> (date accessed: 28 July 2002).

3 In 2001 -and was estimated at year's end -2003 -at 2,641,579 -Statistical Institute of Jamaica.

4 s. 2 Telecommunications Act

5 Nathan J. Muller, IP A to Z (McGraw-Hill: 1993) at 253

6 Infochannel v. The Minister of Commerce Science and Technology & Ors.

7 The licensing regime in the Telecommunications Act 2000.

8 This is up to July 2004

9 Laurent Garzaniti, Telecommunications, Broadcasting and the internet -EU Competition Law & Regulation 2nd Edn Sweet & Maxwell:2003) at 243.

10 This is the E U approach. Their Liberalisation Directive refers to Electronic Communications and Services and networks giving effect the institutional framework for the convergence of technologies as described above.

11 Above note 8.

Indirect access in telecommunications: some legal and implementation issues

Franklin Brown
Economist *

Introduction

INDIRECT ACCESS (IA) is a means of engendering greater competition in the supply of telecommunications services. It is a widely used regulatory mechanism for generating competitive pressure on incumbent network operators. This is especially the case where facilities based entry in the supply of a service is absent and so the incumbent has market power. IA allows customers connected to one telecommunications network (i.e. Access Network Operator [ANO]) to purchase calls from competing service providers (i.e. Indirect Access Operators [IAO]). For example, residential and or business customers connected to network X purchase local and national long distance calls and/or outgoing international calls from operator Y rather than from X. The incentive to do this is usually because operator Y offers cheaper rates than those charged by X.

Besides leading to lower rates IA may also generate other benefits such as:-

- cost efficiency improvements by the network to which the customer is connected;
- increased choices for customers;
- innovation in the supply of services;
- demand stimulation due to lower rates; and
- greater efficiency in the utilization of network investment.

At the same time, it is possible for an IA policy to be implemented in such a way that it dulls the incentive for infrastructure investment. It is therefore critical for all factors to be given consideration before implementing an IA policy.

Forms of indirect access

Panama, South Africa, the European Union, and USA are just some of the countries in which IA is mandatory. In these countries IA usually take two forms: call-by-call selection, and carrier pre selection (with a possible variation). With call-by-call selection a customer purchases domestic and outgoing international calls from IAO by dialling an access code before the sequence of telephone digits. The selection of the IAO is done by the customer on a call by call basis and where no selection is made by a customer then the ANO becomes the default service provider.

By contrast carrier pre selection allows customers to pre-select one or more operators for some or all of their calls. Having pre-selected an operator, the customer would not be required to dial a carrier access code or follow any other special procedure to activate such routing of calls. Calls from the customer will be routed to the pre-selected operator until the selection is changed by the customer. The variation on this is that in some jurisdictions customers also have the option to over-ride the pre-selected operator on a call-by-call basis.

Legal and implementation issues for Jamaica

Since IA impacts on a raft of operational and technical aspects of the ANO and IAO it is important that adequate considerations be given to its requirements. For example, some of the essential requirements for CPS with call-by-call over-ride are:

- availability of trunk-side interconnection with the ANO.
- switch software features to identify customer selections and pre-selections.
- a numbering plan that allocates equivalent codes to the ANO and providers of indirect access services.
- provision of basic signalling services by the ANO including Calling Line Identification (CLI).
- answer and disconnect supervision.
- appropriate arrangements to permit billing and auditing between carrier.

In Jamaica, the implementation of IA is not mandatory; in fact, the Telecommunications Act sets out specific processes to govern its implementation.[1] Notable in this regard are, the limitation of the obligation to operators who have been declared dominant, the requirement for the Office of Utilities Regulation (OUR) to develop robust methodology for ascertaining the benefits and costs of a particular form of IA and the specification that the requirement for IA must not impose an unfair burden on a particular carrier or service provider.

These mandatory requirements apart, it is also important in looking at an IA policy to focus on such additional factors as:

- the operators eligible to offer IA services as well as the services to be provided;
- the form that IA should take;
- whether a carrier may offer indirect access barring any regulatory intervention by the OUR; and
- whether any facility that allows callers to access another platform such as (toll free lines) should be considered a form of IA.

In 2003 the OUR initiated a process of public consultation on whether IA should be introduced in Jamaica. The second phase of that consultation process is currently in train but is being hampered by the lack of cooperation from carriers.

Since the start of its consultations on IA, Cable &Wireless Jamaica Limited (C&WJ) has been declared the dominant fixed network operator and pursuant to the provisions of the Act, the OUR is examining the feasibility of introducing IA on that network. It is worthwhile noting that the legislative provisions do not preclude the OUR from requiring mobile operators (including C&WJ) from offering a form of IA. Indeed, in some countries, dominant mobile operators are required to provide IA to other providers.

It is the norm for operators to meet certain eligibility criteria before they are permitted to offer IA services. In some jurisdictions it is only those operators who have attained certain levels of network infrastructure deployment that are required to offer IA services to customers. Other eligibility criteria are:

- should be holders of service provider licences which allow for the supply of retail services to customers;
- must provide services over a network which has points of interconnection with the dominant carrier's network;
- should be able to deliver calls to all destinations in accordance with the service option(s); and
- should be in receipt of relevant numbering codes.

The Act does not specify the types of IA to be offered by IAOs however, in determining this issue other regulators have taken the following into account:

- the regime must be simple and easily understood by stakeholders. A regime that is unduly complex and lacks clarity is unattractive for customers and is unlikely to serve the purposes for which it was established;
- competitive margin on a certain call type. Carrier select and pre-select operators should have the incentive to offer services where the margin of profitability is attractive and which allows them to compete on the basis of price.

IA may require modifications and or additions to inter-operator processes including:

(i) handling of requests for service and the provisioning of services;
(ii) handling of customer complaints and faults;
(iii) inter-operator billing; and
(iv) management information statistics.

Item (i) encompasses the identification of invalid orders as well as the process for the exchange of orders to allow for the setting up, changing and removal of service on a customer line. Item (ii) involves customer recognition and verification and appropriate steps for responding to faults reported by customers. Inter-operator billing, i.e. item (iii) has to do with changing and removal of specified services on customer lines plus the recovery of Carrier Pre-Selection (CPS) costs. Item (iv) involves the provision of management information statistics to measure inter-company performance and to demonstrate achievement of agreed service levels.

Since these changes/modifications may require additional capital spending it ought to be the goal of the regulator to ensure that these costs are appropriately recovered. This further underscore the need for all stakeholders to work together to ascertain the facts surround IA as lack of information on the technical aspects for network make IA an impossible task.

Measures to shield consumers from unfair trade practices; and prohibits ANOs from engaging in anti-competitive practices are also essential to the successful implementation of IA.

Consumer protection

The experiences of other countries is that IA requires procedures and rules to ensure that operators develop adequate customer information and consumer protection mechanisms to guide the public in understanding the choices they will have, and how the new services will work. The need to shield consumers from the misuse of information by operators is also of concern to regulatory agencies. "Slamming" is one of the most frequently cited examples of misuse of customer information. Slamming refers to any modifications and or amendments of a customer's IA arrangements without the consent or knowledge of the customer. Slamming methods include "free trials" and offers for credit cards that offer prize or give away points for each dollar of charges from a given carrier. Phone solicitors often get approval from children, baby sitters, and domestic workers.

It is also important to protect customers from cramming. "Cramming" is the practice of placing unauthorized, misleading, or deceptive charges on customers' telephone bills. Whether it is done intentionally, or accidentally the effect is that inaccurate billing data is included on the customer's telephone bill. Cramming also occurs when an operator does not clearly and accurately describe all of the relevant charges to the customer when marketing the service. Hence, even though the customer authorized the service, the charge still constitutes cramming because the customer was misled.

In the USA, Southwestern Bell reported that in 1997 it received calls about slamming from 558,000 customers. Each year state Public Utilities Commissions (PUCs) receive complaints from several thousand telephone customers, a phenomenon that has prompted the Federal Communications Commission's Enforcement Bureau to take action against slammers. In November 2000 new slamming liability rules came into effect. The new rules sought to provide a remedy for customers who have been slammed and seek to take the profit out of slamming. In addition, state PUCs have been empowered to punish companies taking part in this practice.

In Ireland, as a pre-condition of providing service, operators are required to be signatories to a Code of Practice governing the provision of IA services. The rationale for a Code of Practice is to offer adequate protection to consumers and to help them in understanding the choices they will have and how the services will work.

Anti-competitive behavior

In provisioning for services, it will be necessary for IAOs information to be passed to the ANO. Information of this kind should not be available to ANO's retail arm for purposes that might be construed as being anti-competitive. This information should be used solely for the purposes for which it was supplied. Indeed, should IA be introduced in Jamaica this practice would be a clear breach of Sections 19-21 of the Fair Competition Act (FCA).

Discriminatory and other unfair practices in the provisioning of IA would also be in breach of the FCA. It would also be in breach of provisions of the Telecommunications Act. Additionally, the OUR can make rules pursuant to its general rule making power under Sections 35 and 36 to establish rules to guard against discriminatory practices by an ANO.

Conclusion

IA provides a means by which competition can be further strengthened in the local telecommunications sector. In deciding on whether or not to require IA and the nature of the IA model to employ the OUR is legally bound to consider the costs and benefits and the implications for both ANO and IAO. The Office is currently carrying out consultation on IA but progress on this is being hindered by lack of cooperation from the major carriers.

Non compliance with the requirements for IA will constitute a breach of the FCA, the Telecommunications Act or both. It is also anticipated that carriers who wish to obtain IA will need to meet specific qualifying criteria. Thus, an IA policy is expected to bring boon to consumers via competition but will at the same time, will need to take account of the need and incentive requirements of investors.

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1. These are sections 36(1) and 36(2). Other aspects of the Act may also be applicable but this will depend on the form of IA.

Taxation & competition: impact of GCT on competitive services provided by locally licensed international carriers

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ON THE commencement of Phase III of the liberalization process on March 1, 2003, a total of forty-five (45) carriers were licensed as international carriers and at least 15 of them entered into interconnection agreements with domestic network operators.

Each locally licensed international carrier then became subject to the imposition of General Consumption Tax (GCT) on the goods and services which were supplied to them by other domestic carriers. An application was made to their behalf for the grant of a remission of GCT in respect of the ***"interconnection specific termination costs"*** which comprise one of the several components of the cost structure for the termination of incoming international calls on local/domestic telephone networks. Carriers who obtained licences in Phase III ("Jamaican International Carriers") have entered into Interconnection Agreements with Cable & Wireless Jamaica ("CWJ") for the termination of incoming international calls on CWJ's network in Jamaica, under which Agreement, GCT is being charged.

There are three main bases for the removal of this tax; firstly that the tax treatment which is being accorded this particular service is contrary to the policy objectives and statutory provisions of both the Telecommunications Act (TA) and the Fair Competition Act (FCA), in that only the Jamaican international carriers are burdened with this additional and substantial cost. This discrimination against locally licensed carriers would inevitably frustrate the development of competition in that sector of the industry, and provide a competitive advantage to the incumbent domestic network operators, whose ownership of the local loop insulates them from that cost.

Secondly, the Jamaican licensed carriers are all entitled to a refund of the tax since in the ordinary course of their business they do not have the opportunity to set-off these payments against receipts from the provision of a local service. International incoming telephone calls are bought and paid for outside of Jamaica, and accordingly the Jamaican licensed carriers who generate this business do not provide services or earn revenues From local consumption of the service. Where carriers are entitled to claim a refund in circumstances such as these, it would not be in the best interest of the Government to collect the tax and then be liable to the carriers for interest, should payment of the refund be delayed. It is worth noting that the Government is not likely to receive from domestic carriers, the full amount paid by these carriers, since each carrier will first exercise its own right of set-off. There is therefore every possibility that the Government will be liable for refunds in excess of the amounts actually received in any given period.

The third ground is that the nature and character of the service is such that it ought not to fall within the scope of the GCT Act. Specifically, the service allegedly provided in exchange for these ***"interconnect specific costs"*** does not constitute a "consumable" product and in fact historically this service did not attract GCT. With the advent of liberalization of the industry, the same service is now being provided by Miphone, CWJ, Digicel, and the Jamaican licensed carriers; because Miphone, CWJ and Digicel own and operate domestic networks, they are not faced with the cost of GCT for termination of international calls on their own networks. The Jamaican licensed carriers however, who interconnect with the local networks, and are required by law to be resident in Jamaica, are obliged to pay the tax simply because they are resident in Jamaica. In other industries (such as transportation) where services are of a character that does not warrant taxation, the GCT Act specifically provides an exemption. The liberalization of the Telecommunications industry has resulted in significant changes to how telecommunications services are provided, and the complexity of cross-border transactions now require specific tax treatment so as to ensure continued compliance with WTO commitments as regards the introduction and facilitation of competition, and the removal of illegitimate barriers to entry from the industry. If Jamaican licensed carriers are not provided with timely relief from this burden, other foreign investors will have no incentive to enter the market, and existing investors will eventually be driven from the market. The Minister of Commerce, Science and Technology successfully negotiated with AT&T for the sale of a fourth cellular licence, and the value of this licence can only be preserved if local operating conditions allow for non-discriminatory and fair competition on an equal playing field.

Most of the Jamaican licensed carriers are still within the first eighteen (18) months of operation, and the effects of the cost of GCT on their profitability and cash flow management are just now being felt, particularly because they are not able to receive timely refunds from the GCT Office. There is therefore an urgent need to initiate the process for amendment of the GCT Act so that specific and appropriate provisions can be made for the exemption of services in connection with the maintenance, extension (by way of interconnection or otherwise), repair, and deployment of telecommunications networks. At present the GCT Act only provides exemption for those services relative to the installation of telegraphic poles, and public postal and telegraph services.

Historical treatment & description of the service

A brief review of the legal/regulatory treatment which international calls are accorded under the TA and previous legislation is necessary to an understanding of the issue. Historically, all voice services were provided by a monopoly provider that owned and operated three primary telephone networks; domestic fixed line network, an international network comprised of satellite and terrestrial facilities, and a domestic mobile/cellular network.

All calls into, and out of Jamaica terminated and originated on that single provider's network. In respect of international calls, CWJ entered into bilateral agreements with foreign carriers under which they permitted those carriers to send calls from the foreign network to CWJ's networks. The contractual arrangements were reciprocal in that CWJ was itself permitted to send calls from Jamaica to the foreign networks. Each carrier establishes a charge which it imposes on those carriers who wish to send calls to their network, and under the bilateral contracts, a reconciliation is done at intervals where each carrier determines the amount owing for calls delivered to its network; usually a net payment is made to the carrier whose calls valued more than is due to the other network. In this regard, the tax treatment of incoming international calls was invisible to the authorities, and even a failure to disclose the resultant revenues could not be traced. Because the calling activity did not originate in Jamaica, there would be no records in Jamaica (save from CWJ) that would reveal the value of the calls that were sent to CWJ from international carriers all over the world.

With the liberalization of the telecommunications industry, CWJ's monopoly on the provision of voice services ended, and a licensing regime was introduced under which new entrants could select specific services and obtain a licence for those services only. In the instant case, a number of new entrants secured licences under which they have chosen to provide international services. These carriers have separated the international voice "market" into two products, namely international incoming service, and international outgoing service. The incoming service is sold to customers outside of Jamaica and is typically provided through a calling card product, and wholesale or corporate accounts. The outgoing service is sold to customers in Jamaica using the same "retail" mechanisms. It is my view that the outgoing service is subject to GCT, but the incoming service is not.

While CWJ's monopoly on the provision of international voice services ended on March 1, 2003 their ownership of the domestic fixed line and domestic cellular networks remained unchanged. In order to ensure that new entrants were given access to those networks the TA introduced a system of mandatory interconnection which required CWJ to allow all licensed voice carriers to interconnect with their domestic networks so that ultimately customers on any network within Jamaica could speak to customers on all other networks. CWJ being the only fixed network operator at the time when liberalization commenced is the only carrier who is mandated by law to interconnect its fixed line network with all other carriers; through this statutory prescription it became a reality that all networks in Jamaica are seamlessly interconnected.

In order to comply with the statutory regime for interconnection, CWJ introduced a standard Interconnection Agreement under which it sets out the contractual terms for the provision of all services on offer to interconnecting carriers. The Agreement also contains the rates which CWJ charges for each service, and for the use of its network by those carriers. A rate per minute is specified for the termination of calls on CWJ's network, and although this is described as a service, it does not represent the performance of any taxable activity on the part of CWJ. It should be remembered that CWJ enters into individual service contracts with each customer on its network, under which contract CWJ is paid to ensure that the telephone line to the customer's residence or business place provides 24 hour connectivity to all other telephone lines in the CWJ domestic network. Each customer pays a monthly access fee to ensure continuity of this service, and to enable the receipt of telephone calls on the telephone line, and the origination of telephone calls to other parties. In complying with their obligation under those customer contracts, the network is thereby capable of conveying both international and local telephone calls to CWJ's customers. In delivering international calls to its subscribers, CWJ incurs no liability for GCT. With the advent of liberalization, it is now apparent that the introduction of competitive international carriers has created an anomaly in the industry where the new carriers are placed at a disadvantage to CWJ by having to shoulder the additional cost of GCT. This is contrary to the clear objectives of the TA and the FCA.

Given the character of interconnection, and its statutory role (as prescribed in the TA Sections 27 to 35) as a mechanism to ensure the integrity of a nationally interconnected telecommunications network, all interconnect specific costs should be exempt from consumption tax. The inevitable result of imposing GCT on both the retail customer and the carrier (under its interconnection agreement) is to force the retail customer to bear the burden of double GCT taxation.

This argument applies in equal strength to the tax treatment of services provided to both international and domestic carriers. My view is that non-consumable elements of the service ought to be free from consumption tax in order to ensure that the objectives of the TA and the FCA are not frustrated by a tax treatment that creates inequity between similarly situated players. Specifically, the incumbent large operators (Digicel and CWJ) should not be given a competitive edge over the new entrants, whose operations are being encouraged and facilitated by the liberalization process.

For domestic calls (calls originating and terminating within Jamaica) there is absolutely no doubt that GCT applies since both the supply and consumption of the service occurs within Jamaica. However, when GCT is imposed on the interconnect specific costs of a domestic voice service, it has the ultimate effect of increasing the cost of the service to the consumer, since the carrier will pass on the GCT for the interconnect specific cost to the customer, in addition to the GCT on the carrier's own charges.

Incoming international calls are of a different specie altogether. Jamaican carriers are in the business of offering foreign carriers alternative routes to Jamaica and through their pricing and creative product offering stimulate an increase in the volume of calls which come into Jamaica. They are all competing against each other and against domestic operators such as CWJ for customers. CWJ, being the owner of the network on which calls are terminated is entitled to be compensated, by way of these ***"interconnect specific charges"***, for each call that is terminated on its network, and therefore the extent to which CWJ can inflate those charges to its competitors will ensure that CWJ maintains a competitive advantage in its pricing.

The termination of incoming international minutes ought to be excluded from the scope of the GCT Act firstly on the basis that no taxable activity takes place in Jamaica, save for the lease/rental of the circuits connecting the two networks. The telephone calls are made and paid for by persons outside of Jamaica and it is the place of origination of the calls which in this case determines the point or place of the taxable supply. Section 5 of the GCT Act supports this interpretation in its treatment of how and when the tax is due and payable. For imports, the tax is due when goods are entered for home consumption and in all other cases (telecommunications services for example); the tax is due at the time of supply.

The situation is analogous to the treatment of air travel in the transportation industry. Under section 25 (Schedule 3) of the GCT Act, airline tickets for international travel and services rendered at a port in connection with the transportation of people into or out of Jamaica are exempt from taxation. This amplifies the point that the mere utilization of a service or facility in Jamaica is not a sufficient basis for imposition of the tax, where the substantive product or service is provided, or consumed and paid for outside of Jamaica. A review of the GCT Act disclosed that telecommunications services were not specifically mentioned save (as previously indicated) for a reference to the exemption for services relative to the installation, construction, demolition, or extension of telegraphic lines, public and postal telegraph services, and of course the recent increase of the tax on telephone services. It seems to us that more detailed treatment is required having regard to the increasing complexity and diversity of the services in the sector.

International carriers (licensed in Jamaica or not) who only terminate international traffic in Jamaica are not liable to pay GCT on that service under section 3(2)(b) of the Act since they are not importing goods or services into Jamaica. The imposition of this tax creates inequities in many ways, not the least of which is the clear competitive and economic advantage immediately conferred on those non-Jamaican Carriers who send traffic to Jamaica under Bi-lateral Agreements where there is no suggestion that the traffic originating from their home country constitutes a supply of services in Jamaica. Nor is there any suggestion that the origination of international outgoing calls should attract the taxes imposed in the countries where the called parties reside. In fact, it is a commonly held view that locally licensed carriers who only send traffic to Jamaica are creating an "export service" since their only business is stimulating a demand for Jamaica by making it more attractive for persons outside of Jamaica to call Jamaica. The calls represent taxable revenue for Jamaican companies such as the carriers themselves, and CWJ on whose network the calls are terminated. This well entrenched view is based on the classification that activities such as tourism enjoy, since it is now generally acknowledged that tourism is an export service, for which the consumers reside in foreign markets.

The most egregious result of this tax treatment is that it discriminates against locally licensed operators, and offers an advantage to the domestic network operators who engage in the same activity.

Finally, it should also be noted that the imposition of GCT on this service is a form of double taxation since the foreign consumer who places the telephone call to Jamaica is already subject to taxation in the country where the call originates, and the foreign carrier on whose network the call originates is itself subject to taxation of the income generated by the call, and finally the Jamaican carriers who must maintain a network presence both in Jamaica and the foreign country all pay tax on the charges for the facilities which convey the same telephone call, and also on the revenues generated by the call. In all cases except for the locally licensed carriers who are faced with the imposition of GCT, this tax is recoverable from the end user customer.

A waiver is granted

In September 2004, the Honourable Minister of Finance & Planning responded to the plight of the Jamaican carriers and granted a waiver of the tax payable by local carriers to CWJ and committed to review the taxes on telecommunications services and electronic commerce in order to bring Jamaica in line with international practice.

Viability of business

1. A Wholesaler shall not, directly or indirectly or through any officer, agent or employee in respect of the sale and distribution of petroleum products:-

    a. fail to act in good faith in performing or complying with any term or provision of, or collateral to, a contract with a retailer;

    b. impose on a retailer any contractual provisions including a provision respecting an increase in the rental for a gasoline retail outlet, that are likely to be impossible or unreasonably onerous to perform at the time it is demanded to be performed; or

    c. cancel or terminate a contract with a retailer for a cause not contemplated in the relevant contract.

2. A wholesaler shall not recommend or suggest to a retailer retail prices of fuels which would make it impossible for the retailer to cover reasonable operational costs of the outlet.

3. A wholesaler shall give notice of no less than three (3) months of any changes in the applicable rents and fees. Increases in such rents and fees shall not be made payable retroactively.

4. A wholesaler shall not refuse to sign a contract with a dealer on the ground that the dealer is a limited liability company.

5. A contract between a wholesaler and a retailer shall contain in clear and unambiguous terms the criteria upon which the wholesaler offers or grants discounts or price support to its retailers.

6. All amounts that shall become due and payable by a wholesaler to a retailer and by a retailer to a wholesaler shall be clearly established in a contract between the parties.

7. A contract between a wholesaler and a retailer shall contain the criteria for determining the goodwill and/or any other payments of a similar nature, that may become due when such contract comes to an end.

Duration of contract

8. No contract between a wholesaler and a retailer shall be for less than three (3) years, in respect of a company-owned retail outlet, PROVIDED THAT the retailer is not serving a probationary period which must not be more than one (1) year.

9. No contract between a wholesaler and a retailer entered into after the effective date of this Code shall be for more than five (5) years, in respect of a dealer-owned retail outlet.

10. An existing contract between a wholesaler and a retailer, in respect of a company-owned retail outlet, excluding a probationary period, which is for a period less than three (3) years shall be pro-rated so as to comply with Provision (8) herein.

11. All contracts must have a specified duration.

Disposal of property

12. Where a wholesaler is desirous of selling property housing a gasoline retail outlet, the existing retailer shall be given first option to purchase the said property.

13. No agreement for the sale by a wholesaler of property housing a gasoline retail outlet shall contain a provision prohibiting the buyer from operating a gasoline retail outlet or any other business at that location, PROVIDED THAT said business is in accordance with the relevant Town and Country or any other zoning laws for the time being in force in Jamaica.

Compensation for termination

14. Where a wholesaler terminates a contract with a retailer for any cause not contained and recognized in the said contract the wholesaler shall compensate the retailer for the unexpired proportion of the contract.

15. Where a retailer terminates a contract with a wholesaler for any cause not contained and recognized in the said contract the retailer shall compensate the wholesaler for the unexpired part of the contract, PROVIDED THAT the contract is in relation to a dealer-owned retail outlet.

16. The method for calculating the compensation shall be set out in the contract between the parties.

Notice of termination or non-renewal

17. A minimum of three (3) months notice shall be given by any party to a contract who wishes to end the contract before its expiration date PROVIDED THAT where there is a substantial breach, a contracting party shall have the right to terminate the contract immediately.

18. Notice of renewal or non-renewal of a contract shall be given to either party three (3) months prior to the end of the contract and the parties shall communicate to each other any new terms and conditions within the said time frame.

19. Prior to the commencement of a contract, a wholesaler shall advise retailers of the grounds for termination of that contract.

20. For the purpose of this Code, notice means notice in writing.

21. Any notice or demand to be served or made on any party shall be deemed to be sufficiently served or made if served personally or sent by pre-paid registered post addressed to the relevant party's address and shall be deemed to have been received seven (7) days after date of posting in any post office in Jamaica. This method is not exclusive and shall be in addition to any other available procedure, inclusive of such Notice being served on the Attorney representing a party to the contract, which shall be deemed Notice to such party.

Display of pump prices

22. Gasoline retail outlets shall prominently display the prices of fuels (unleaded 87, unleaded 90 and diesel) on both sides of a double-sided display board.

23. Prices on pumps shall be visible; and no price shall be displayed on pumps that are not operational.

24. Prices displayed on pumps shall be identical to the prices displayed on the display board.

25. The layout of the display board shall be two columns by three rows. The first column shall list the type of fuel in the order of unleaded 87 , unleaded 90 and diesel; and the second shall display the corresponding prices.

Price discrimination

26. A Wholesaler who operates a retail outlet directly or indirectly through an agent or employee shall not retail gasoline at that outlet at prices at or below the prices at which it supplies outlets operated by independent retailers, within the same transportation zone.

27. Where a wholesaler grants discounts those discounts shall be made available to all retailers within its network of retail outlets, who meet the criteria under which discounts or price support are/is granted.

28. A wholesaler shall sell to all retailers within the same transportation zone at the same price, except in situations in which discounts or price support are/is given to a dealer at the request of that dealer. A transportation zone is the area in which the transportation cost to deliver fuel to retail outlets is identical.

29. Within fourteen (14) days of the implementation of this Code all wholesalers shall supply to [the body implementing this Code] an up-to-date list of the established transportation zones and indicating all the outlets which fall within each zone and shall provide an updated list within seven (7) days of such update for the life of this Code.

30. Where a wholesaler recommends or suggests the price at which gasoline should be retailed at a dealer operated outlet that price shall not be below the price, discounted or otherwise, at which it supplies another retail outlet within the same transportation zone.

31. Except where discounts are granted, all retailers who operate retail outlets within the same distance from the refinery or distribution racks shall be charged the same price for fuels delivered to such retail outlets.

32. Except where discounts are granted, no retailer who operates a retail outlet which is closer to the refinery or distribution racks than another outlet is, shall be charged a higher price than the price charged to a retailer who operates a retail outlet farther away from the refinery or the

distribution racks.

Predatory pricing

33. A Wholesaler shall not sell gasoline to independent retailers at prices below the cost of the gasoline together with and the cost of supplying it.

34. A wholesaler who operates a retail outlet directly or indirectly through an officer, agent or employee shall not retail gasoline at prices that do not allow for the recovery of the operational expenses of retailing the gasoline.

35. Where a wholesaler grants discounts to dealers those discount prices shall not be below the cost of the gasoline together with the cost of supplying it.

36. Where a wholesaler recommends or suggests the price at which gasoline should be retailed at a dealer operated outlet that price shall not be below the cost of the gasoline together with the cost of supplying it.

Obligation of wholesaler

37. A retailer who owns the property housing a retail outlet and who has entered into a contract with a wholesaler shall not be in any way prevented from switching to another wholesaler at the end the contract.

38. At the end of a contract by effluxion of time, or where any party wishes to discontinue the contract, in respect of retailer-owned property, the wholesaler must remove its signage, logo etc within one (1) week of the end of the contract.

Obligation of retailer

39. A retailer who has contracted with a wholesaler for the supply of fuel exclusively from that wholesaler, to be sold by said retailer at a designated retail outlet, shall not accept delivery of fuel to be sold at said retail outlet from any other supplier or wholesaler.

Effective date of Code

40 The effective date of this Code is **December 20, 2004.**

"COMPLIANT" to read "COMPLAINT"

COMPLIANT STATISTICS

COMPLIANT STATISTICS

FOR SEPTEMBER 1, 2001 - AUGUST 31, 2004

PRODUCTS AND SERVICES	YEAR 2001/2002	YEAR 2002/2003	YEAR 2003/2004
Airline Services	3	5	6
Appliances	0	1	3
Auto Parts & Supplies	10	7	8
Automobiles	150	159	90
Banking Services	7	6	13
Clothing & Accessories	21	17	12
Computers	32	29	14
Construction/Home Repair Supplies	10	2	9
Education	14	14	16
Electronics	1	1	16
Financial Services	28	23	7
Food Items	5	10	8
Hardware Products	9	10	6
Household Appliances	88	82	39
Household Furnishings	25	46	22
Insurance[1]	4	6	10
Media	5	8	5
Office Equipment	9	3	2
Petroleum Products & Accessories	2	6	5
Professional & Specialist Services	9	2	14
Real Estate	13	13	4
Telecommunications Equipment	9	13	35
Telecommunications Services	47	73	38
Transportation Systems	7	7	2
Utilities	6	2	4
Other[2]	64	38	109
TOTAL	578	583	497

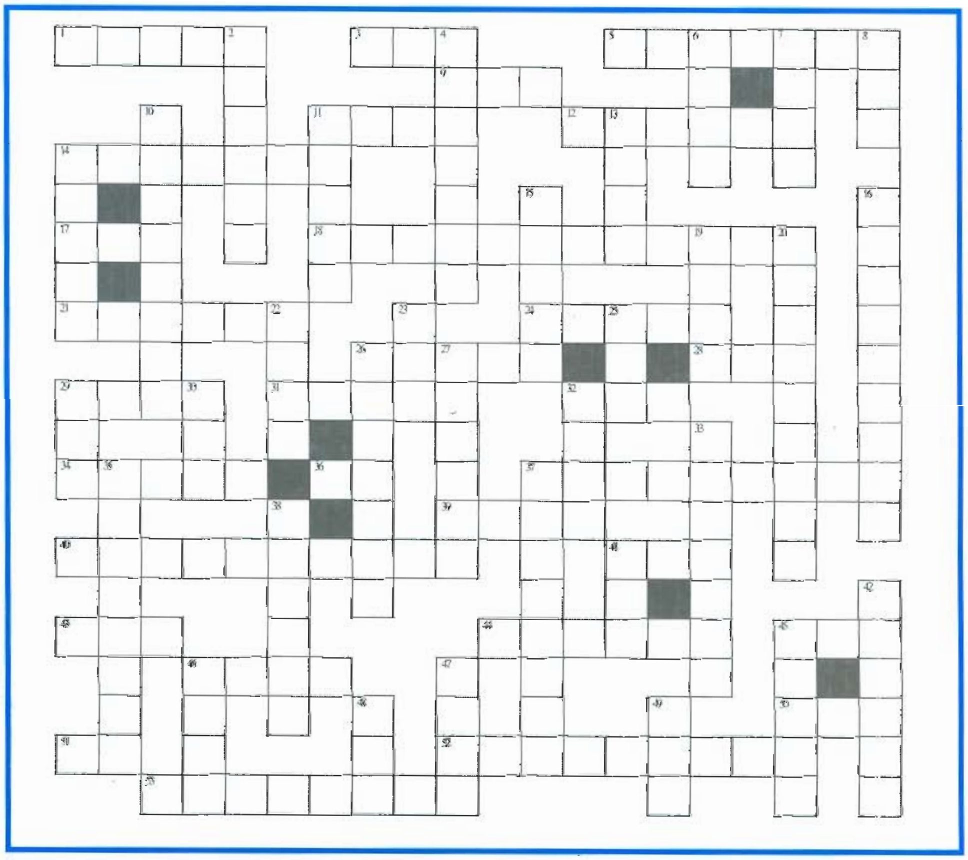
NOTES

1 Insurance includes Life, Health and Peril

2 Includes product areas such as Agricultural Products, Optometric Goods & Services, Auto Repair Services, etc.

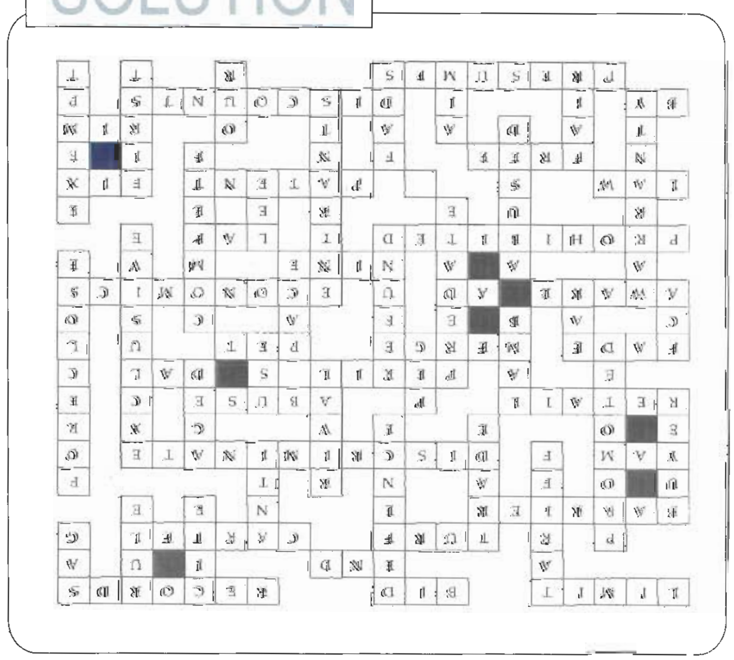
FTC PUZZLE

ACROSS
1. Ultimate point
3. Tender
5. Files
9. Terminate
11. Comfort area
12. OPEC, for example
14. Obstacle
17. Edible tuberous root
18. Treat differently
21. Sell to final consumers
24. Misuse
26. Endangerment
28. An Indian dish
29. Pass out of sight
31. Join as one
32. A fit of bad temper
34. Cognizant
36. Short form of Advertisement
37. Study of Scarcity
39. # of equally sized firms corresponding to HHI of 1,111
40. Banned
41. Lave
43. Canon
44. Exclusive licence for innovation
45. Amend
46. Without charge
50. Fringe
51. __-laws
52. Reduced prices
53. Presupposes



DOWN
2. Price (colloq.)
4. Justification
6. Quote
7. Regulation
8. Wilt
10. Advertised
11. Peddle
13. Against
14. Purchaser
15. Competitor
16. Shut out of the market
19. Mature
20. Barring all other
22. Person who is easily deceived
23. Tapered pin
25. Employ
26. Sell below cost
27. Pay back
29. Ja.'s competition legislation
30. Space for small ads in newspaper
32. Rate of movement
33. Strive against others for victory
35. Manufacturer's assurance on products
37. New competitors
38. Mistreated
41. FTC's Executive Director
42. Excuse from the ambit of the law
45. Preceding all others
46. Part of FTC
47. Crazes
48. Target
49. Utilities watchdog

SOLUTION



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