COMPETITION MATTERS

FAIR TRADING COMMISSION

VOLUME XIII , DECEMBER 2008

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FOREWORD

Shanker Singham, writing in the Brooklyn Journal of International Law (Vol XXVII, No. 1, P 36) observed that, "because the failure of domestic markets can prevent the benefits of economic liberalization from materializing, the relationship between trade and competition policy fits centre stage in the international arena". This is no less true of national economies. Governments around the world have had to recognize and carefully manage the interface between these policies, sometimes with less than successful results, especially evident in circumstances under which trade rules are relied on to address competition problems.

In this issue of **Competition Matters 2008**, we explore the theme: ***'When Signals Collide'*** with a view of dissecting the major issues concerned with the promotion or distortion of signals associated with competition in the market place. One such issue which we have wrestled with in various arenas and debated for or against in many forums, is that of State Aid to select companies experiencing economic hardships or on the verge of major expansion or investment. This type of intervention by the State/Government is offered in various ways: one of which is the granting of tax concessions to ease monetary pressure thereby free up cash flow for future re-investments. However, the debate continues as to whether this type of intervention affects competition negatively and sends distorted signals to the market place.

As the Agency responsible for the monitoring of competitive practices in the Jamaican market, the FTC seeks to facilitate a forum for various views relating to market competition to be put forward. This is one such forum and we therefore thank those individuals and organizations who have taken the time to contribute to this year's Magazine.

Paul Cooper
2008 Magazine Coordinator

Competition Matters is a publication of the Fair Trading Commission. For questions, comments, clarification or additional information please contact:

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MESSAGE

THE FAIR TRADING COMMISSION (FTC) has served us well since its establishment in 1993 to administer the Fair Competition Act (FCA), which provides for the maintenance and encouragement of competition in the conduct of trade and business and in the provision of services in Jamaica.

The underlying rationale is that more competition will increase efficiency in production and allocation of resources; that it will enhance market outcomes for both producers and consumers; and generate employment and economic growth.

It is clear, however, that if the FTC is to remain relevant and play a greater role in administering the FCA, amendments or adjustments will have to be made as the need arise. One such situation emanates from the 2001 Court of Appeal judgment which indicated that the Commission, being vested both with the powers of investigation and adjudication, would be in breach of the principles of natural justice if a decision should be made in the execution of both these powers in any one case. This situation will be changed with the amendment of the Act.

I must commend the staff of the FTC for your perseverance and your ability to obtain results, even against the constraints that you face. I am confident that the Commission will be accorded the necessary legislative support as we seek to achieve our objective of promoting a competition culture which deters anti- and uncompetitive practices; protects the reasonable rights of both companies and consumers; and overall, contributes to a stronger economy.

The Honourable Karl Samuda
Minister of Industry, Investment & Commerce

Barbara Lee moves on

Mrs. Barbara Lee, former Executive Director of the Fair Trading Commission

AFTER SERVING the Fair Trading Commission (FTC) as its Executive Director for almost 7½ years, Mrs. Barbara Lee ended her tenure in July 2008. She served admirably in many respects - from Staff development, to the efficient handling of the Commission's daily activities, to the enhancement of the Commission's profile primarily through high quality output. Mrs. Lee must be commended for the high standards which she maintained.

She was instrumental in spearheading many of the FTC's accomplishments, both locally and in the international arena. Under her stewardship, the FTC became an active member of the International Competition Network (ICN), an informal virtual network of competition agencies; and it was as a result of her recommendations and with her active involvement that the ICN Consultation and Mentorship programme was launched. She is considered by many to have placed the FTC in the international arena of competition agencies.

Mrs. Lee, an actress in her spare time, allowed her artistic creativity to be interwoven into the work of the Commission; leading to the discovery, development and honing of many talents among the Staff. This involved the use of drama in the FTC's public education programme, which resulted in the production of a DVD on competition issues; participation in programmes such as *Read Across Jamaica*, targeting primary school students, for the past three years; the creation and production of skits used in the *Under the Law* radio series; and the evolution of our annual Newsletter, *Competition Matters*, into a creative magazine depicting competition in varying forms. This creative force culminated in the recent publication of Mrs. Lee's brainchild *Competition Focus for Children*, a booklet of stories on competition for children at the primary level of education.

Mrs. Lee's legacy to the FTC is excellence. As she moves to a new sphere and undertakes a new mission, we salute her outstanding service; and wish her continued success.

Mrs. Barbara Lee now serves as Executive Director of the CARICOM Competition Commission.

David Miller appointed Executive Director

Mr. David G. Miller, Executive Director of the Fair Trading Commission

ON NOVEMBER 1, 2008, David G. Miller assumed duties as the fifth Executive Director of the Fair Trading Commission (FTC).

Mr. Miller has served as General Manager and Secretary of the FTC since July 2000. In that capacity, he provided invaluable assistance to the Executive Director in the management of the day-to-day activities of the Commission in support of its mission of promoting competition by ensuring compliance with the Fair Competition Act (FCA). His responsibilities included corporate services, financial affairs, budget development and monitoring, personnel development and administration, public relations, and the development and maintenance of general administrative systems, policies and procedures.

He spearheaded the Commission's initiatives to secure funding from international funding and developmental agencies for the purpose of improving the technical capacity of the FTC; and has worked extensively on several projects, funded by entities such as the United States Agency for International Development, the European Union, the Inter-American Development Bank and the United Nations Conference on Trade & Development.

Prior to joining the FTC, Mr. Miller had accumulated in-depth financial, administrative and manufacturing experience in various industries in Jamaica which has allowed him to gain a unique perspective and comprehensive knowledge of Jamaica's business sector.

Having served the Commission for the past eight years, Mr. Miller has displayed the requisite skills, acumen and leadership for his new post; and his appointment will ensure continuity in the direction of the Commission's work.

Mr. Miller's focus is to improve the efficiency, effectiveness and relevance of the FTC. This, he plans to accomplish by increasing the Staff compliment, harnessing core competencies, streamlining work and investigation processes and maximizing the enforcement potential of the FCA. His ultimate goal, which is consistent with that of the Commission, is to provide the necessary direction to ensure the minimization of anti-competitive practices in Jamaica, and to enhance the welfare of the Jamaican consumer through the protection of undistorted and competitive markets.

Regional Competition Agency opens its door

THE REGIONAL Competition Authority, the CARICOM Competition Commission (CCC), was inaugurated on January 18, 2008, and is based in Suriname. Established under article 171 of the Revised Treaty of Chaguaramas, it functions within the CARICOM Single Market and Economy and its mandate includes: (a) applying the rules of competition; (b) promoting and protecting competition; (c) co-ordinating the implementation of Competition Policy; (d) monitoring anti-competitive business conduct; (e) promoting the establishment of national Competition Institutions and harmonization of Competition Law; and (f) advising the Council for Trade and Economic Development on Competition and Consumer Protection policies.

The CCC comprises seven members (Commissioners), each of whom is contracted to serve a five (5) year term; with the possibility of renewal for another five (5) year term.

In 1993 Jamaica became the first CARICOM Member State to establish a national competition authority; and to date, the only other Member State that has a functioning competition authority is Barbados, whose Commission was established in 2001.

It is no surprise therefore, that two former Executive Directors of Jamaica's Fair Trading Commission (FTC) have ascended into prominent posts within the CCC. Ambassador A.B. Stewart Stephenson, who served the FTC from 1998 to 2000, is one of the first Commissioners of the CCC; and Mrs. Barbara Lee who served for seven and a half (7½) years between February 2001 and July 2008 is the first Executive Director, charged with the responsibility of building the foundation.

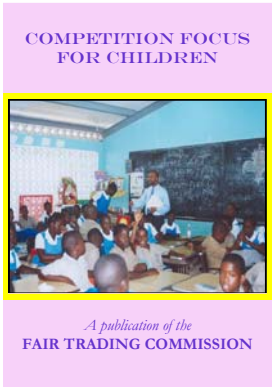
We wish Ambassador Stephenson and Mrs. Lee, themselves trail blazers in Competition Law enforcement within the region, all the best in their work at the CCC. We remain confident that the expertise which they possess will contribute immensely to the development of the CCC as a reputable institution within CARICOM.

Consent order endorsed on Court records

BASED ON THE terms of a Consent Order issued by the Supreme Court of Jamaica on November 19, 2008, Bent/Speare Entertainment Limited (Bent/Speare) agreed to pay the Fair Trading Commission's costs of $463,720.10 and to issue a public apology in the Daily Gleaner newspaper within sixty days of the date of the Order. The Consent Order was based on the terms of a Consent Agreement arrived at between the Fair Trading Commission (FTC) and Bent/Speare.

The matter arose in December 2006 when the FTC investigated two complaints against Bent/Speare. The allegations were that during December 2006, Bent/Speare scheduled a concert titled 'Welcome to Jamrock' for December 22, 2006 at the Constant Spring Football Field and advertised that pre-sold 'VIP tickets' were being sold for $3,000. In fact, the VIP tickets were being sold for $3,500.

Following its investigations, the FTC issued a directive that Bent/Speare sell pre-sold tickets at the price advertised. Bent/Speare complied with the directive. Recognising that harm had been done, however, the FTC filed suit in the Supreme Court pursuant to section 37 of the Fair Competition Act. The matter was settled with the Consent Order. The significance of the Consent Order is that it is directly enforceable by the Court, should there be a breach of its terms.



FTC educates children on competition law

IN KEEPING with one of its mandates to educate the general public in the area of competition law and policy, the Fair Trading Commission (FTC) has published its first booklet targeted specifically at children at the primary school level. The booklet, entitled *Competition Focus for Children,* comprises three stories and two puzzles, written by the Staff of the FTC.

The official launch is scheduled to place in January 2009, at the Offices of the FTC; and copies will be issued to all schools at the primary level. It is the hope of the FTC that this booklet will help to build in the children, a necessary awareness and appreciation of the benefits of competition to every consumer and to the economy.

Perhaps children can bring the adults with whom they interact, to that awareness and appreciation. Did the Good Book not tell us that a little child shall lead them?

MEET THE COMMISSIONERS

The Fair Trading Commission has five Commissioner: They are Dr. Derrick McKoy (Chairman), Mr. Jasper Burnett, C.D., Mrs. Dorothy Carter-Bradford, Mr. Robert Drummond and Dr. Peter-John Gordon.

Chairman's profile

DR. DERRICK MCKOY - Chairman

Dr. Derrick McKoy holds a doctorate in Business Administration from Nova Southeastern University, specialising in the New Public Management, an LL.M. in International and Comparative Law from University College London, the M.B.A. from Barry University, and the LL.B. from the University of the West Indies. He is also a graduate of the Norman Manley Law School. He was a Commonwealth Scholar; and in 1999 he participated in the US International Visitors Program on "*The role of Ethics in Business and Government.*" He has been nominated to Sigma Beta Delta International Honour Society.

He is the current Chairman of the Fair Trading Commission, and a former Commissioner from 1996 to 1998; and also serves as Chairman of the Jamaica Antidumping & Subsidies Commission. He was Contractor-General of Jamaica from 1998 to 2005 and has served on the Disciplinary Committee of the General Legal Council, Jamaica.

Dr. McKoy has consulted in Jamaica and the broader Caribbean in the areas of competition law and policy, utilities regulations, and public sector reform. He has lectured in the University of the West Indies on the LL.B. and LL.M. Programmes; and as an adjunct in the Mona School of Business, the Institute of International Relations, Trinidad, the Norman Manley Law School, Barry University's Andreas School of Business, and Nova Southeastern University's Huizenga School of Business.

He has participated in Penn State Management Development Courses, U.S. Coast Guard International Maritime Law Enforcement Training, and the Commonwealth Association of Corporate Governance's course for directors.

Dr. McKoy has published in the areas of constitutional law, labour law, competition law, public management and governance, and the law of computers. He is also a member of the Jamaican Bar and the Jamaica Institute of Management.

The FTC benefits from the

IN RECOGNITION of the need for continuous training and modern equipment to effectively carry out its function, the Fair Trading Commission (FTC) has sought, from time to time, financial assistance from various organizations. Assistance was received under the Private Sector Development Programme (PSDP), where funding was provided by the European Union and the Government of Jamaica.

The Project was aimed at strengthening the technical capacity of the FTC, and in effect, to allow the Staff and Commissioners to perform their functions more effectively.

It allowed us to:

- Publish the 2007 issue of the Commission's Annual Newsletter, ***Competition Matters***, which is distributed locally as well as internationally to other competition agencies and development-oriented organizations as well as to members of the Barbadian and Trinidadian Judiciary.
- Publish the newly revised brochure ***A Guide to Anticompetitive Practices*** which will be distributed at our public education activities over time and will also be made available at our Office.
- Publish several articles in our ***Competition Focus*** series in the Daily Gleaner.
- Create our first publication targeted at children. ***Competition Focus for Children,*** a booklet comprising three (3) stories and two puzzles.
- Air episodes in the ***Under the Law*** radio programme which allowed us to be 'heard' in a different medium and by a wider cross section of persons. It was done in a skit format involving two or three persons, using real life situations to highlight issues related to competition law and policy.
- Attend three (3) overseas seminars/conferences which addressed many of the problems faced by other jurisdictions, possible solutions for these problems as well as developments in the area of competition law and policy.
- Acquire several items of office equipment for use primarily in our advocacy activities.

It is without a doubt that the Staff and Commissioners benefited immensely from these workshops/conferences; and that this benefit is evident in the quality of our work. For example investigation techniques used, reports produced, information disseminated in education and awareness programmes with stakeholders and policy makers, and opinions provided to the business community and other Government Agencies, in particular.

The overall objective of acquiring the office equipment was to allow the Commission to perform some of its functions more efficiently and effectively, specifically to improve our advocacy capabilities. We have been able to conduct a greater number of public education activities on a consistent basis with improved and more reliable visual presentation equipment.

IADB-Funded Project concludes

THE PROJECT "*Strengthening the Jamaica Fair Trading Commission*", valued at US$439,300, commenced in April 2005 after the Fair Trading Commission (FTC), on behalf of the Government of Jamaica, and the Inter-American Development Bank (IADB) entered into formal arrangements. The project's goal was to enhance competition in the Jamaican economy; and its purposes were: (i) to strengthen the capacity of the FTC to be an effective enforcer of competition policy in Jamaica; and (ii) to better inform economic actors about the criteria and enforcement mechanisms of competition policy and the importance of competitive markets. It was designed to achieve the objectives through the improvement of the technical capacity and outreach efforts of the FTC. Accordingly, the areas covered fell within two main components: (i) Improvement of the efficiency and technical capabilities of the FTC; and (ii) Outreach programs.

The first component involved the hiring of consultants to provide training and guidance to the Staff in competition law and policy in general as well as in specialized competition matters, and to guide the process of amending the Fair Competition Act (FCA). It also included facilitating the exposure and participation of Staff to international conferences and workshops on competition law; improving the Commission's database and workflow management system; and acquiring journals and reference materials for the library. The second component was geared at executing several activities of the Commission's communication programme. Activities included publishing articles in a local newspaper, having information aired on radio programmes, the hosting of special interest workshops, lectures and seminars; as well as improving our website and purchasing teleconferencing equipment.

The benefits gained from the project were tremendous. These include:

- Improved techniques in conducting investigations and research methods as well as report writing;
- Creation of a more structured approach to assessing complaints and investigating allegations of anti-competitive practices;
- Exposure of the Staff to the latest developments in investigative techniques;
- Structured and effective advocacy programmes, in the area of competition law and policy;
- Exposure to the Staff to investigations in network industries;
- Addition of reference material to the library;
- Improvements to the network environment of the FTC's information technology system;
- Improvements to the reporting capabilities and user friendliness of the workflow management system;
- Improved methods of disseminating information through electronic based presentations;
- Airing of radio programmes have broadened our reach in terms of our target audience;
- Improvements to the website to make it more user friendly and to provide a wider breadth of information;
- Assistance with the re-drafting of the FCA;
- Improvements to the Commission's communication capabilities to allow for video conferencing; and
- Increased number of meetings with the business community and Government policy makers.

The Project allowed us the opportunity to improve on our knowledge base, to increase the breadth and scope of information residing within the Commission and in essence, to strengthen our technical capacity to conduct investigations and research. Much of this 'new' information has already been utilized in specific matters being faced by the Commission.

FTC/OUR workshop for members of the judiciary

ON MARCH 14th and 15th, 2008, the Fair Trading Commission (FTC) hosted its fourth Workshop for members of the Judiciary. It was held jointly with the Office of Utilities Regulation (OUR). The theme of the Workshop was "Competition Issues in the Telecommunications Sector"; and several relevant aspects of the subject area were discussed.

The Workshop began with a presentation from Dr. John Hilke, an Economics Consultant, who laid the foundation for the Workshop by describing the relevant and applicable economic concepts. This was followed by a presentation by Mr. Curtis Robinson, Chief, Numbering Administration & Technical Support of the OUR, who outlined the fundamentals of interconnection, different types of networks, convergence issues and technological shifts. Mr. Geoffrey Myers, Director of Competition Economics of the Office of Communication, United Kingdom, discussed the issues surrounding dominance in the sector as well as common disputes, that is, disputes which judges are likely to encounter. Like Dr. Hilke, he too closed his part of the Workshop programme by conducting a simulation exercise with the participants, during which he shared his personal experiences as an Economics witness in Court matters.

In summary the Workshop provided a tremendous opportunity for participants not only to understand the concepts better, but also to be able to apply the information in a practical way and to examine how the Court may apply the concepts to real situations. It also provided participants with guidance on perspectives which would allow them to make decisions.

Nineteen (19) persons attended – eleven (11) Jamaican Judges, two (2) Barbadian Judges, one from Trinidad & Tobago, three (3) from the Caribbean Court of Justice, and two (2) members of the local Telecommunications Appeals Tribunal. This was the second occasion on which colleagues from the region attended a Workshop for the Judiciary and we will continue to facilitate and encourage the participation of our CARICOM counterparts.

In 2002 the FTC committed itself to facilitating and coordinating training programmes for the Judiciary on a regular basis, and to date four (4) such Workshops have been hosted, all of which were made possible through financial assistance from either the United States Agency for International Development (USAID) or the Inter-American Development Bank (IADB). This Workshop, as well as the previous one, was funded by an IADB facility aimed at building the technical capacity of the FTC as well as increasing the awareness and knowledge of key participants in Competition enforcement.

The FTC continues to work towards securing the financial resources which will enable it to continue with the programme, as there is no doubt that the economic benefits that are to be realized are real.

Ninth Annual
Shirley Playfair Lecture

THE NINTH Lecture in the Shirley Playfair Lecture Series was presented by Mr. Joseph G. Krauss, attorney-at-law, of the US Law firm Hogan & Hartson, on Wednesday, September 10, 2008, at the Knutsford Court Hotel.

Mr. Krauss, an antitrust practitioner with vast experience in merger and acquisition counseling and litigation in all industries, served the United States Federal Trade Commission for eleven (11) years and was Assistant Director of the Premerger Notification Office in the Bureau of Competition, when he left the Commission in 1999. His presentation entitled "Adopting Merger Control Laws: Lessons Learned of Patience and Humility" followed opening remarks from the Hon. Michael Stern, Minister of State in the Ministry of Industry Investment & Commerce.

Mr. Joseph Krauss, *Presenter*

The lecture outlined the many important factors that ought to be given due consideration when deciding how best to implement merger review laws in a developing country such as Jamaica. Mr. Krauss discussed the benefits of Merger Control or Merger Review; the relevance of Merger Control/Review laws in Smaller Economies; the costs associated with having a Merger Review regime; as well as different types of Merger Review systems. Throughout the discussion he underscored the fact that, while we deliberate as to whether or not we ought to adopt Merger Review provisions in our statute, there is much information available to us – information such as the mistakes and difficulties encountered by other countries during their process as well as best practices and procedures that have been found to be most successful and least likely to impose unnecessary burdens on the private sector. In closing he warned that we should "avoid adopting laws that solve only short term problems to the detriment of long-term, sustainable policies that encourage business transactions that result in efficiencies, increased innovation, and societal advances."

From left to right: Mr. Reginald Budhan, *Permanent Secretary* - Ministry of Industry, Investment & Commerce; Mr. Krauss, *Presenter*; Dr. Derrick McKoy, *Chairman* - Fair Trading Commission; and the Honourable Michael Stern, *Minister of State* - Ministry of Industry, Investment & Commerce.

The discussion which followed the presentation centered around a few of the most recent mergers which have taken place within several sectors of the Jamaican market place, the cost to business entities of filing merger notifications, and the cost to the FTC of conducting the relevant research. Several persons from the business community and Government Ministries and Agencies had their issues addressed by both Mr. Krauss and the Chairman of the FTC, Dr. Derrick McKoy, during the hour long session.

The audience included representatives of various interest groups and the Jamaican Bar, the Judiciary, and academia.

The Lecture was publicized by way of newspaper advertisements and radio and television interviews as well as radio advertisements and episodes in the *Under The Law* radio series.

feature on The Consumer Affairs Commission: An advocate for all Jamaicans

THE CONSUMER AFFAIRS COMMISSION (CAC) derives it authority from the Consumer Protection Act 2005 which became effective June 1, 2005. Part II Sections 5 to17 of the Act sets out how the CAC should conduct its affairs and the provision that enables the Agency to act on behalf of the consumer.

Role & Function

At the policy level, the Commission ensures that its Education Programme synchronizes with the 1985 United Nations Guidelines on Consumer Protection – to which Jamaica is signatory.

Our function involves a three-pronged approach lead by Consumer Education, which is underpinned by solid Research and thirdly Complaints Resolution which stands at an 88 to 93 percent success rate for over three years.

As mandated by the Honourable Minister Karl Samuda, our expanded role is evolving as a Research Centre for the provision of data collection and analysis of industry practices aimed at influencing policy making decisions.

Significant Milestones

During the Years 2005 to 2008

The enactment of the Consumer Protection Act in June 2005.

- Workshops aimed at educating the retail and business communities about the Consumer Protection Act (2005), and informing the Commission about the challenges the CPA would pose for the over 250 business leaders and frontline staff who attended.
- CPA Education Campaign increased media opportunities by over 50 percent.
- Completed the manual for the Disaster Management Plan for the Distributive Trade.
- Launched the Consumer Club in Schools in eight rural and urban schools.
- Marked World Consumer Rights Day 2007 under the theme ***Motor Vehicle Purchase Pitfalls*** which has accelerated both policy and industry trade practices towards positive changes.

Year to date April 1 to September 30, 2008

The Agency engaged in face-to-face sensitisation of 23,510 consumers at 92 events which included exhibitions, presentations and health fairs among other activities.

- Consumer Awareness was complimented by the partnerships between key media personnel disseminating critical information as a public service to the consumer exceeding 200 opportunities on radio, television, internet and in print.
- Other opportunities to serve consumers included requests via e-mail from students, researchers, consumers from Brazil, Sweden, Nigeria, Caricom, and the U.S. in addition to over 4,000 visitors to our website www.consumeraffairsjamaica.gov.jm.
- The CAC worked closely with the Fair Trading Commission, Bureau of Standard Jamaica and the Office of Utilities Regulation particularly complaint resolution. Members of the CAC's team also serve on technical committees involved in the development and or review of regulation and

Feature contributed by the Consumer Affairs Commission, an agency of the Ministry of Industry, Investment & Commerce.

standards of various industries.

- Between April 01 and September 30, 2008 the CAC resolved 788 complaints of the 897 handled. The expeditious settlement of these claims resulted in consumers receiving $8.36 Million in refunds and compensation.
- Monthly and weekly surveys of Petrol, Grocery and Household Products provide consumers with the power to make informed choices about availability and price. A survey of primary and secondary level textbooks is conducted annually. During the hurricane season, June to November, information on hardware items and other critical items are also monitored.
- Routine surveys are also undertaken at the request of the Minister of Industry, Investment & Commerce, Honourable Karl Samuda on the market industry practices such as bank rates or availability and price of items such as cement, chicken, meat, rice, etc to guide policy or to understand the rationale for industry changes.
- The CAC is the Secretariat of the Distributive Trade, which is convened monthly and is chaired by the Chairman, Minister of State in the Ministry of Industry Investment & Commerce, Honourable Michael Stern. The purpose is to ascertain the level of food security (availability and price), and resolve relating issues that impact transportation (air, land and sea ports), customs and tariffs, road networks, storage and distribution.

Our Team

The Chief Executive Officer, Mrs. Dolsie Allen has been at the helm for the past five years with a team comprising 39 permanent members in addition to a pool of six part-time survey officers. The team is deployed from one of six Units, namely Field Operations, Research, Information/Communication, Finance/Administration, Legal Services and the Information & Technology.

It is our intention to continue serving Jamaica's consumers with excellence, diligence and commitment towards engendering an educated, forthright and responsible population of consumers.

VOX POP

The Fair Trading Commission carried out a Vox Pop exercise in October 2008 to ascertain the public's view on the application of competition law to energy providers. The following was posed to the public:

> *"Alternative energy is becoming an 'electrifying' topic in Jamaica. Do you believe that our competition laws should apply to energy providers? Why?"*

A total of 37 persons responded. The sample is not representative and the responses should not, therefore, be considered to reflect the views of the public in general.

All 37 respondents believe that our competition laws should apply to energy providers. Their reasons for holding this belief are summarized in the table below.

Table: *Reasons for believing that competition laws should apply to energy providers*

Reason	Number of Respondents
Competition will lead to less exploitation of consumers	14 (38%)
Competition will lead to lower prices	8 (22%)
There is a need to have more than one energy providers	6 (16%)
Competition will lead to increase service quality	2 (5%)
Other	7 (19%)
Total	**37 (100%)**

Selected Answers:

Yes. To facilitate more efficient production and best price resulting from competition.

Yes. All players in the economy must be monitored or governed by laws to prevent exploitation of the consumer. If this is not done self-regulating entities will utilize various strategies to maximize profits at the expense of the consumer and the wider society.

Yes. I think that competition laws should be applied to all suppliers of goods and services, including energy providers. Energy is a critical input in the cost of production and therefore a competitive energy sector should deliver lower competitive prices to the productive sectors and therefore lower overall prices.

The Fair Competition Act: Answering the jurisdiction question

By Stacey-Ann Soltau-Robinson

THE FAIR COMPETITION ACT (the "FTC"), much like the ethos of the Jamaican people: "Out of many, one people", mirrors provisions contained in the competition legislation of several other jurisdictions such as Canada and Australia, or modified versions thereof. These provisions have culminated into a statute pulsating with a necessarily distinct legal jurisprudential underpinning. To further "sweeten" the melting point, the area of competition law may be described as a marriage between law and economics set against a backdrop of governmental policy within the context of an unavoidably dynamic global and local economy. It is, therefore, important to highlight the jurisdictional parameters of the legislation which forms the concentration of this paper.

The Green Paper on the Proposals for a "Competition Act" (at page 3) identified as two (2) of the objectives of Jamaican competition policy and legislation:-

a. to provide for competition, rivalry in markets, and to secure economic efficiency in trade and commerce; and
b. to promote consumer welfare and to protect consumer interest.

It is suggested that these two (2) objectives converge into a singular theme: To support a market driven economy in which competitors have, relative to each other, a fair opportunity to engage therein, according to their particular business activity, to the benefit of consumers, the notion of "fair" being necessarily fixed by the rules prescribed by the Act and relevant caselaw.

The monitoring of those conducting business in Jamaica by the Fair Trading Commission (the "FTC") to ensure "fairness" will become even more important as the Economic Partnership Agreement, itself containing domestic competition law-related mandates (see Title IV - Trade-related Issues, Chapter One – Competition), takes effect resulting, as is expected, in an increase in business activities being conducted in Jamaica and/or more intense rivalry among local businesses, particularly in light of the fact that s. 2 (1) of the FCA defines "business" as including the export of goods from Jamaica.

Domestic competition law is concerned with all business entities operating within Jamaica. S. 5 (1) (a) of the FCA states that one of the functions of the FTC is "…to carry out…such investigations or inquiries in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act…". The Act defines an "enterprise" as "any person who carries on business in Jamaica, but does not include a person who (a) works under a contract of employment; or (b) holds office as director or secretary of a company and in either case is acting in that capacity" and "business" as "any activity that is carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied including the export of goods from Jamaica.": s. 2(1). This means that all commercial entities, such as commercial banks and insurance and telecommunication companies, are, save for the exceptions listed in s. 3, without more, subject to the rules set out in the FCA.

It is also noteworthy that the FTC may have jurisdiction concurrently with other government agencies such as the Office of Utilities Regulation (the "OUR") and the Financial Services Commission (the "FSC") in relation the same set of facts. This is, for instance, evident from the Telecommunications Act which has as one of its objectives the promotion and protection of the interest of the public by "promoting fair and open competition in the provision of specified services and telecommunications equipment": s. 3 (a) (i). While the OUR regulates the overall telecommunications industry, s. 5 of the Telecommunication Act states that, "Where after consultation with the Fair Trading Commission, the [OUR] determines that a matter or any aspect thereof relating to the provision of specified services (a) is of substantial competitive significance to the provision of specified services; and (b) falls within the functions of the Fair Trading Commission under the Fair Competition Act, the [OUR] shall refer the matter to the Fair Trading Commission". S. 73(2) of the Telecommunications Act further states that "Except as provided in subsection (1) nothing in this Act shall be

Mrs. Soltau-Robinson is a Legal Officer at the Fair Trading Commission.

construed as affecting the right of any person to refer a matter to the Fair Trading Commission in accordance with the Fair Competition Act." S. 73(1) refers to agreements between the Minister and a universal service provider in relation to a universal service obligation or any agreement approved by the OUR after consultation with the FTC.

While, for instance, neither the Financial Services Commission Act of 2001 which established the FSC nor the Insurance Act of 2001 which is administered by the FSC refers to the FCA or the FTC in relation to companies carrying on insurance business, the FTC may have concurrent jurisdiction in relation to the same set of facts. The function of the FSC as stated in s. 6 of Financial Services Commission Act is to protect customers of financial services which includes promoting the modernization of financial services (which includes services provided or offered in connection with insurance) with a view to the adoption and maintenance of international standards of competence, efficiency and competitiveness." However, the distinction between the functions of the FSC and the FTC is evident through the appreciation that the FSC does not have the jurisdiction to proceed against a company carrying on insurance business in Jamaica in relation to an alleged anti-competitive act as described in the FCA but proceeds according to the own legislative construct.

S. 5(1) (a) of the FCA provides that an initiative or complaint based investigation or inquiry must refer to "the conduct of business *in Jamaica*". While one may more readily conclude that this would include business transactions which proceed entirely within the geographical confines of Jamaica, the issue becomes more involved when considering whether cross-jurisdictional transactions in which a part of a business transaction takes place in Jamaica, other than exports which the definition of "business" in the legislation specifically includes, are covered by the FCA. While the FCA does not explicitly indicate whether these transactions fall within its ambit, an examination of the text of the legislation is, it is submitted, useful.

"Business" is defined in s. 2 (1) of the FCA as "any activity that is carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied…". The FCA would, therefore, apply to activities carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied even though these activities may be a part of a cross jurisdictional transaction ***as long as, independently considered, these activities may be described as the conduct of business in Jamaica***.

There has also been some discussion as to whether agreements that form the vehicles for mergers or acquisitions are included under the FCA. It is suggested that the text of the FCA, and notably ss. 17 and 18 which deal specifically with the provisions of agreements do not exclude acquisitions or mergers from the description of "the conduct of business in Jamaica" as set out in section 5 (1) (a). It is also important to note that the fact that a transaction may be defined as a merger or an acquisition without more does not constitute a "defence" under s. 17 (4).

A review of The Green Paper on the Proposals for a "Competition Act" on "Mergers and Dominant Market Positions" (pages 7-9) would seem to suggest that what was intended for inclusion, and ultimately excluded, was the examination by the Commission of a merger or an acquisition to determine whether, *because it was a merger or acquisition*, it should be monitored and prohibited on the basis that to permit the transaction would be "…to create or enhance market power where such power operates against consumer welfare" (page 7), and that "A transaction would be prohibited only upon a finding that it is likely to create or strengthen a dominant market position" (page 9). An examination of the FCA, and ss. 19-21 in particular which speaks to dominance, suggests that the legislation does not stipulate that dominance and market power are not permissible in the conduct of business in Jamaica. Instead, s. 17 refers to the individual provisions of any agreement (whether the transaction can be categorized as an acquisition or merger or not) which have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market. This, it is submitted, is perfectly consistent with the position not to include in the regime ultimately adopted the prohibition of mergers and acquisitions because of the resultant dominant market position potentially created.

It is submitted that the FCA is one of the most useful pieces of commercial legislation in Jamaica as it serves as a construct for monitoring the conduct of business in Jamaica so as to ensure that all enterprises engage in "healthy" competition according to the certainty and clarity of the rules set out in the FCA. It is hoped that this initial discussion concerning the jurisdictional ambit of the FCA, will, in some measure, serve to answer the Jurisdiction Question.■

State aid and competition law:

By Kevin Harriott

Summary

THE PRIMARY objective of competition law enforcement is the protection and promotion of the competitive process as the primary means through which economic activities are directed within defined boundaries. Competition is desirable because no other means of organizing economic activities have been found to generate a greater level of public benefits. Competition law enforcers should be concerned with state aid because such intervention interferes with the private incentives of consumers and or suppliers to participate in the market *and therefore distorts the signals emitted by market prices.* The main conclusion of this paper is that while there may be many worthy non-efficiency goals that the Government may pursue, it is generally ill-advised for Government to intervene in the market in order to achieve them.

Introduction

The primary objective of competition law enforcement is the protection and promotion of the competitive process as the primary means through which economic activities are directed within defined boundaries. Competition is desirable because no other means of organizing economic activities have been found to generate a greater level of public benefits. Under a competitively organized market, key economic decisions are decentralized so that no single participant has any undue influence on market outcomes. The result of the competitive process is that the scarce productive resources of the economy are directed to industries in which they will best serve in the interests of the broader society. In contrast, under the less desirable centralized (command) economy, key economic decisions are made by the Government and generally results in a situation in which productive resources are (mis)directed for the benefit of only a narrow group of individuals, to the detriment of the interests of the broader society.

Information, Signals, Incentives and Efficiencies

The main distinction between a command economy and a market economy is the way in which decisions are made. Under a command economy, key decisions are made by a central authority, customarily the State. Under a market economy, however, such decisions are decentralized and determined through the interaction of consumers and suppliers. Suppliers determine, among other things, which products (i.e. goods and services) to offer, and how to produce them whilst consumers determine, among other things, which products they consume and how many units of each product to purchase.

Leading economic indicators such as per capita *Gross Domestic Product (GDP)* demonstrate that traditionally, countries organised by market economies have outperformed countries organised by command-style economies. The main reason for the subpar performance of command economies is the large volume of information that the State needs to gather and interpret to make key economic decisions; in market economies, however, the market-determined relative price of products conveys all the information needed by market participants to make economic decisions.

Competitive markets are considered the 'best' form of market structure in the sense that no other structure generates a greater level of public benefit. Theoretical research and empirical studies consistently vindicate economists' preference for competition as the means of organizing economic activities; the primary reason being that competition generally provides the *proper incentives* for suppliers to operate efficiently in that consumers will not purchase products from inefficient suppliers. Consumers benefit because the efficient use of productive resources generally leads to: lower prices; an increase in the pace at which new products and services are introduced; or an expansion of the varieties of existing products and services, relative to market conditions in the absence of competition.

An efficient use of productive resources requires that society allocates fewer resources to those products it produces least efficiently. Under market economies, changes in the relative price of products efficiently direct the allocation of society's productive resources

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An economics perspective

across various industries. For example, in a market economy in which cane farmers become less efficient at producing sugar, then the sugar market would be in disarray in the sense that the quantities of sugar that farmers would be willing to supply at the existing market determined price would be less than the quantity of sugar that consumers would demand at that price.

When a government intervenes because of market failure, it does so to correct the market's inefficient allocation of resources. When a government intervenes because of inequity, it does so in order to redistribute the benefits generated by the market.

The market would then trigger an adjustment process to restore order by increasing the price of sugar. The price increase will signal to consumers and suppliers, the society's inefficiency in producing sugar. This higher price increase will simultaneously (i) encourage consumers to reduce their demand for sugar and (ii) encourage cane producers to increase the quantity of sugar supplied to the market. The adjustment process will continue until the quantity of sugar demanded is equal to the quantity of sugar supplied. At the end of the process, the higher price of sugar will result in an efficient reallocation of resources so that fewer resources would then be allocated to the production of sugar.

State Aid and Competition Law

Notwithstanding the discussion above, there are two instances when the intervention of the Government is justified in the sense that said intervention could inure to the benefit of the public: (i) *market failure* and (ii) inequity. When a government intervenes because of market failure, it does so to correct the market's inefficient allocation of resources. When a government intervenes because of inequity, it does so in order to redistribute the benefits generated by the market.

State aid is one way in which a Government intervenes in decentralized markets. In general, state aid refers to any advantage conveyed by the State to a particular domestic industry or business. T*ax holidays* offered to business investors in the hotel sector is an example of state aid. Competition law enforcers should be concerned with state aid because such intervention interferes with the private incentives of consumers and or suppliers to participate in the market *and therefore distorts the signals emitted by market prices in the economy*. Whether and the extent to which state aid affects competition depends on the nature of the intervention. Whenever the only effect of state aid is to correct market failures, then such intervention would not be in conflict with competition law as it would in fact lead to a more efficient market. Whenever state aid is designed to correct perceived inequities, however, then the objective of the government's intervention *may* conflict with the primary objective of competition law.

State aid as a means of correcting market failure

In general, the competitive process is one way in which the productive resources are allocated efficiently throughout the economy. The market, however, yields an inefficient allocation whenever *externalities* are present; that is, when there is a divergence between the private and social incentives for participating in the market. Externalities occur whenever someone is affected by any economic arrangement that he was not directly involved with. An example of a positive externality is observed when individuals 'consume' education. Even uneducated individuals benefit from this consumption in the sense that the educated persons will be more productive workers; are more likely to invent better products; will help to elect better political leaders, etc. The social benefit of acquiring education is, therefore, the private benefit to educated individuals in addition to the benefit to uneducated

individuals. Left by itself, the market would result in too few educated persons. To correct this failure, the Government could offer to pay a stipend to persons who are enrolled in suitable educational institutions; this would provide the incentives for additional persons to get educated.

State aid as a means of redistributing wealth

While market economies perform well at generating relatively large public benefits, they do not always do as well in equitably distributing the benefits among consumers and suppliers. When the Government believes that either suppliers or consumers are receiving less than their "fair" share of the benefits, it might be tempted to use state aid as a means of addressing the perceived inequity. For example, if government believes that dairy farmers are making less than their "fair" share of the profits generated by the dairy industry, it may seek to "correct" this inequity by establishing price floors for dairy milk or, alternatively, subsidise the costs to farmers of producing milk.

Achieving an "equitable" distribution of income is a worthy goal of any Government. Great care must be observed, however, whenever state aid is being used to achieve goals of social equity. The primary reason is that there is often a trade-off between achieving goals of efficiency and achieving goals of equity. That is, government intervention aimed at achieving more equitable distributions often results in less efficient markets. Similarly, attaining greater levels of efficiencies in a market may lead to a less equitable distribution of the resultant benefits.

Implications for National and Regional Competition Law Enforcement

The main reason that positive externalities result in market failure is that the private incentives to participate in the market are less than the social incentives to do so. Government intervention, through state aid, could prove beneficial as it would realign the private and social benefits of those who participate in the market. It must be noted, however, that while market failure is a necessary precondition for state intervention, it is not always a sufficient one. This as the Government's intervention in one market may have (unintended) effects on competition in other markets.

Consider, for example, a shoe market in which two suppliers are aggressively competing with each other. While the suppliers produce identical products, they differ in the means by which their products are manufactured. One supplier, who uses a labor-intensive production process, relies more heavily on trained (educated) laborers and less so on capital equipment. In contrast, the other supplier, who uses a capital-intensive production process, relies more heavily on capital equipment and less so on educated laborers.

Under the conditions described above, Government's intervention (via state aid) in the education market will affect competition in the shoe market. Specifically, state aid aimed at correcting market failure in the education market will invariably lead to an increase in the number of educated persons and a consequent reduction in the wages paid to educated worker. State aid to persons consuming education would therefore, by lowering production costs, also convey an advantage to the supplier who uses the labor-intensive production process. If this cost reduction is significant, the capital intensive supplier would be forced to exit the shoe market; after which the remaining supplier would charge the monopoly price. In order to assess the net effect of state aid, therefore, competition law enforcement officers would have to balance the benefits of having more educated workers against the harm to competition and consumers in the market for shoes.

Conclusion

State aid should fall within the purview of competition law because of its potential for altering the private incentives of suppliers, among others, to participate (hence compete) in the market. The need for state aid to be within the purview of national and regional competition law is even more poignant when one considers its potential for cross-border effects in a regional market. That is, the adverse effect of state aid in one jurisdiction may manifest only in another jurisdiction. The effect of state aid on the efficiency of market economies can be determined only after an examination of the market and the nature of the aid. State aid should be encouraged only in markets in which positive externalities are present; as intervention in the absence of externalities will diminish the ability of market prices to signal the most efficient use of society's scarce productive resources. The main conclusion of this paper is that while there may be many worthy non-efficiency goals Government may pursue, it is generally ill-advised for Government to intervene in the market in order to achieve them.■

Exploring the interface between trade policy and competition law: Conflict or convergence?

By Delroy Beckford

TRADE POLICY consists of an array of ideas primarily about market access and development that are already implemented through treaties or domestic legislation or are currently being negotiated with a view to their prominence in such norm creating instruments. Increasingly, trade policy has lost its hitherto domestic focus since the norms reflected in domestic trade policy are often the result of those agreed upon within the multilateral or regional context. Consequently, it is less apt to speak of domestic trade policy (if by that one means country specific norms) as opposed to trade policy in general that includes multilateral norms that are given effect within a domestic legal order. In this article we treat trade policy as those norms related to market access and development that are derived from the multilateral context.

By contrast, competition law is not yet part of the multilateral norm-creating framework given the absence of an agreement on competition law and policy within the World Trade Organisation (WTO) - the body that has been given the mandate to clarify multilateral trading rules. Whereas trade policy as narrowly defined above is concerned with state conduct, competition law is primarily concerned with private conduct as in the removal of private constraints that affect the operation of a market.

Any discussion about whether trade policy conflicts with competition law must at the outset recognize that competition law is often conceptualized as part of trade policy even in the way in which I have narrowly defined it. Market access, it is often said, will be enhanced by the removal of private restraints, and some conceptions of development regard the implementation of competition law as being integral to this process. In other words, trade policy is not only about state conduct, but *how* the state regulates private conduct; and development is not only about GNI per capita, often the result of the profits of national champions directed by an industrial policy, but also about *how* wealth is shared or distributed among a country's inhabitants. The latter view commends itself to the importance of competition law in the development process because much of competition law as reflected in concepts such as abuse of dominance, price fixing etc. is about lessening the illegitimate transfer of resources from consumers to producers.

Yet, despite this view, competition law often presents a conflict with trade policy goals. Trade policy adopts as its primary goal the non-discriminatory access to foreign markets while competition law's primary goal is the promotion of consumer or total welfare. In short, the interest of the producer is the domain of trade policy, while consumer interests are the domain of competition law.

Market access enhanced by the reduction of tariff barriers is often seen as reducing, if not eliminating the role for domestic competition law because increased market access reduces the market power of domestic firms. This view of course obscures the potential power and clout of foreign firms that may replace domestic monopolies.

Some conceptions of development are often at odds with the maintenance of an effective regime of competition law. Special and differential treatment for developing countries is often pursued as a development oriented trade policy whereby relaxation of core multilateral trading rules such as most favoured nation treatment or national treatment is tolerated for some transitional period after which fidelity to these norms is expected as a precondition for full integration into the multilateral trading system.

As a trade policy tool special and differential treatment is reflected in many of the WTO annexed agreements. A prominent feature of special and

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differential treatment is the permission given to developing countries to apply state subsidies as exception to the WTO Agreement on Subsidies and Countervailing Duty measures. Thus, in accordance with section 27 of the SCM Agreement, developing countries can maintain subsidies that existed before the WTO Agreement came into force, although these may not be increased and are subject to a phasing out timetable. The provision of subsidies affects the competitive advantage of firms in particular markets, although state conduct, to the extent that the state functions as a regulator or as setting government policy, and not as a market participant, is often not cognizable under many competition law statutes.

And, for some scholars competition law is not a necessary condition for development. Competition laws in developed countries were put in place when they were already at an advanced stage of development and were not necessarily geared towards promoting efficiency, but served other social and political objectives.

Some countries have recognized that competition law must at times be subordinated to robust trade policy that puts a high premium on the observance of reciprocity as an overarching principle. As one example, the United States (US), through its *Webb-Pomerene Act of 1918*, buttressed by its *Export Trading Company Act of 1982,* permits export cartels to the extent that there is no spill over effect of the cartel activity within the US. This is necessary, the argument goes, to counter foreign cartels because of inadequate or no restrictions on export activities of foreign cartels, and to shore up US companies against the effects of monopolies and state subsidies in markets being pursued by US companies.

Similarly, although the European Union (EU) has no similar piece of legislation encouraging export cartel exemption, cartel activity designed purely for an export market outside of the Community, and without the possibility of spill over effects within the Community, is not cognizable under EC competition law.

Economic development is often seen as requiring a relaxation of competition laws whereby industrial policy should be given precedence- an industrial policy that focuses on redirecting resources into export sectors. If economic development is regarded as a process of moving from primary production, then to more value added productive activity as reflected in industrial production, and finally, at least for the current classificatory phase of productive activity, to a more complex-knowledge intensive industrial production, a *sine qua non* for moving through the various stages must certainly be the use of technology in product design and production processes that are in use elsewhere, mostly in developed countries.

This relaxation is recognized even within the regime of competition law enforcement regarding the appropriate policy space for the interaction of competition law and some indicia of development. Innovation promoted through intellectual property rights is seen as necessary for development and competition law enforcement authorities have recognized the need to balance the competing goals of protecting against abuse of monopoly power that may arise from IP rights while at the same time ensuring that the exercise of IP rights is done in a pro-competitive manner. Hitherto rigid rules as the Nine No-No's in the US or the original technology transfer Block Exemption in the EU have been abandoned; and so too the blanket per se ban on resale price maintenance.

To the extent that competition law is often used as a market opening device, there may be some basis for relaxation of competition law to meet this development objective in view of the asymmetries in enforcement between developing and developed countries as regards firms with global reach from either set of countries. Cooperation agreements are often promoted as a means of resolving transnational anti-competitive conduct. But these are limited by rules prohibiting sharing of confidential information or there may be lack of agreement on what is anti-competitive (whether a particular vertical restraint should be subject to per se or rule of reason) that eliminates the incentive to cooperate in a particular case. Ceding jurisdiction to another country to discipline anti-competitive conduct, whether this is done under negative or positive comity rules, may often be a bitter pill to swallow, particularly for developing countries that may find themselves the ones to be making this move given their relative inexperience in the implementation and practice of competition law.

The recent practice of developing countries in accepting competition law provisions in Regional Trade Agreements (RTA) suggests the force of this argument (i.e. the resistance to competition law as a market access enhancing tool) is severely undercut. Although this development is not necessarily to be treated as indicative of developing countries' more receptive stance on global competition rules, it does demonstrate why the gap hitherto championed has narrowed significantly. We may not necessarily speak

of global competition norms in the sense of a set of binding norms, but rather a working blue print of best practices that may in time be elevated to binding norms in much the same way as trade rules have become binding norms subject to dispute resolution.

More may be noted about the synergies that abound between trade policy and competition law. Several of the WTO agreements contain competition related provisions. The Agreement on Technical Barriers to Trade contains rules to ensure that the adoption and application of technical regulations, standards, and conformity assessment procedures by non-governmental bodies, do not discriminate against foreign products and that they are not more trade restrictive than necessary. Therefore, WTO Members may not encourage or require private standard setting bodies (e.g. trade associations) that perform product tests or issue certificates that products meet technical regulations and standards to discriminate against foreign producers. That standard setting bodies conducted by trade associations may discriminate against non-members' products has been recognized in some jurisdictions as cognizable under competition law principles, and particularly so where this amounts to a restriction or denial of access to conformity assessment procedures deemed essential to carry on business.

The Agreement on Safeguards prohibits Member states from encouraging or supporting non-governmental measures of private enterprises that are equivalent to voluntary export restraints. The General Agreement on Trade in Services (GATS) contains rules to ensure that monopolies and exclusive service suppliers do not nullify and impair obligations under GATS. Article VIII:2 of GATS, for example, provides that where a WTO Member's monopoly supplier competes in the supply of a service outside of its monopoly rights, and which is the subject of specific commitments, the WTO Member is to ensure that there is no abuse of that monopoly position. At the very least, this provision requires that WTO Members put competition laws in place to address these concerns in order to avoid the costly procedure of dispute settlement at the multilateral level where there is an abuse of a monopoly position.

The TRIPS Agreement also allows the application of competition law to discipline abuse of intellectual property rights, including compulsory licensing. Other examples of the convergence of trade policy and competition law include the Agreement on Government Procurement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Trade Related Aspects of Investment Measures.

Notwithstanding these instances of convergence there is yet to be any clearly articulated position on *how* competition law principles are to be applied to resolve disputes under these provisions. In particular, it is not clear how disputes would be resolved where there are inter-jurisdictional differences in the classification of prohibitions, as for example whether an offence is to be treated as per se or rule of reason.

Would an exclusive distributorship agreement between a monopoly service supplier (outside the area of its monopoly rights) and another party violate Article VIII of GATS? In the same scenario, would a retail price maintenance arrangement be subject to challenge?

At the time of writing, it seems that only prohibitions on which there is widespread agreement on classification would permit the application of some semblance of competition law principles.

Concluding Remarks

It cannot be gainsaid that there is some conflict between trade policy and competition law, at least with respect to the different goals pursued, the one producer welfare, the other consumer welfare. However, it is important not to exaggerate this conflict because the pursuit of trade policy does not entail the relaxation of competition law. Many countries that are members of the WTO or have signed RTAs maintain a domestic competition law regime. The incidence of convergence mentioned above (competition law provisions in RTAs and some of the WTO Agreements) suggests that there may well be a false conflict.

The convergence identified is doubtless in its incipient stages. There is yet to be a common set of norms to bridge inter-jurisdictional differences in the classification of prohibitions, and to address effectively the impact of conduct in one country that originates from another.

A common competition regime that supports trade policy is far from being realized, not least because that would entail changing some of the current trade rules on specific disciplines (e.g. rules on anti-dumping and subsidies) that countries are not yet prepared to forego. It remains to be seen whether the incipient convergence will deepen as we move beyond the current pace of globalization.■

When signals collide: The case of Jamaica's unregistered financial organisations

PRUDENT AND successful investors examine a range of information, such as financial and economic data, the general mood and expectations of other investors as well as their experience and opinions. Like traffic lights, these bits of information serve as signals that can exert influence on investors as they decide what their next course of action will be. However, there are times when these signals collide as the investors cannot perceive a clear message as they are beset by conflicting messages about the economy, the markets, and their own investment choices.

Jamaica's recent experience with at least thirty home grown unregistered investment schemes or unregistered financial organisations ("UFOs") offering returns of 120% per annum and above, can be described as a period in the country's financial history where the signals have collided. On one hand, the signals indicated that the returns from the UFOs were too good to be true and therefore they should be avoided by prudent investors. The Financial Services Commission ("FSC"), the securities regulator, cautioned the public against investing in UFOs through its "Think and Check Before You Invest" themed public education campaign. Other responsible persons and agencies also warned the public of the dangers in investing in UFOs. But there were conflicting signals. The question was whether the sources of the conflicting signals were reliable.

What were these conflicting signals? There were promises of great yields and stories about investors who had applied these very high returns to improve their lifestyles with the acquisition of high-priced consumer goods to substantiate their claims that the UFOs were helping poor people. These stories were widely disseminated along with myths and rumors which ultimately influenced many individuals from various backgrounds to invest millions of dollars in these schemes. These myths - some of which extolled the wealth making genius of the operators of the UFOs - were dispersed by the scheme operators and loyal clients who were blinded by the prospect of becoming wealthy through extraordinarily high returns.

We will seek to expose and explode in this article some of the myths spread by the UFOs.

Myth#1: Not Subject to Regulation

Amongst the first set of myths that was spread by the UFOs was that these unregistered entities did not fall within the regulatory framework. There were three main arguments put forward in support of this position as examined below.

i. Dealing in Securities

While the organisers of these schemes denied that they were dealing in securities and thus they were not subject to regulation, the FSC determined that the UFOs were dealing in securities as defined by the Jamaican Securities Act 2001, specifically under the provisions of the definition of "securities" as

> (b) **debentures**, stocks, shares, **bonds or promissory notes** issued or proposed to be issued by a company or unincorporated body; (e) **certificates of interest or participation in any profit sharing agreement**; and (f)…**investment contracts**….

Article contributed by the Financial Services Commission.

Based on the definition of securities and drawing on the case law of other jurisdictions, such as the United States (U.S.), Canada, and the United Kingdom (U.K.), the activities of the UFOs were viewed as falling within the definition of securities.[1]

In the 1969 case Canadian Commercial Bank v. Greenwood Forest Products[2] the court looked at a debenture as a security, stating that:

> "… a debenture is a document which creates or acknowledges a debt, normally a debt owed by a company. It contains an undertaking to repay that debt. It may be unsecured, but it is usually secured by a fixed charge over certain property or by a floating charge over the whole property and undertaking of the company, or both. These are the essential characteristics, but they frequently may have others of almost infinite variety."

Based on this legal precedent and evidence obtained by the FSC documenting the nature of the transactions in which Cash Plus Limited was entering into with investors, the FSC concluded that Cash Plus was dealing in securities.

Another instructive legal precedent was the Howey test which is a set of principles enunciated in the landmark 1946 United States case Securities Exchange Commission (SEC) v. W.J. Howey Company[3]. Courts in jurisdictions across the world regard the Howey principles as persuasive authority when determining whether or not a particular arrangement is an investment contract and whether or not that arrangement is a security that is subject to registration. In Howey, the United States Supreme Court pronounced that an investment contract exists when (a) an investor invests money (b) in a common enterprise (c) with an expectation of profit (d) and that profit is to arise solely from the efforts of the promoter or a third party.

Again, based on evidence that the FSC obtained of the nature of the transactions entered into by OLINT with investors, the FSC concluded that OLINT was issuing investment contracts and hence dealing in securities. Based on its findings with respect to the activities of these two UFOs, the FSC issued cease and desist orders against each of them.

On December 24, 2007, Justice Norma McIntosh of the Supreme Court of Jamaica issued judgment in the OLINT appeal against the FSC's cease and desist order. McIntosh, J. ruled that while foreign currency trading itself may not *per se* be securities dealing, OLINT did issue securities in the form of investment contracts that amounted to certificates of participation in profit sharing agreements.

Interestingly, Cash Plus Limited sought a declaratory judgment from the court as to whether or not their loan agreements with members of the public were securities. After the FSC served Cash Plus Limited with a cease and desist order at the end of 2007, the company on January 23, 2008 discontinued this action and while doing so indicated that they would be submitting themselves to the FSC's regulation. Subsequently, Cash Plus Limited decided that it would pay out its investors and would not seek the FSC's approval to continue operating.

ii. Investment Clubs or Alternative Investment Schemes.

The stakeholders (mostly the principals) of UFO used the terms "investment clubs "and "alternative investment schemes" to define themselves and as their justification for the position that the schemes were not subject to regulation. They argued that investment clubs and alternative investment schemes are not regulated in other jurisdictions and hence there was no basis for them to be regulated in Jamaica.

The FSC has insisted that the unregistered investment schemes operating in Jamaica, most of which have characteristics of illegal pyramid or Ponzi schemes are not alternative investments. These unregistered investment schemes do not come within the definition of alternative investments in other jurisdictions.[4] Further, while investment clubs[5] are usually subject to little or no regulation in other jurisdictions, they are subject to limitations under the securities laws in those jurisdictions.

The rationale for limited regulation of such alternative investments and investment clubs expressed by regulators in countries such as the U.S., U.K., Canada, and Australia is the existence of specific rules of conduct that have been established for compliance by alternative investments and investment clubs. While there is some relaxation of the requirements as prescribed by the various securities acts, these regulators expect that adherence to the specific rules of conduct will provide sufficient protection for clients of alternative investment schemes and investment clubs.

In the U.S., for example, one of the conditions for a hedge fund to be subject to little or no regulation is the requirement that the fund be offered only to qualified institutional investors and high net worth individuals who are deemed to have the resources to carry out

their own due diligence of the fund itself, its promoters, investment advisers, and asset managers. A qualified purchaser or investor of a hedge fund is an individual or institution with over US$5,000,000 in investment assets who is presumed to be able to absorb the losses that could arise from the collapse of a hedge fund. Another condition for hedge funds is a limit of 100 or fewer investors.

With respect to investment clubs, some of the governing laws require that all members participate in the investment decisions, as well as impose restrictions on the number of members[6] in each club and the amount that may be contributed by each member. Also, investment clubs are prohibited from soliciting business from the public and borrowing funds from the public.

Based on the international practices stated above, the Jamaican UFOs are not appropriately classified as alternative schemes or investment clubs since the Jamaican UFOs typically have the following attributes:

a. "membership" or client base in excess of 100 persons, in some cases in the thousands and ten thousands;
b. the financial product of the UFO is sold to persons of low to high net worth without any restriction; and
c. investment decision making is concentrated in the hands of one or a few "members", in other words there is no collective decision making involving all the participants of the UFO.

It is clear then that these schemes, contrary to what they say, would be required to become licensed and to comply with all the requirements for issuing securities in other countries.

Additionally, some have opined that the Jamaican securities laws do not cover investment clubs and that there is a gap in regulation which makes it permissible for the UFOs to operate here. However, the FSC has taken a position that is consistent with the legal precedent internationally and which has now been adopted by the Supreme Court of Jamaica - that the determination of a whether a security exists goes beyond the name, internal arrangement or form of the instrument or activity and is based on the substance of the arrangement, such as the characteristics or features of the activities conducted.

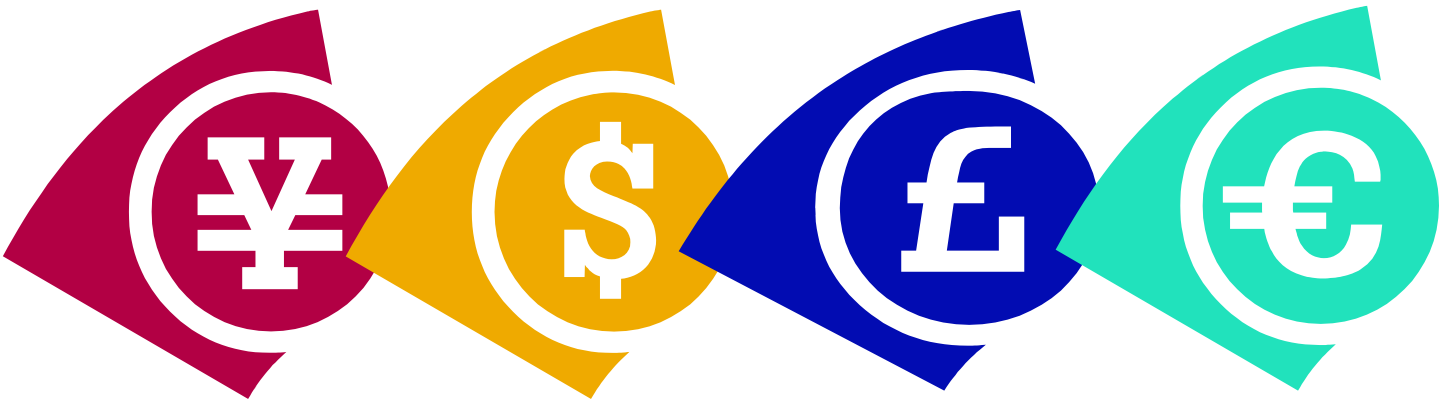
iii. Foreign Currency Trading

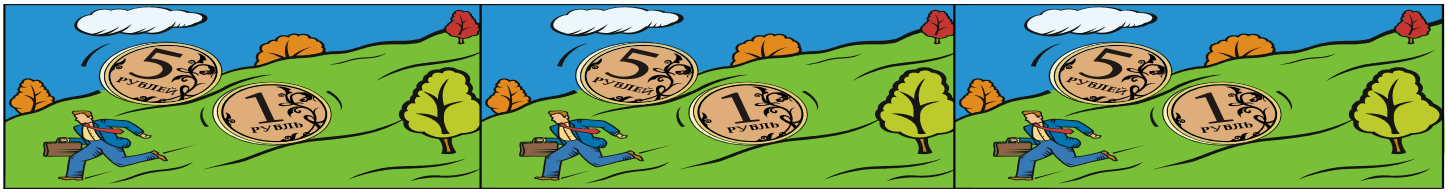
It was widely circulated that the foreign currency trading market is not regulated, implying that companies that engage in foreign exchange speculation for individuals are not regulated. Again, this is not consistent with the treatment in other jurisdictions. In the U.S. and the U.K., foreign currency traders and brokers are regulated. Brokers in the U.S. must adhere to standards set by National Futures Association (NFA) and the Commodity Futures Trading Commission (CFTC).

Myth #2: The Hidden Agendas

The scheme operators and their legion of supporters claimed that anyone who educates investors about safe investing must have a hidden agenda. One alleged hidden agenda was that the FSC and the government are enemies of the investor and the poor who saw these schemes as a ticket to prosperity. This flawed argument is oftentimes accepted by significant segments of the public in a society with historic class differences who seem to inherently distrust state authorities.

The FSC's mandate is to protect users of financial services and this was the agenda supporting the FSC's position. The FSC does not take issue with the investing public making high returns or with the introduction of new investment products as long as these products and their issuers comply with the law. The purpose and intent of the securities laws (the Act and regulations) administered by the FSC is to protect the customers who have limited information or knowledge of (i) the products, services, operations, of





financial institutions and (ii) the integrity, experience and skill of those who manage these institutions. Financial regulation seeks to ensure that the owners and managers of financial service institutions are honest persons with the appropriate skills to carry out their responsibilities in an ethical, prudent, and lawful manner.

With the signals coming from the schemes, the FSC was concerned about the very strong possibility of investors being defrauded due to lack of disclosure of information related to their investment, misinformation, deception, lies, corruption, misappropriation and other devious practices designed to separate ordinary people from their hard earned money. Some of the signals that were observed from these schemes are normally associated with fraudulent investment schemes. These signs included the following.

i. Promises of high returns.
ii. Claims of no risk or minimal risk.
iii. Claims that the investment does not have to be registered.
iv. Lack of transparency.

Myth #3: Astronomical Profits

There were many who believed that astronomical profits of 120-200% were not only possible, but sustainable. These individuals often asserted that the commercial banks engage in foreign currency trading which has contributed to the millions of dollars the banks made in profit. Further, they claimed that the large amounts of profits reflect the banks' short-changing of depositors through ridiculously low returns on deposits. However, this reasoning is unsound as the comparison is being made between dollars and percentage returns. The distinction should be made between the banks' return on capital and the returns offered by these schemes. The return on capital for local banks has been in the range of 20 to 30% per annum, which is quite minute when compared to 120-200% per annum claimed by the scheme promoters. No investment product or opportunity in the world is known to consistently generate such extremely high returns.

Conclusion

The human race has always been desirous of signs to guide their steps in a world of uncertainties. While signs can be very helpful, it is the view of prudent and successful investors and the FSC that regardless of the signals one may receive; it is always best for investors to think and check before investing and to:

- Always request written information;
- Never make any investment or purchase you don't fully understand;
- Ask if the firm and product are registered by the regulator;
- Check out the company or organization carefully;
- Ask what recourse you would have should you make a purchase and are not satisfied;
- Ask for balance sheets and income statements of the issuer; and
- Heed the maxim: "If it sounds too good to be true … it probably is."■

[1]It is common practice for lawyers and judges to use case law from other jurisdictions as persuasive authority to arrive at judgment especially in cases where the law is being tested for the first time in the respective jurisdiction. For example, the Canadian courts have been persuaded by USA case law in deciding cases in their jurisdiction. The Canadian courts adopted and expanded the **Howey** ruling in Pacific Coast Coin Exchange v. Ontario Securities Commission.

[2] (1985) 66 BCLR 145 (D.C.C.A

[3] (1946) 328 U.S. 293 66 S Ct 100

[4] The term "alternative investment" is used internationally to refer to investments in assets such as hedge funds, private equity funds, commodities, financial derivatives and real estate, which are alternatives to investments in traditional securities such as listed company shares, treasury bills and corporate bonds.

[5] An investment club is generally defined as a group of individuals who periodically contribute sums of money to invest in securities which are held in a pool managed by these individuals and beneficially owned by these individuals.

[6] In Canada, the limit on the number of investment club members is 50 while in most states of the U.S. the limit is 25 and in Australia, it is 20.

Balancing competing interests in the agricultural sector

International Context

THE economic dictum of most modern market economies is that the 'market' will balance competing interests in the economy and ensure that resources are allocated in an efficient manner and therefore state intervention should be kept at a minimum. For the global agricultural sector, state management and interventionist policies have been dominant for many years, so mush so that the current WTO Doha round of negotiations has been struggling unsuccessfully since 2002 to remove heavy tariff and non tariff protection from global agricultural trade and economic policies. Concurrently there are strong pressures globally to liberalize agricultural markets such as sugar and bananas in the EU as well as the increasing popularity of Free Trade Agreements such as the Cariforum/EU Economic Partnership Agreement, which seeks to reduce tariffs to zero over a specified period of time.

Goals of the Ministry of Agriculture

It is within this global context that Jamaica has established its goals for the agricultural sector and seeks to manage market liberalization in a manner that provides maximum benefits for the sector and the people of Jamaica. The Ministry of Agriculture in Jamaica focuses attention on the development of a modern, competitive agricultural sector, as well as the importance of national food security, export expansion and the growth of agro industries. To the extent that market liberalization or statist policies assist with the achievement of these objectives they should be endorsed.

In pursuit of the abovenamed high order objectives, the Ministry seeks to provide services, and in some instances financial assistance and incentives to a range of stakeholders in the sector encompassing groups such as farmers , commodity producers, processors, exporters, importers, local traders, providers of inputs such as fertilizers, providers of agricultural tools and equipment etc. All of these critical players contribute to the attainment of a vibrant and prosperous agricultural sector. The Ministry is committed therefore to providing them with the support which they need, within the boundaries or limits set by its budgetary allocation as well as Jamaica's international legal commitments.

Services Offered by the Ministry

While the Ministry is not directly involved in the production or marketing of agricultural goods and services, its function is to be the main facilitator for these activities. In performing this role of facilitator, it offers a range of services to the sector such as Extension, Research and Development, Plant Protection, Veterinary Services, Marketing, Business Planning and Policy Development, Soil Testing, Data Collection, Processing and Dissemination, Disaster Management, Coordination of external aid for the sector and so on.

Most of the services provided by the Ministry and which are funded by its annual budget are for the benefit of the broad agricultural sector and therefore in this regard conflicts of interest between various stakeholders in the sector are not a major issue.

With respect to international financial and technical assistance, the donors usually determine which sub sector should benefit and how the assistance is to be utilized, and therefore relieve the Ministry of this type of decision. However the Ministry, in consultation with stakeholders and the Planning Institute of Jamaica, develops projects which are then submitted to donor agencies for funding.

Traditional Crops and later Diversification

For many years the Ministry had placed a lot of emphasis on the development of the traditional crops such as sugar, bananas, coffee, tobacco, pimento and so on. In this regard there were minimal competing interests as the other crops were not very developed.

Article contributed by the Ministry of Agriculture.

interests as the other crops were not very developed. Not only were these the main crops cultivated for a long time but they contributed more than the other domestic food crops to foreign exchange earnings and employment and dominated the use of national resources such as land, labour and finance, (both public and private).

However due to significant changes in the export markets particularly in the EU for both sugar and bananas, the sector has been shifting its focus somewhat and more emphasis is being placed on a range of food crops normally produced for the domestic market. This diversification from traditional crops gave rise to the cultivation of non traditional crops such as yams, papayas, vegetables etc.

In more recent times, concerns about global food prices and the national availability, affordability and nutrition of foods have triggered increased concentration on growing foods such as fruits, vegetables, tubers and others, for the domestic market, including the tourism market.

Another strong motivating factor for diversification was the anticipation for sometime that the export market in the EU for sugar and bananas respectively would experience serious challenges in the future, some of which have already occurred.

As a consequence considerable attention is being given to the development of the non traditional sector, agro-processing as well as the development of new products (such as ethanol) and new markets.

Use of Trade Defense Measures

Jamaica operates a policy of tariff and other forms of protection granted to a number of sensitive or strategic domestic agricultural products including fruits, vegetables, meats, fish, tubers and dairy products. WTO compatible border measures such as custom duties, and other duties and charges such as stamp duties are used to defend these sub sectors against competition from competing imports. In keeping with its WTO commitments Jamaica is also able to offer certain forms of non trade distorting subsidies such as those classified as Government Services and outlined above.

In this case it could be argued that the interest of importers and in some cases consumers is subordinated to the interest of domestic producers. However in the establishment of import duties, cost of living considerations are taken into account, for example, the duty on chicken necks and backs (5%) is considerably lower than 260% charged on imports of other poultry products.

Although Jamaica supplies agricultural products to both the domestic and export markets, it is a net importer of food. It is recognized therefore that some food importers such as importers of cereals and some meats make an important contribution to food security, as Jamaica is unable to produce all its food requirements, sometimes particularly for the tourism sector. Food importers are therefore an important constituency and in some cases there is a conflict of interest with that of the farmers who supply mainly the domestic market and sometimes at a higher price. In such cases the consumer might choose the Jamaican product based on its superior quality, for example locally produced carrots.

In order to preempt food shortages and sharp increases in prices, importers of foods such as meats, may be granted a temporary duty waiver, subject to the relevant CARICOM approval. Duty waivers are also granted to manufacturers and the tourism sector. These duty waivers are classified as subsidies in the WTO lexicon as they represent a foregoing of the duty by the Government.

Market Liberalization

During the 1980s and 1990s considerable market liberalization occurred in the agricultural sector in Jamaica as a condition of the World Bank and IMF Structural Adjustment loans. As a consequence tariffs were reduced, quantitative restrictions on imports were removed, the state trading corporation was dismantled and price supports to specific agricultural commodities were discontinued. This market opening took place before the WTO rules on agriculture were established and placed Jamaica ahead of many developed countries in terms of the liberalization of its agricultural market.

In the current WTO Doha round of trade negotiations Jamaica will be required to undertake additional market opening but with the understanding and appropriate policy flexibility required to ensure that food security, rural development and employment would not be adversely impacted by the new trade concessions.■

Protection against unfair competition and intellectual property

PROTECTION AGAINST unfair competition has been recognized as forming part of industrial property protection for almost a century. It was in 1900, at the Brussels Diplomatic Conference for the Revision of the Paris Convention for the Protection of Industrial Property, that it was stated that the countries of the Union are bound to assure nationals of such countries effective protection against unfair competition; and that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. This would include:

- all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
- false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
- indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

At first glance, there seem to be basic differences between the protection of industrial property rights, such as patents, registered industrial designs, registered trademarks, etc., on the one hand, and protection against acts of unfair competition on the other. Whereas those industrial property rights are granted on application by industrial property offices and confer exclusive rights with respect to the subject matter concerned, protection against unfair competition is based not on such grants of rights but on the consideration-either stated in legislative provisions or recognized as a general principle of law-that acts contrary to honest business practice are to be prohibited. Nevertheless, the link between the two kinds of protection is clear when certain cases of unfair competition are considered. For example, in many countries unauthorized use of a trademark that has not been registered is considered illegal on the basis of general principles that belong to the field of protection against unfair competition (in a number of countries such unauthorized use is called "passing-off"). There is another example of this kind in the field of inventions: if an invention is not disclosed to the public and is considered to constitute a trade secret, the unauthorized performance by third parties of certain acts in relation to that trade secret may be illegal. Indeed the performance of certain acts in relation to an invention that has been disclosed to the public and is not patented or in respect of which the patent has expired, may under very special circumstances also be illegal (as an act of "slavish imitation").

The above examples show that protection against unfair competition effectively supplements the protection of industrial property rights, such as patents and registered trademarks, in cases where an invention or a sign is not protected by such a right. There are, of course, other cases of unfair competition, for example the case referred to in Article 1 Obis(3)2 of the Paris Convention, namely that of a false allegation in the course of trade of such a nature as to discredit a competitor, in which protection against unfair competition does not perform such a supplementary function. This is due to the fact that the notion of unfair competition covers a great variety of acts, as will be discussed in the analysis below.

A number of countries both in regions of the developed and developing world are adopting or have adopted market economy systems, which allow free competition between industrial and commercial enterprises within certain limits defined by law. Free competition between enterprises is considered the best means of satisfying supply and demand in the economy and of serving the interests of consumers and the economy as a whole. However, where there is competition; acts of unfair competition are liable to occur. This phenomenon has been discernible in all countries and at all times, regardless of prevailing political or social systems.

Sometimes economic competition has been compared to competition in sport, because in both the

Article contributed by the Jamaica Intellectual Property Office.

best should win. In economic competition, that should be the enterprise providing the most useful and effective product or service on the most economical and (to the consumer) satisfying terms. This result can only be achieved, however, if all participants play according to a certain set of basic rules. Violations of the basic rules of economic competition can take various forms, ranging from illegal but harmless acts (which can be committed by the most honest and careful entrepreneur) to malicious fouls, intended to harm competitors or mislead consumers.

Experience has shown that there is little hope of fairness in competition being achieved solely by the free play of market forces. In theory consumers, in their role as referees of economic play, could deter dishonest entrepreneurs by disregarding their goods or services and favoring those of honest competitors. Reality, however, is different. As an economic situation becomes more complex, consumers become less able to act as referees. Often they are not even in a position to detect by themselves acts of unfair competition, let alone react accordingly. Indeed it is the consumer who, along with the honest competitor, has to be protected against unfair competition.

Barbados competition law on intellectual property rights

By DeCourcey Eversley and Deirdre Craigwell

THE SIGNIFICANCE of the approach adopted by the Barbados Fair Competition Act (the Act) in relation to the enforcement of intellectual property rights can be summed up in one sentence: The Act exempts the exercise of monopoly power obtained by virtue of an exclusive intellectual right, insofar as that power is not utilized in a manner that lessens competition substantially.

Intellectual Property Rights in Barbados

In simple terms, intellectual property refers to creations of the mind such as musical, literary, and artistic works. It also includes inventions, symbols, images and designs used in commerce. An intellectual property right is an exclusive right over creations of the mind, both artistic and commercial (for example, the writing of a song), and includes copyrights, trademarks and patents. Intellectual property rights serve as incentives for inventors to develop by giving them property rights over their creations.

The intellectual property rights legislations in Barbados are the Copyright Act, the Trademarks Acts and the Patents Act. These legislations have diverse objectives. The Copyright Act serves to revise the law of copyright. The Trademarks Act is an Act to revise and reform the law governing signs used as trade marks, service marks or collective marks in connection with the marketing of goods or services, and the Patent Act revises the law relating to patents in order to give effect to certain international conventions on patents and for related matters.

The Commission has had a few queries but has conducted no investigations pertaining to intellectual property rights infringements. It is however cognisant of the fact that in Barbados there have been growing concerns pertaining to possible intellectual property piracy such as unauthorized copying of music of calypsonians and other artistes during the Crop-Over season. Perhaps however, the most potentially disruptive market abuses alleged with respect to intellectual rights have come in the form of artists threatening to exclude certain media houses from having the opportunity to distribute their work, or occasional calls for boycotts of particular media houses which support or are associated with certain causes or personalities. None of these have however escalated into actual abuses warranting investigation.

Intellectual Property Rights under the Fair Competition Act

Subsection 3(1)(c) of the Fair Competition Act states

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very broadly that the Act shall not apply to the entering into of an agreement insofar as it contains a provision relating to the use, license or assignment of rights under or existing by virtue of any copyright, patent or trademark subject to section 16(4) of the said Act.

Section 16(4)(c) states that an enterprise shall not be treated as abusing a dominant position by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark.

Section 16(4) however, also stipulates that the exercise of those rights are not exempted where the Commission is satisfied that the exercise of those rights has the effect of lessening competition substantially in a market and impedes the transfer and dissemination of technology.

Analysis of provisions in the Fair Competition Act

The approach adopted by the Fair Competition Act is therefore quite interesting. The Act firstly supports the establishment of temporary monopolies or positions of dominance created by virtue of an intellectual Property right. The Act under Section 16 (1) does not prohibit a dominant or monopoly position, even where that position has been realized by the exclusive ownership of an Intellectual Property Right. The Act stipulates that only the abuse of a dominant position is prohibited, never simply the possession of dominance.

In addition to accepting the establishment of a monopoly position in the market inherited through an Intellectual Property Right, the Act goes further in determining that enterprises fortunate to possess such dominance shall not be treated as abusing that position insofar as it is the result of an enterprise enforcing an Intellectual Property Right. This makes it clear that in addition to maintaining a position of dominance, the enterprise supported by an Intellectual Property Right can also undertake conduct that might otherwise be condemned as abusive, because of the possession of that property right.

The Act however does place some restraint on the conduct of enterprises which possess a monopoly position as a consequence of an inherent Property Right. The Act determines that where the exercise of those rights is likely to *substantially* lessen competition then the related practices are no longer exempted. The key word to be considered here is substantially. It gives the enterprise the latitude to engage in any type of abusively defined conduct under the Act, without condemnation. The type of conduct is irrelevant, resale price maintenance, excessive pricing, market restriction, exclusive dealing, predatory pricing etc are all exempted practices when undertaken in an attempt to enforce an Intellectual Property Right. The only criteria for prohibition are the substantial lessening of competition, and the impeding of technology transfer.

Summary

The Fair Competition Act therefore appears designed to support the development of artistic and technologically nascent industries. Infant industries of this nature seeking to emerge are not likely to impact competition substantially because of their uniqueness and small size. They are also less likely to be viewed as impeding technology transfer again because of their smallness, their uniqueness and their emerging nature.

During early stages of development therefore, businesses of this nature are able under the Act to engage in any type of conduct that would allow them to establish themselves and begin to flourish, without fear of legislative reprisal. This may be very important to their initial development. Once however these businesses begin to occupy a more significant place within the market and their impact becomes more pervasive, they will have to manage their behaviour more carefully because they would have the potential to affect competition substantially.

The approach of the Fair Competition Act in respect of Intellectual Property Rights therefore may be viewed as one supportive of the infant industry concept. The Act supports the initial development of artistic and technological investment undertaken under the ownership of an Intellectual Property Right, by exempting conduct otherwise viewed as anti-competitive. It however will prohibit similar practices undertaken by these same enterprises when more entrenched and their conduct lessens competition more substantially.■

Price caps as a regulatory tool in a market driven economy

Many will question the need for any form of regulation in markets as a whole and certainly in the telecommunications market in Jamaica. This is more the case as many view the telecommunications market in Jamaica as a competitive one. However, regulation remains in many markets that are deemed to be even far more competitive than the Jamaica telecommunications market. The United Kingdom (UK) telecommunication market is a good example. Notwithstanding that, lets take a look on our history and see if there is a rational for continued regulation in the Jamaican context.

Background

The Jamaican telecommunications market dating back to the 1990s was dominated by one operator, Cable and Wireless Jamaica (C&WJ). C&WJ enjoyed an exclusivity in license to provide telecommunications in and out of Jamaica for twenty-five years. This license of exclusivity was obtained from the Government in 1988. However at the end of 1990's the Government, due to external pressures, sought to liberalize the telecommunications sector. The Government managed to renegotiate C&WJ license and embarked on a process of introducing competition in the sector on a phased basis. The Telecommunications Act was established in 2000, as part of the legal framework by which the sector should be regulated.

Regulation and regulatory framework

The Office of Utilities Regulation (OUR) was established in 1997 as the regulatory authority for telecommunications (and other utility services) and was given the mandate to promote and foster competition for the provision of telecommunication services. The first of three phases of the liberalization process commenced in the year 2000, and the first cellular mobile licenses were granted in this phase. It paved the way for the entry of Mossell Jamaica Limited (Digicel) and Centenial Miphone (now Oceanic Digital Miphone), and thus the introduction of competition in the provision of cellular mobile services. A number of new licences were issued and a number of operator and/or providers of telecommunications services entered the market during phases II and III of the liberalization.

Whilst competition was introduced in some areas, competition remained lacking in many other areas of the telecommunications industry. For instance, in the market for fixed access and fixed lines services, including domestic fixed line calling, competition was non-existent. C&WJ was the monopoly provider of these services. C&WJ therefore had complete latitude to absorb additional consumer surplus from customers, by pricing its product and services at higher rates than would otherwise exist in a competitive market environment. It was a difficult task to attract competition in this area, because of some intrinsic and legacy structures of the fixed line market and monopoly markets. These features include, inter alia, an inability for another company to profitably duplicate building out of the local (access) network, inability to compete effectively on low access and domestic calling rates, high instance of cross-subsidization and an urgent need to rebalance rates to reflect actual cost of providing service. The local access network, both on cost and rights of way access to facilities, provided the main barriers to entry in the local fixed line market.

The regulatory framework through the works of the OUR however provided remedies to mitigate the abuse of C&WJ's monopoly power and to facilitate rate rebalancing to reflect the actual cost of providing the service. The price cap was the regulatory remedy prescribed in the Telecommunications Act 2000. The Telecommunications Act 2000 specifically requires the price of services of any operator that are not subject to effective competition to be regulated by a price cap regime.

Price Cap

The price cap determines the rate at which C&WJ could adjust it rates on an annual basis. It includes a parameter for the Consumer Price Index (CPI), and productive X-factor. This X-factor captures the amount of productive efficiency that the regulator

Article contributed by the Office of Utilities Regulation

deems that operator should share with consumers. A positive X-factor implies that rates will move slower than the CPI and a negative X-factor implies the contrary. Price cap is believed to provide incentive for operators to be more efficient. It is easier to implement and monitor and therefore is more attractive than other forms of price regulation. Price cap is placed on a basket of services, and the weighted average price movement in these services can equal but must not exceed the price cap adjustment rate.

The telecommunications industry however is characterised by change. Advancements in technology provide new solutions and erode previous barriers to entry. In the Jamaican context, Columbus Communications Limited (Flow), a cable TV provider piggy-backing on the experience in Canada and the USA, has started providing traditional fixed line services. Advancements in technology have allowed Cable TV operators to venture into traditional telecommunication markets and the fixed line and the internet are the first markets of venture. On this background, C&WJ has questioned the relevance of still maintaining the price caps, largely by asserting that competition is now present in this segment of the market and therefore calls for complete removal of the price cap. The OUR however must determine whether the services in the price cap basket are faced with effective competition. If the analysis and findings show that there is effective competition in the particular services then those services will be removed from the basket.

The role of the OUR in the face of competition

This remains a crucial function of the OUR even in this increasingly competitive environment. The OUR must be absolutely sure that any product that is removed from price regulation (price caps) must be faced with effective competition now or will be faced with effective competition in the not distant future. In this time where operators and/ or service providers are retailing telecommunications services in the form of bundles, operators could potentially leverage the use of non-competitive service to lesson or limit the effects of competition in a very anti-competitive manner. If operators are able to bundle competitive and non-competitive services, the operator could use one (especially if it is a basic service that is very important) to promote the sale of another service, through tied selling. This could be deemed anti-competitive if it provides the operator with an unfair competitive advantage. In addition, it provides the operator the opportunity to cross-subsidize services. This is so if services that are not faced with effective competition (and therefore have low or negative price elasticity of demand) could be used to subsidize services that face competition (and therefore have positive and higher price elasticity of demand). The service that faces competition could be sold at lower price in the market, therefore providing the operator with an unfair competitive advantage relative to other service providers in the market.

Interestingly, the price cap regime has provided the ground work to foster and promote competition in the sector. Price cap has facilitated the process of rate rebalancing, whereby rates are adjusted to reflect the actual cost of providing service. In so doing, it provides the right signals to the market to ensure more efficient allocation of resources, whether through investment efficiency or otherwise. The fixed line market has certainly experienced increases in domestic calling rates and access rates, vis-à-vis a steady decline in prices of cellular mobile services, internet access, inter alia. This is an indication that fixed line rates are being rebalanced to reflect the actual cost of providing the service.

As markets change, technology changes, approaches change, and business models change as well, and therefore regulation must change to remain relevant and to serve the sector in the best way. The telecommunications industry continues to be bombarded by endless developments in technology, approaches, modes in delivery of service and marketing of product and services. Traditional market boundaries are fast blurring. This requires constant revision by the OUR of definition and conceptualization of service markets. Its clear that no longer can the impacts of services such as Voice over Internet Protocol (VoIP) and cellular mobile, be ignored as legitimate substitutes to some of the more traditional plain old telecommunications services (POTS). Price cap remains a fixture or presence in many markets suggesting that while many markets are faced with increased competition it has not yet permeated into some of the traditional markets. This is evidenced by the recent re-imposition (2008) of the price cap regime in Barbados. There are still acute entry barriers in some markets, or enduring bottlenecks, as it is coined by the Office of Communications (Ofcom), the communications regulatory authority in the UK.■

Anti-dumping and competition policies: Is there a role for both?

By Keisha-Ann Thompson

Introduction

TWO IMPORTANT aspects of a country's domestic regulatory arsenal are competition policy and trade remedies, of which anti-dumping is a subset. Trade remedies are special border measures that can be used to discipline trade flows under certain conditions. They can either take the form of duties or quotas. Anti-dumping duties and Countervailing duties are used when there is dumping or subsidisation, respectively, practices which are regarded as unfair if they harm a domestic industry producing a like product. A Safeguard measure, in the form of a quota or duties, may be used where there is a significant increase in imports, which affects a local industry.

As the nomenclature would lead one to believe, trade remedies are more instruments of the international trade policy of a country than of domestic policy, in contrast to competition policy. Notwithstanding this difference, both operate to have an impact in the domestic market for a particular product in that both are aimed at accomplishing some degree of levelling the playing field for business, and, as such, constitute important elements of policy space. In a globalised world, with the increased lowering of trade barriers, firms produce both for the domestic market and for export. This leads to increased import penetration and hence, the argument goes, competition. In such an environment there can be many suppliers of goods to the market; a firm need not be established locally to have its goods enter the Jamaican market. Studies have shown that international trade has limited domestic concentration. This, however, it is given, is an inadequate measure of the monopolistic behaviour of firms[1] and by extension, and I would argue, the institution of competition. To say that unrestrained trade liberalisation increases competition because of the increased number of players in the market, expresses a simplistic view. The nature and degree of competition in the market place will depend on how these players conduct themselves in the market and on the characteristics of the market.

In a global environment therefore, it is no surprise that trade policy is concerned with developments in the domestic market and competition policy is increasingly concerned with the behaviour of foreign players. This naturally raises questions of jurisdiction, whether one discipline may undermine or compliment the other and whether or not one policy can be used to deal with both the behaviour of foreign and domestic firms. Those who believe that the disciplines are at cross purposes, call for the abolition of one in favour of the other. The main reason for this is the controversy over the practice of dumping.

To determine if such rationalisation is feasible, there must be an examination of the "behaviour" at issue and the relevant disciplines. Against the backdrop of these competing concerns this article attempts to show, through this examination, that both anti-dumping and competition policy, whether or not you agree with their theoretical bases, have a role to play and either directly or indirectly can preserve competition in the marketplace.

Roles and Functions of the Authorities in Jamaica

Jamaica, unlike most other Caribbean countries, has put in place the legislative and institutional framework to administer both competition and anti-dumping policies. The Fair Trading Commission (FTC) in Jamaica was established to administer the provisions of the Fair Competition Act, 1993 (FCA). As the name suggests, the role of the FTC is to ensure that there is fair competition in the market with respect to both the provision of goods and services. One must clearly note the emphasis on the provider of the good or service,

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i.e. the supply of these goods or services to the market, whether or not these providers are the producers of such goods and services and whether or not they reside in Jamaica. The goal is to ensure that consumers benefit from the best prices and widest choice of goods and services. The FCA clearly specifies that the Jamaican market is the one at issue. Pursuant to the FCA, the FTC can investigate any business activity that reduces competition in the Jamaican market place, such as abuse of a dominant position, collusion, restriction of supply, price fixing, and, subject to certain conditions, price discrimination.

Price discrimination, charging different prices to customers in different markets, is not *per se* regarded as anti-competitive, unless done in a manner that reduces competition as described in the FCA. The most extreme case of price discrimination that is anti-competitive is, predation. This takes place when a competitor sets prices low enough to drive other competitors out of the market, and then later raises prices to recoup profits. For this to be a profitable strategy there must be considerable barriers to entry. Otherwise firms can re-enter the market and drive prices and hence, profits, down. It is a widely accepted view that this strategy is very hard for firms to pursue successfully, and very difficult for authorities to prove in practice.

The purpose of competition policy is to preserve competition in the market place. It is not focused on an individual firm or group of firms. To analyse whether anti-competitive forces are at play, the focus is on the relevant product market. In order to define this precisely, demand plays a significant role, so that consumers' perceptions and issues of substitutability are taken into consideration. In this regard, competition rules focus not on the *local production* of the product, but rather the provision of the product, from both local industry and foreign sources, and the underlying processes.

The Anti-dumping and Subsidies Commission (ADSC) was established to administer the provisions of, first, the Customs Duties (Dumping and Subsidies) Act 1999 and later, the Safeguard Act 2001. The disciplines against dumping and subsidisation are often referred to as the "unfair trade laws". This is as distinct from safeguards that are deemed to address rather significant import surges into the market. As noted previously, anti-dumping policy is a subset of trade remedies, and is used specifically to address instances where dumping affects a local firm that is producing a like product. The trade practice of dumping is deemed to confer an unfair advantage on foreign firms, distorting trade and can potentially have a detrimental impact on local firms, and by extension, some would argue, competition. Through the provision of remedies in the form of anti-dumping duties, the ADSC ensures that exporting countries either undertake fair trading practices or are disciplined, and domestic industry is shielded from erosion or further erosion of its business. By aiding in the preservation of local industry, anti-dumping helps to preclude the dominance of foreign firms, whose behaviour may be beyond the discipline of domestic competition policy.

Though the practice of dumping can simply be described as price discrimination, it is more precisely defined under Anti-dumping law as, the practice of selling a product to an overseas market at a price that is lower than the price at which it is sold in the home market. This is essentially price discrimination between international markets, rather than the notion of discrimination between domestic players, which is more familiar. Further, this is different from the practice of predatory pricing.

Anti-dumping policy addresses the issue of such price discrimination (dumping) when there is harm to a domestic industry that produces a like product, and does not test whether or not such price discrimination is predatory. Under current anti-dumping policy such international price discrimination does not need to be predatory in nature for anti-dumping duties to be applied. If there is no predation, some argue, then such "behaviour" is legitimate. To underscore this they point to the fact that the first anti-dumping laws were put in place because of concerns about predation and the fact that competition policy could not be applied extraterritorially. An early example of this is the United States, which supplemented its anti-trust laws with the Wilson Tariff Act 1894.[2] However, as is given by proponents of anti-dumping, it is precisely because such behaviour is not condemned elsewhere that anti-dumping laws must be preserved. Absent such laws domestic import competing firms would be left open to the ravages of international competition, which though not predatory in nature, may still be "unfair" by leading to the decline of industry.

In order to impose such duties a determination has to be made that the foreign producer is dumping and that it causes harm to a local industry. This is different from the focus of competition policy in many respects. Firstly, while competition policy would look to see if price discrimination is actually predatory in nature,

anti-dumping laws do not require this. All that is required is that there is a difference in price between the two markets that is more than *de minimis*. The difference in price between the two markets need not be anti-competitive. Further, the focus is not on the degree of competition in the market, but the impact of international price discrimination, *whether predatory or not*, on the local firms in an industry. In fact, even if the practice could be regarded as predatory, if it does not have a material impact on the local industry then anti-dumping duties could not be applied.

Though the focus of one part of the analysis, like competition policy, is on the relevant product market, it is circumscribed. Anti-dumping protection can only be awarded to an industry where it produces a like good, so it is more difficult, and not advisable, to broaden the definition to include directly competing goods, as can be done in competition policy. We see therefore that the purpose of anti-dumping policy is the defence of local industry (production), irrespective of the number of players (industry and importers) that may supply a similar product.

It should also be noted in the current legislative framework, trade remedies apply only to goods, while competition policy's reach can extend to services. Trade remedies disciplines in the area of services are in the process of negotiation, though some countries have put restrictions in place to guard against such unfair practices as dumping and subsidies. It is recognized that such practices are possible for services and as such, there must be avenues to address them, which will necessarily be different than the way in which goods are treated, for instance using the appropriate regulation in the sector concerned.

Notwithstanding the differences in the roles and functions, both anti-dumping and competition policy have the effect (directly or indirectly), of reducing those instances where the pricing practice of firms has a deleterious impact on competition in the market.

The Dilemma?

Given these apparent differences between the two policies, aside from any theoretical or economic deficiencies in their underlying tenets, where then is the conflict? A simple example may illustrate how this arises as a concern.

Consider that a domestic manufacturer of goods (Firm A) applies to ADSC for relief from import competition on the basis that the only other supplier in the market (Firm B) is importing dumped products from a foreign producer. Prior to the entry of Firm B, the importer, there were no other suppliers in the market and Firm A, the local industry, was regarded as a monopoly. There have been no complaints that Firm A was abusing its dominant position.

Firm B is selling its product at a lower price. However, there is no evidence that this is not merely competitive pricing. An anti-dumping investigation finds that the foreign producer is in fact selling his product to Firm B at dumped prices. This has in fact caused the Firm A to suffer a significant decline in its cash flow and profits; and has also had to let go a number of employees. This deterioration in Firm A's position has taken place much faster than it otherwise might have, because it tried to maintain its sales by reducing its prices to match that of Firm B, employing this strategy even in light of increases in its costs.

The decision is taken by ADSC to impose an anti-dumping duty on that product coming from that foreign producer, by the amount of the dumping margin (the difference between the price at which the foreign producer sells to his local retailers in his home market and the price at which he was selling to Firm B). Given that, the anti-dumping duty is product, country and exporter (foreign producer) specific, Firm B can continue to import the product from the same foreign producer, pay the duty and sell at a fair price or may import from another foreign producer and not incur that duty. Firm B, however, did not continue to import the product and left Firm A as the sole supplier in the market. Additionally, a substitute product could have been imported or the same product could have been brought into the market by a different importer from a non-dumped source.

This example illustrates the main concern of competition advocates who decry anti-dumping disciplines - *anti-dumping perpetuates monopolies*. This leads us to the question of whether Firm A, being the sole supplier, in and of itself, makes the industry in the above example anti-competitive? Secondly, this begs the question of whether, if there is the option of sourcing the product or a substitute elsewhere, or paying the duty and still operating profitably, the application of an anti-dumping duty really limits competition? As can be seen from the above, the anti-dumping duty does not by itself restrict the product's entry into the market. In addition, the one firm industry situation that may develop subsequent to the imposition of an anti-dumping duty could have existed even without the imposition of the duty, as in our example.

Firms can occupy a dominant position in a market

for a number of reasons. The aim of competition policy is not simply to break up monopolies, which may exist for natural reasons, but to monitor and regulate such monopolies so that they do not abuse their dominant positions. The FCA at Section 20(2) addresses the abuse of a dominant position, where the maintenance or development of effective competition is impeded.

From the example, we see that in the absence of any anti-competitive pricing strategy on the part of Firm B, there was no basis on which to discipline them under the FCA. Further, Firm B simply set its price based on the price at which it had acquired the product from overseas. This was a price however, with which the local industry was unable to compete, and not based on fundamentals such as cost, but rather of the discriminatory pricing behaviour of the foreign producer. Such price discrimination is common, not only at the international level but is also a legitimate business strategy that can be pursued by domestic firms. Price discrimination itself is not illegal, nor even regarded as anti-competitive under the FCA.[3]

The problem in this instance was not how Firm B priced its product, but that the foreign producer was selling the product to Firm B at a price significantly below what it would charge to a similar firm in its home market. This was detrimental to a local producer and absent anti-dumping policy; this local producer would not have been able to survive.

Conclusion

Anti-dumping, as with any other policy that affects the behaviour of market participants will have an impact on the market. The purpose of regulation is to have a means by which market behaviour, if detrimental to other interests, can be addressed. Increased market opening internationally means that domestic firms not only have to contend with the strategies of their local counterparts, but also that of their foreign rivals. Therefore, it is necessary that policy makers be equipped with mechanisms to deal with both sets of players. Given the different dimensions of the problem of dumping and that of anti-competitive practices, it is unlikely that any one policy, as currently formulated, can address both issues. Further, it may be expedient, precisely because of the potential impact on the behaviour of market participants, to have two independent policies that are complementary in the sense that one can operate where the other cannot. Further, the practice of one of these two policies may act as a check on market effects that may arise from utilising the other.

It is noteworthy that in instances throughout the world (which are few) where competition provisions have replaced anti-dumping policies; there has been a high degree of integration between the markets, such as in the case of Customs Unions, where a supranational authority might operate. However, an even more significant point to note is that even for such countries, while anti-dumping disciplines may have been abolished on intra-regional trade, they have been maintained to deal with extra-regional trade. This is simply because, as the example above illustrates, competition policy in its current formulation is ill-equipped to deal with the phenomenon of dumping in international trade.[4]

Anti-dumping duties, in and of themselves, cannot and do not limit competition. In fact, anti-dumping policy could act as a kind of industrial policy, like subsidies (similar to infant industry type arguments). In this regard, it would be absurd to regard such industrial policies as anti-competitive.[5] Further, as often happens naturally in markets, based on their particular characteristics, they may naturally lend themselves to the dominance of one firm or a few firms, which is why competition policy exists, not to condemn these anomalies but to ensure that they do not distort the competitive processes that would work under those particular market characteristics. Anti-dumping rules therefore are required where competition rules stop short. Likewise, competition rules are required where anti-dumping stops short. Some would argue that by complementing each other in this way, it is a necessary pre-condition for the maintenance of competition generally.■

[1]Smith A., and Venables, A. 1986. Trade and Industry, *Economic Policy*.

[2]Knorr, A.2004. Antidumping Rules vs. Competition Rules. www.iwim.uni-bremen.de

[3]See Article- Price Discrimination under the Fair Competition Act, www.jftc.com .

[4]See Kong, Y. 2003. Persistent dumping, competition and welfare, *Journal of International Trade and Development*, 12 (1).

[5]See Chang, Ha-Joon, Protectionism ...The Truth is on a $10 Bill, reprinted in ADSC Newsletter, **Trade Gateway**, Volume 4, Issue 1, June 2008. www.jadsc.gov.jm

COMPLAINTS STATISTICS

For the period November 1, 2005 - October 31, 2008

PRODUCTS AND SERVICES	Year 2005/2006	Year 2006/2007	Year 2007/2008
Automobiles	21	11	11
Banking/ Financial Services	5	5	12
Clothing & Accessories	1	2	1
Computers	0	2	3
Construction/Home Repair Supplies	4	0	5
Education	2	4	8
Food Items	2	1	0
Government Services	0	1	5
Household Appliances	8	3	7
Household Furnishings	2	3	6
Insurance[1]	4	3	6
Leisure & Recreation	0	7	5
Media	0	0	1
Petroleum Products & Accessories	2	3	1
Professional & Specialist Services	2	3	3
Real Estate	2	1	5
Telecommunications Equipment/Services	21	29	55
Transportation Systems	3	9	8
Utilities.	9	4	7
Other[2]	30	22	27
TOTAL	**118**	**113**	**176**

[1] Includes Auto, Health, Life and Peril.

[2] Includes product areas such as Agricultural Products, Funeral Services, Auto Repair Services and Industrial Machinery & Products

TEST YOUR KNOWLEDGE

The Fair Competition Act was introduced for the maintenance and encouragement of business in Jamaica. More competition means better prices and more product choices for consumers. *How much do you know about competition law in Jamaica?* Test your knowledge by answering the questions below.

1. The Fair Competition Act was passed in 1993. True or False.
2. Monopolies are illegal in Jamaica. True of False.
3. Price Fixing is illegal under the Fair Competition Act. True or False.
4. A material representation that is likely to be misleading, though not actually misleading, is not an offence. True or False.
5. When a supplier sells identical goods or services to different customers at different prices and the price differences are not due to differences in costs, this could amount to _____ .
6. When an advertisement offers goods at an attractive price to lure consumers into purchasing, at a higher price, some good other than that advertised, this is referred to as _____ .
7. A manufacturer's or seller's promise to stand behind his product is called a _____ .
8. An arrangement between a supplier and a reseller whereby the reseller is prevented from advertising, displaying or selling goods below a specified price is illegal. True or false.
9. It is illegal for a supplier to specify a maximum price for resale. True of False.
10. An agreement between two or more persons whereby one or more of them agree or undertake not to submit a bid in response to an invitation for bids or tenders is referred to as _____ .
11. The maximum penalty for an enterprise under the Fair Competition Act is _____ .

Sudoku

							7	
2	8	3						9
		1	4		6			
								6
	4	6	7	3	5	8	1	
3								
			9		7	1		
8						7	9	5
	6						2	

Instruction: Fill in the grid so that every column, row and 3x3 square includes all digits from one (1) to nine (9).

Solutions

6	9	4	2	8	3	5	7	1
2	8	3	5	7	1	6	4	9
5	7	1	4	9	6	2	8	3
1	5	7	8	4	2	9	3	6
9	4	6	7	3	5	8	1	2
3	2	8	6	1	9	4	5	7
4	3	5	9	2	7	1	6	8
8	1	2	3	6	4	7	9	5
7	6	9	1	5	8	3	2	4

1. True 2. False. If an enterprise is dominant in the market and abuses that position by lessening competition in the market, then it could be in breach of the Act. 3. True 4. False 5. Price Discrimination 6. Bait and switch 7. Warranty or guarantee 8. True 9. False 10. Bid-rigging 11. $5 million

Barbara Lee's send-off reception











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