

## SESSION II – OECD Global Forum on Competition

### CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION Contribution from the Fair Trading Commission, Jamaica's competition agency

#### 1. Introduction

1. It is widely accepted that competition authorities in developed and developing countries alike encounter challenges and obstacles in their effort to promote competition and enforce their various competition laws. While the challenges faced are similar in nature their degrees vary across countries. Some challenges however are unique to small developing countries which have limited resources and pressing social problems which require immediate attention. Developing countries do not generally place the implementation and administration of competition law on their priority lists. With the changing global landscape, trade barriers being removed and markets becoming more integrated, developing countries find themselves in the situation in which they now have no choice but to institute the relevant legislation. The implementation of institutional reform that the developed countries took several decades to accomplish is now being thrust upon developing countries which do not have the luxury of time, the requisite skill or the resources. The developing world is just not equipped to deal effectively with all the issues of a global market place and all the relevant institutions, which come with them.
2. The Fair Trading Commission (FTC), Jamaica's competition agency, which was established in 1993, during a period of trade liberalization, privatization and deregulation, faces numerous challenges as it strives to carry out its mandate under the Fair Competition Act (FCA). The FCA requires that the FTC promote competition and enforce the competition law. Given the limitations faced by the Commission, however, these two tasks are not executed in an optimal manner, thus reducing the possible impact on the economy and the general population. The major challenges which impede the work of the FTC most profoundly relate to the absence of a competition culture; the history and the structure of the economy; resource constraints of the competition agency; and a deficient legislation. These challenges are discussed in detail below.

#### 2. Major challenges

##### *Absence of a competition culture*

3. Competition culture refers to the awareness of the general public, including the business community, politicians and civil servants about competition law and the benefits of competition. This is woefully lacking in Jamaica. Although Jamaica's competition law has been in force for over ten years, it is apparent that there is still a wide section of the society which does not know about the law and the agency. Even among some individuals who are aware of the FTC and the FCA, there is a disconnect between knowing of the existence of the institution and the benefits which can arise from competition. There is currently strong anti-competition sentiments arising regarding the cement industry, as important voices within the

society are giving support to protectionist sentiments under the guise of promoting Jamaican businesses and workers.

4. Prior to the passing of the law the private sector lobbied against the inclusion of merger control provisions (MCP). Similarly the law does not contain any prohibition against interlocking directorship. The arguments against MCP indicate that there was either a lack of understanding of how mergers are dealt with in other jurisdiction or plain self-interest. One argument against the inclusion of MCP in the Jamaican competition law is that as a small economy companies may need to merge to be more competitive in the global market. This argument however does not apply to sectors for non-traded goods. As regards interlocking directorship it was recognized and accepted that given the size of the country (a population of 2.7 million) it would be impossible to avoid the situation in which any one person would sit on various boards. It was believed that the provisions addressing abuse of dominance are sufficiently able to deal with any potential abuse by directors. Under the abuse of dominance provisions, however, only exclusionary abusive conduct is prohibited, exploitative conduct by a dominant firm is not prohibited.
5. The FTC in its formative years has faced challenges regarding its jurisdiction. There are two instances in which the jurisdiction of the FTC has been successfully challenged in the Courts. One case involved the General Legal Council, the regulatory body governing the legal profession in Jamaica, and the other involved the Jamaica Stock Exchange. The General Legal Council is governed by the Legal Profession Act and its subsidiary rules, while the Jamaica Stock exchange is governed by the Securities Act which, incidentally, was passed on the same date as the Fair Competition Act was. Both institutions challenged the FTC claiming that the FCA does not apply to them as they are governed by their respective legislation. The Courts ruled in favour of both institutions.
6. The lack of competition culture is manifested also in consumer attitude. Consumers are generally unwilling to “shop around” in search of the best deals. They often complain about the relatively high prices being charged by some stores in competitive markets, but are unwilling to shop at a store with comparable lower prices. They expect the agency to address the issue of high prices. Against this background the agency has embarked on a number of outreach programs aimed at educating consumers about their rights and obligations.

*History of the country and Structure of economy*

7. Jamaica is an island economy in the Caribbean, with a GDP in 2002 of US\$8,365.2 million; a per capita income of US\$2645.43; and average growth rate of 0.71 per cent over the ten year period to 2002. Jamaica was essentially a heavily regulated economy with the government controlling most of the island’s leading industries. Jamaica’s trade regime was characterized by high tariff and non-tariff barriers. The market place then comprised protected monopolies and was governed mainly by Government Regulations. During that era a significant institution was the Prices Commission, which regulated the prices of goods and services offered by the miniscule private sector. Various Commodity Boards played a significant role, primarily in foreign trade, but sometimes also affecting the local market. These Commodity Boards determined which producers could export and import, and what prices local exporters would receive for their products. In some instances the commodity boards could determine who was allowed to produce.
8. Decisions about the allocation of economic resources were often made by the Government, whether directly through state-owned companies or indirectly through the various Government

agencies. Firms generally co-operated with each other in the delivery of goods and services. This co-operation was facilitated through the various government regulations, which fostered co-operation instead of competition. The various regulations promoted such anti-competitive practices as market sharing, price-fixing, and exclusive dealing. The concept of competition was alien.

9. Then came the period of liberalization in the 1980's and early 1990's, when the structure of the economy witnessed significant changes, which required that the private sector become the main actor in the economy and market forces would determine the prices of goods and services. With the reduction of trade barriers entered foreign competition; firms were expected to compete with each other to gain market share. This type of open market environment was expected to result in economic efficiency and hence economic growth, with consumers benefiting from lower prices, better products and wider choices.
10. Unfortunately, the long history of protectionism, co-operation among firms and the standard prices and services are embedded in the culture and therefore policy makers and the business community are influenced accordingly. Some government regulations which are clearly anti-competitive are still in place; and efforts to have them amended are met with resistance. Even when there is no resistance the process of amendment can be quite protracted.<sup>1</sup> The competition agency was successful in lobbying a government agency to amend a 1975 Regulation, which granted exclusivity to one taxi company to operate at the island's two international airports. The FTC recommended that the regulation should be amended to allow for competition *for* the market and/or competition *in* the market. The process took over three years. The FTC's efforts to have the various regulations relating to the Commodity Boards amended have been met with great resistance.
11. Almost every industry in Jamaica has an association. The bankers, bakers, general insurers, petroleum retailers, used car dealers and all the professions have associations. While these types of associations are the norm, they are conducive to collusive activities. The FCA does not apply, however, to activities of professional associations, designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public.

*Resources of the competition agency*

12. The Jamaican competition agency deals with both competition matters and consumer protection. While this arrangement might be suitable for other developing countries with limited resources, it is not optimal in Jamaica's case given that there are at least two other agencies which deal with consumer protection.<sup>2</sup> The agency's resource problem is a combination of a relatively small staff complement, lack of requisite technical skills and limited finances.
13. The human resources of the agency comprise five part-time Commissioners, who could be considered adjudicators and the Staff, who carries out the investigations. The Commissioners comprise one economist, two lawyers and two accountants. The Staff, which is headed by the Executive Director, comprises two economists, three lawyers, three complaints officers and one research officer. The post of senior economist has been vacant for more than a year. The

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<sup>1</sup> The process of amending most legislation is usually protracted.

<sup>2</sup> The Consumer Affairs Commission (CAC) deals exclusively with consumer protection, while the Office of Utilities Regulation has a department which deals with consumer protection with regard to utilities. CAC is not yet supported by a law.

Staff, under the guidance of the Executive Director investigates the complaints submitted by consumers and businesses. Almost all competition-related complaints, which span a number of industries, are handled by the two economists with the assistance of the research officer. The consumer protection related complaints are generally dealt with by the lawyers and complaints officers.

14. With the agency concentrating on both consumer protection and competition matters, taking into consideration the staff complement, the work output suffers gravely. The volume and nature of the complaints require much more human resources; it could be said that the agency is operating below the minimum efficient scale.
15. Competition enforcement requires expertise in competition law. The leading tertiary institutions in Jamaica which are responsible for training lawyers and economists do not offer courses specific to competition law and its enforcement. The result is that neither the Staff nor the majority of Commissioners have had any formal academic training in these areas. We have benefited however from short term courses in competition law and enforcement aimed at correcting this deficiency. The Staff has also invested a considerable amount of time in trying to learn by doing and in educating themselves.
16. Complaints relating to abuse of dominance and agreements which lessen competition are often technical and require time intensive investigation and research which require a high degree of technical skills. Some investigations are best carried out by a team of lawyers and economists. These investigations are often in respect of complaints against multinationals or companies with vast amounts of financial resources to hire the best competition experts. In one case involving the local subsidiary of an international company, the Respondent actually hired consultants from NERA Economic Consulting, an international firm of economists, which specializes in market analysis. The Commission is unable to match skills and expertise.
17. The lack of resources makes it difficult for the agency to perform efficiently and therefore to be successful. The agency's image is undermined by the limitations in its ability to carry out investigations.

#### *Deficient legislation*

18. The Fair Trading Commission is established under Section 4 of the Fair Competition Act, as a body corporate. The Act defines the Commission as the five Commissioners who are appointed by the Minister of Commerce, Science and Technology. Section 5 of the FCA authorizes the Commission to carry out investigations in relation to the conduct of business in Jamaica to enable it to determine whether the Act is being breached. Accordingly, the Commission is authorized to summon and examine witnesses, administer oaths and hear evidence. The Act therefore gives the Commission the power to act as both investigator and adjudicator. It must be noted, however, that decisions by the Commission are appealable to a Judge of the Supreme Court sitting in Chambers.
19. This structure and the legislation are probably the biggest obstacle being faced by the agency. This weakness became apparent when the Staff of the Commission undertook an investigation involving the Jamaica Stock Exchange, in March 1994, less than a year into the operation of the Commission. The Staff having concluded that the Exchange's actions constituted a breach of Sections 17 and 20 of the FCA which render void agreements which lessen competition; and prohibit abuse of dominance, respectively, filed a complaint with the Commissioners. The Exchange having been informed of the Staff's conclusion and the filing of the complaint

with the Commissioners, filed an application in the Supreme Court seeking declaration that, among other things, the action of the Commission whereby it is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and void. The trial commenced in June 1996 and judgement was handed down in favour of the Commission in July 1997. The Judge found, *inter alia*, that there has been no breach of natural justice. The Exchange appealed the ruling of the Supreme Court. The appeal began in the Court of Appeal in February 1998 and judgement was handed down in favour of the Exchange in January 2001. Specifically the Court held that the Commission's functions as adjudicator and complainant are a breach of the rules of Natural Justice. The Court stated that the FCA does not clearly distinguish between the function of investigating and the function of adjudicating upon matters which are the subject of complaints, as it merges the judicial function into the investigative function. Further, the Court stated that there is no general provision for the delegation of the investigative functions of the Commission to the Staff or other agencies to be administered independently of the Commission. The FCA is currently being amended to rectify, among other things, the problem of breach of natural justice. What is being proposed is that the FCA recognize the Staff, led by the Executive Director, as the Investigator and the Commissioners as adjudicators.

20. The implication of this ruling is far reaching and has greatly affected the substantive work of the agency. The FCA mandates that matters relating to agreements which lessen competition, abuse of dominance, exclusive dealing, market restriction and tied selling be adjudicated by the Commission. The Staff therefore in their investigation of these cases hope that where a breach is found that Respondent, (i.e. the offending party) will agree to enter into a Consent Agreement with the Commission. In one case however, after the investigation was completed by the Staff and the Staff's finding was presented to the Respondent, the attorney acting on the Respondent's behalf reminded the Staff of the ruling of the Court of Appeal. The Staff had no choice but to discontinue the matter.

### **3. Conclusion**

21. Both the Commissioners and the Staff recognize the challenges faced by the institution and are committed to overcoming them. Notwithstanding the deficiency in the legislation, the agency has been functioning fairly effectively in relation to consumer protection. In recent times we have found that not only are consumers complaining about false and misleading advertising but also competitors, which points to the fact that firms are becoming more aware of the work of the agency and also of how seemingly simple actions by their competitors can affect their businesses.
22. While the limitations of the legislation have significantly impeded the effectiveness of the FTC, many companies have been anxious not to violate the spirit of the FCA. It is not uncommon for companies to seek the opinion of the FTC as to whether proposed changes in their operations would offend competition.
23. Ground is slowly being won in the struggle to establish a competition culture in Jamaica. The progress made in the telecommunications industry is a manifestation that competition has a positive effect on consumer welfare and the economy. It is anticipated that when the FCA is amended the agency will be more poised to effectively carry out the mandate of

the law and to demonstrate the benefits of competition in other industries; and this should contribute to the building of a competition culture in Jamaica.