# COMPETE

FAIR TRADING COMMISSION

*Promoting Competitive Markets*

Vol. XXI, January 2017

## Fair Play: Competing by the Rules

**The role of market definition in disruptive innovation**

**Much more than fair play**

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# COMPETE

## Foreword

In this issue of **Compete**, we explore the theme "*Fair Play: Competing by the Rules*", which explores the different aspects of competition law and the benefits of competition to consumers, businesses and the wider economy.

The FTC was established to enforce the Fair Competition Act (FCA) with the objective of encouraging competition in the conduct of trade and business in Jamaica. The FCA contains two broad categories of prohibitions, those dealing with anticompetitive conduct and those dealing with consumer protection. **Compete** 2016 focused on consumer issues, therefore, this issue will focus on competition matters.

Competition law and policy is vital in Jamaica as it facilitates the equality of opportunity for businesses and ultimately fair play in the conduct of trade and the supply of services. This benefits consumers, businesses and the wider economy. Consumers benefit from competition law as they are provided with competitive prices, better quality goods and product choices. Businesses benefit from competition law as there is a level playing field where their competitors are concerned. Finally, the economy benefit from competition law as competitive markets increase productivity and promotes economic growth.

The articles contained in the magazine touch on several topics including the concurrent application of competition law and regulation in the ICT sector, disruptive innovation and market definition and the essential facilities doctrine. We have also included a list of activities that are prohibited under the FCA.

In addition to the articles, the magazine highlights some of the matters we explored in 2016.

We know you will enjoy this issue of **Compete** as much as we enjoyed putting it together.

Happy reading!

*Kristina Barrett-Harrison & Paul Cooper*

*Magazine Coordinators*


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## IN THE NEWS



## ARTICLES


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# FTC participates in CARIFORUM- EU capacity building project on competition


From left: Marc Jones, *Legal Officer*, FTC; Patrick Martens, *Project Coordinator*, Taimoon Strewart, *Project Coordinator*; Bevan Narinesign, *Executive Director*, Trinidad and Tobago Fair Trading Commission; Barry Headley, *Senior Economist*, CARICOM Competition Commission; and David Miller, *Executive Director*, FTC.

As a show of its commitment to the strengthening of competition in the region and as the most experienced competition agency in the region, the FTC conducted several sessions in the CARIFORUM-EU Capacity Building Project on Competition held in Antigua and Barbuda, Trinidad and Tobago and Guyana during 2016. The project is geared toward assisting CARICOM and OECS member states in developing competency in the area of competition law and ultimately establishing national competition authorities.

The FTC Staff presented on several areas including the economics of competition law, cross -border anti-competitive conduct, institutional design, institution building and jurisdictional issues.

The FTC remains committed to promoting competitive markets and lends a helping hand to other jurisdictions that are looking to do the same.

# FTC comments on petroleum sector

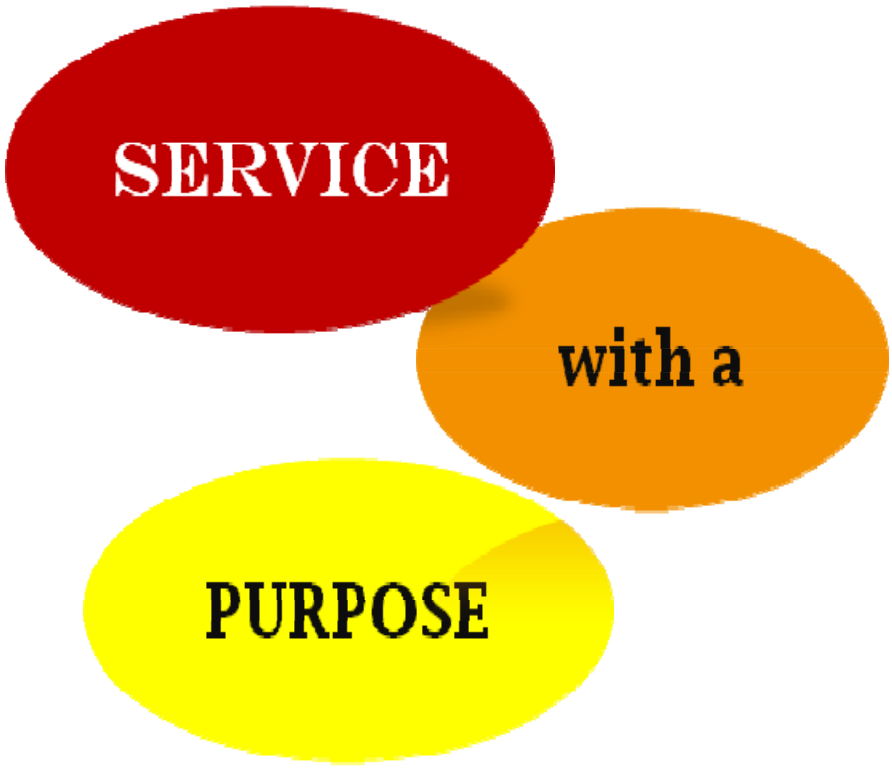
In 2016, the FTC issued two position papers on matters concerning the petroleum sector. One paper discussed the inclusion of goodwill compensation in contracts between bulk distributors and retailers of petroleum products. The FTC argued that the value of a company's brand name, solid customer base, good employees relations and any patents or proprietary technology contributes to goodwill. Marketing companies and retailers have the opportunity to generate goodwill jointly at retail locations.

With goodwill compensation, retailers have incentives to exert greater levels of effort to generate sales. Accordingly, goodwill compensation to retailers, by stimulating retailer efforts to drive sales, is likely to increase the value of the product to final consumers. Contracts between retailers and marketing companies should include a scheme for measuring and allocating the goodwill between both parties at the conclusion of the contract.

The other paper discussed the competitive effects of vertical integration in the petroleum sector. Vertical Integration is a business transaction which occurs when an entity operating at different stages of the production and/or distribution chain in the same industry. The structure of the Petroleum sector in Jamaica is such that there are three main stages in the distribution chain: (i) Bulk supply; (ii) Transportation; and (iii) Retail supply (filling stations). There are numerous suppliers at each stage of the distribution chain.

The structure of the petroleum sector plays an important role in the assessment of the probable effect of vertical integration on competition in the sector and based on the structural characteristics of Jamaica's petroleum sector, vertical integration is unlikely to have adverse competitive effects.

In addition to the position papers, the FTC submitted comments on the proposed Amendments to the Petroleum (Quality Control) Act and recommended measures intended to create a more effective market environment in the petroleum sector. The measures will also likely improve the market dynamics and relationships between the players in the sector, and more specifically to redress the unequal bargaining position between marketing companies and retailers. This inequity has resulted in the market not functioning as efficiently as it should be, thereby leading to disruptions.



# FTC partners with agencies to promote competition

In 2016, the FTC partnered with regional and local agencies in public education efforts to promote competition in Jamaica. On May 31, the FTC facilitated the hosting of a level one training seminar on Competition Law and Policy. The seminar was hosted by the Forum of the Caribbean Group of African, Caribbean and Pacific (ACP) States (CARIFORUM) with funding from the European Union (EU). It was held at the Mona Visitors Lodge and some areas covered were Institutional Arrangements for Competition Law Enforcement in CARICOM, Competition and Trade Agreements and Competition Culture in CARICOM. A total of sixty two persons participated including representatives of the business community, several Government Ministries and Agencies, the media and academia.

On July 21, 2016 the FTC participated in the Kingston chapter of the Mobile Business Clinic Initiative (MBCI). The MBCI was launched in September 2014 to facilitate business formalization, market access and market entry; to increase awareness of business development services, provide training, capacity development and technical support; promote sound entrepreneurial practices through public education; and to sensitize Medium, Small and Micro Enterprises (MSMEs) about the Government's reform agenda. At the event, several pamphlets, posters and magazines on competition matters were distributed to over fifty MSMEs.


# FTC appeals to Privy Council

The Fair Trading Commission (FTC) has appealed to the Judicial Committee of the Privy Council to vary the judgment handed down by the Court of Appeal on December 19, 2014 with respect to a Stock Purchase Agreement between Digicel Jamaica Limited ('Digicel') and Oceanic Digital Jamaica Limited ('Claro'). The Court of Appeal held that the FTC has jurisdiction over telecommunications matters, but not over transactions between the parties.

Arising from the Court of Appeal Judgment, the FTC now seeks to clarify issues relating to: (a) the proper interpretation of the relationship between the Fair Competition Act (FCA) and the Telecommunications Act; and (b) the interpretation of section 17 of the FCA. The matter has been set for hearing before the Judicial Committee in May 2017.

# FTC to defend Court findings

Following Crichton Automotive Limited's appeal of the May 2015 Supreme Court judgment in the case of Fair Trading Commission v Crichton Automotive Limited, on October 11, 2016 the Court of Appeal set the appeal for hearing on February 6, 2017.

In the judgment delivered on May 22, 2015, the Court found that Crichton Automotive Ltd (CAL) is liable for misleading representation under section 37 of the Fair Competition Act (FCA). The Court imposed a penalty of $2 million dollars against CAL for breach of the FCA; and awarded costs to the FTC.

The case had arisen upon the FTC's investigation into an allegation that CAL had misled a customer regarding the model year of a Nissan Sunny motor car. At the time of sale, the car was represented as a 2007 model, but subsequently, valuators, the Island Traffic Authority and Fidelity Motors Limited, the authorized Nissan dealer in Jamaica, confirmed that the motor car is in fact, a 2005 model.

# FTC-OECS collaboration

Hon. Oliver Joseph, Minister for Economic Development, Trade, Planning and Cooperatives in Grenada (left) with FTC-OECS team (from left) Safiya Horne-Bique (OECS); David Miller (FTC); Nicole Garraway (OECS) and Marc Jones (FTC)

Between July and September 2016 the Staff of the Fair Trading Commission (FTC) undertook a diagnostic assessment of the current consumer protection landscape in the Member States of the Organization of Eastern Caribbean States (OECS). The assessment was conducted in the context of a pending consultancy for the OECS Commission on the institutional arrangements needed to facilitate the formalization of consumer protection regimes in the OECS. The main objective of the assessment was to ascertain the current legal framework, institutional systems and administrative processes that contribute to existing state of consumer affairs in the Member States.

The Members States involved were: Antigua & Barbuda, Dominica, Grenada, Montserrat, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines and the British Virgin Islands. The assessment included on-the-ground stakeholder consultations in each Member State by a Country Mission comprised of FTC Staff and facilitators from the OECS Commission. Other activities undertaken by the FTC include desk research, data collection and comparative assessments.

The Country Missions conducted over the period of the assessment produced specific findings in relation to each Member State. In general, it was found that Member States are at varying levels of progress on the development and implementation of legislative frameworks for consumer protection as well as in public education sensitization programmes. Also, that nearly all Member States had at least one informal or unincorporated organization which handles consumer affairs issues; and most of those organizations had developed the capacity to receive, and in some instances record, consumer complaints. Further, there is work to be done in improving the state of awareness by business enterprises and consumers, on consumer issues.

The Executive Director, David Miller, and Legal Officer, Marc Jones, presented the findings of the diagnostic assessment to Member State representatives at a Validation Workshop held in Grenada on September 27 and 28, 2016. The findings were confirmed with participants agreeing proposals for further consideration.


Grenada Mission: (from Left) Tiemonne Charles, *Statistician*; Gabriel Baptiste, *Senior Price Control Officer*; Safiya Horne-Bique (OECS), Hon. Oliver Joseph, *Minister*; Natasha Deterville-Moise (OECS); David Miller (FTC); Nicole Garraway (OECS); and Paul Cooper (FTC)

# FTC signs consent agreement with banana chips producer


In December 2016, the FTC entered into a Consent Agreement with JP Tropical Foods Limited. The Agreement relates to an investigation that was initiated by the FTC on the basis that at least one packet of JP's branded banana chip product did not contain a promotional item, which had been advertised by way of a label strip affixed to the packaging of the product.

While the label strip contained a disclaimer indicating the possibility that some packets of the product may not contain any promotional item, the FTC took the view that this disclaimer may not be sufficient to exclude liability for misleading advertisement under section 37 of the Fair Competition Act. Without admitting liability, JP Tropical Foods Limited agreed to settle the matter on certain terms by way of a Consent Agreement pursuant to the Fair Competition (Notices and Procedures) Regulations, 2000.

# FTC participates in international forums

During 2016 Senior FTC Staff participated in several international conferences. The conferences were:

- The Latin American & Caribbean Forum (LACCF) - Focused on two main areas, namely: Disruptive Innovation in Latin America and the Caribbean, competition enforcement challenges and advocacy opportunities; and Promoting Effective Competition in Public Procurement.
- The Annual International Competition Network Conference- Conference discussed topical issues on competition policy in areas such as Cartel enforcement; Mergers, Unilateral Conduct; Agency Effectiveness; and Advocacy wherein the Executive Director led discussions on Agency Ethics Programmes and its significance to the effectiveness of competition agencies.
- 2016 Seminar on China's Experience in the Development of Economic Special Zone for Developing Countries- Participants were given insights into China's historical, cultural, philosophical, political and economic ambitions. The take-away message emanating from the Seminar is that within the space of two generations, through a process of trial, assessment, planned allocation of available resources and political/social stability, China was able to "think" its way out of a situation where its economy was transformed from humble means to one which is anticipated to overtake the United States of America (USA) as the leading economy by 2030. China has identified the inherent stability in its political system as an important pillar in this economic transformation of the economy. Indeed, China's successful economic reform has rekindled the usually emotive debate in political economy- the virtues of democracy over communism as a rule of law.
- 2016 Seminar on Industry Associations (Chambers of Commerce) Management for Developing Countries, hosted by the Ministry of Commerce of the People's Republic of China and organized by the Academy for International Business Officials (China) - Focused on areas such as Electronic Commerce, Mobile Commerce, Current Economic Situation and Business Associations, Industry Association and Social Innovation, and The Internet of Things in Logistics.

# Appointment of Commissioners

Dr. Derrick McKoy, Chairman

Dr. Derrick McKoy, an Attorney-at-Law, has been appointed Chairman of the Fair Trading Commission by the Minister of Industry, Commerce, Agriculture & Fisheries effective June 6, 2016. Dr. McKoy previously served as Chairman for the period 2008-2011.

The other Commissioners are: Mr. Stuart Andrade, Finance Specialist; Mr. Robert Collie, Attorney-at-Law; and Dr. Lloyd Waller, Methodologist/ Governance and Development Specialist. They have been appointed to serve for the two year period, June 6, 2016 to June 5, 2018.

# FTC advocacy activities

## FTC comments on draft Microcredit Bill

In September 2016, the FTC submitted comments and recommendations on the draft Microcredit Bill to the Ministry of Industry, Commerce, Agriculture and Fisheries. The FTC's comments spoke to: (a) the "fit-and-proper" test for persons involved in microcredit enterprises; (b) the functions and powers of the proposed Regulatory Authority, to specifically prohibit false or misleading representations; (c) the application procedure and the conditions for the grant of licenses; (d) factors that the Regulatory Authority should take into account in determining the public interest in license applications; and (e) competition issues with respect to limiting the number and range of suppliers in the relevant market.

## FTC participates in stakeholder consultation on ICT framework

Senior FTC Staff participated in a stakeholder consultation workshop hosted by the Ministry of Science, Energy and Technology in September 2016. The purpose of the workshop was to review recommendations on the legal and regulatory framework of the proposed Information and Communications Technology sector as well as the proposed changes to the Telecommunications Act and the Radio and Telegraph Control Act.

## Merger control review regime

The FTC completed two major activities in 2016 as it relates to the merger review regime in Jamaica and CARICOM. In September, the Ministry of Industry, Commerce, Agriculture and Fisheries, the Planning Institute of Jamaica and Jamaica Trade and Invest finalized the Terms of Reference and the Expression of Interest for the Consultant, which will be contracted under a World Bank Growth and Competitiveness Project to develop the merger review regime framework for Jamaica.

Regarding the merger review regime in CARICOM, the FTC submitted comments to CARICOM on the Policy draft entitled "Revised Policy and Rules Framework For The Control Of Mergers And Acquisitions In The CSME". The FTC advised that it supports the current version of the Policy subject to the concerns being resolved by COTED.

## Competition Advocacy

For markets to be competitive, Competition Authorities must do much more than the enforcement of competition law.

Complementary to enforcement is Competition Advocacy which includes those activities, undertaken by a Competition Agency, that are geared toward the promotion of competition through its relationship with other government entities and by increasing public awareness of the benefits of competition.

The OECD Competition Assessment Toolkit notes that : "Despite that fact that almost all economic activity today occurs in markets where competition can work efficiently, economic regulations that reduce competition and distort prices are pervasive. They take many forms at various levels of government, ranging from legal monopolies that block competition in entire sectors, to a host of less visible restrictions on starting up and operating businesses, such as quotas on business licenses and shop opening hours. Yet economic regulations have often proven to be extremely costly and ineffective means of achieving public interest goals. In the absence of clear evidence that such regulations are necessary to serve public interests, governments should place a high priority on identifying and removing economic regulations that impede competition."

It is noted also in the Toolkit that: "A conclusion one can draw is that since competitive markets are expected to yield high economic welfare in most circumstances, assessing the impact of rules and regulations on competition will provide significant benefits."

# FTC initiates study of the market for microfinance services

The FTC has received numerous complaints about micro financial institutions. These are institutions which offer financial services primarily to low income individuals and individuals who typically would not qualify to access financial services from commercial banks or other regulated financial institutions.

With the eminent enactment of the Microcredit Bill, which will create an Authority to regulate micro financing institutions, the FTC has initiated a study to assess the structure and characteristics of the microfinance industry and the scope for greater competition. To the extent that the microfinance institutions cater to a vulnerable segment of consumers, the study will focus on the extent to which customers are adequately informed about the terms and conditions under which these products are being offered.

# FTC and BOJ craft ToR for review of commercial banking sector

In accordance with their respective mandate as Jamaica's central bank and national competition authority, the Bank of Jamaica (BOJ) and the Fair Trading Commission (FTC) respectively, have developed the Terms of Reference (ToR) for a review of the commercial banking sector. The team from the FTC was headed by David Miller, Executive Director whilst the team from the BOJ was headed by Brian Wynter, Governor.


The ToR contemplates a supply-side review of regulations governing access to finance in Jamaica and was informed primarily by the FTC's extensive study of the commercial banking sector in 2010 as well as comparable reviews carried out in other jurisdictions. One of the key issues to be determined by the review is a description of the main factors explaining low competition outcomes in Jamaica.

The ToR was finalized in December 2016 at the request of Jamaica's Economic Growth Council and represents one of the key deliverables under Jamaica's Stand-by Arrangement with the International Monetary Fund. It is anticipated that phased reviews of banking, insurance and pension regulations that impact access to finance would commence by March 2017 with recommended measures adopted by June 2017.

# Much more than fair play

*Contributed by the Consumer Affairs Commission*

**What is "Fair Play"?**

FAIR PLAY, in economic terms, usually has a very narrow definition among regulators and members of the business community. Firstly, it usually centres on businesses meeting their economic and legal responsibilities. Secondly, it normally focuses on those responsibilities with reference to other businesses. That is, fair play normally means that businesses are meeting their economic and legal responsibilities to other businesses. However, this perspective on fairness is very limited and ignores the ethical responsibilities businesses also face, especially those to their customers.

**As such, it can be argued that companies can seem to play fair while still falling short of ethical standards.**

**CSR: Much More than Fair Play**

Academics and managers have developed a broad, holistic paradigm used in the evaluation of business action termed Corporate Social Responsibility (CSR). **Writing as far back as 1991, Carroll described the notion of CSR as a business's determination to "make profit, obey the law, be ethical, and be good corporate citizens" (1).** He noted that the idea of CSR first means that a company should meet its economic responsibility by maximizing profit, reducing cost and maintaining a competitive edge. The legal responsibility of firms is to act in accordance with the laws and regulations of their marketplace. The ethical firm is one that meets the expectation of "societal mores and ethical norms" (1). Finally, a business is expected to "assist voluntarily with those projects that enhance a community's 'quality of life'" (1). Figure 1 provides an illustration of the concept.

Some will propose that one is asking too much of businesses when anything other than economic and legal responsibilities is placed on them. Businesses are created solely to make profit, doing so within the confines of the law. However, even

the staunchest defenders of this position cannot ignore the importance of acting ethically and the benefits that follow philanthropic activity. Economist Milton Friedman noted that businesses should "make as much money as possible while conforming to the basic rules of society, both those embodied in the law **and those embodied in ethical custom**"[1] [2]. He may have ignored philanthropic acts, but many managers will agree that charitable programmes should be included where possible [1]. But even if we agree that philanthropy is an overkill, **one cannot exclude the importance of ethical responsibilities alongside the economic and legal responsibilities of companies.**

In fact, a business's ethical responsibility goes beyond its economic and legal responsibilities. Businesses are expected to be "more proactive [in] efforts towards good citizenship and fair business practices" [3], treating customers, employees and even the environment with a high level of consideration, justice and fairness. Today, society evaluates companies using this more holistic approach. **As such, sometimes, the scandal our businesses experience are not because of economic failings or legal missteps, but breaches of a broader expectation of good, right, just, fair, and proper behaviour.**

**Examples from the Jamaican Petroleum Industry**

The petroleum retail industry in Jamaica has been shown to be a competitive industry. In 2015, international crude oil prices experienced a decline. Local consumers cried foul as prices seemed reluctant to fall commensurate with the huge dips experienced in the price of the raw material. The Fair Trading Commission (FTC) conducted an investigation of the market to determine whether uncompetitive behaviour was evident. Using monthly petrol prices collected by the Consumer Affairs Commission (CAC), the FTC compared the movement in prices of petrol stations located in relatively close proximity to each other. They showed that these stations were adjusting their prices in line with the fall in ex-refinery prices from Petrojam, all the while trying to keep the price within a few cents of each other. Members of the Jamaica Gasoline Retailers Association (JGRA) have said that the general tendency of sticky downward price movement was so that marketing companies could get "the best return on their investment" [4]. **While they may have been fair between themselves, recent developments call into question the extent to which they have been fair to their customers.**

Between 2009 and 2015- before the steep declines in crude oil prices- the CAC's data showed that retailers and marketing companies normally obtained an average mark-up of roughly12% for E10 87, 16% for E10 90, 13% for Auto-diesel, and 11% for ULSD[2]. During the recent decline in oil prices, the CAC observed that retailers and marketing companies sold at mark-ups of 20% for E10 87, 25% for E10 90, 23% for Auto-diesel, and 24% for ULSD. It was expected that, following the explanation from the industry, mark-ups would return to normal once crude oil prices began to rise again. Crude oil prices have not risen to recent levels, but they have inched back up. Further risk to the upside has increased, especially as members of OPEC have committed in part to a freeze on production. As at October 2016, the CAC observed that annual point-to-point price changes showed that US Gulf Coast regular gasoline prices increased 15% while Jamaican pump prices increased 10%. However, at the same time, CAC data showed that mark-ups have not moved down. The industry seems to be experiencing a new normal. In short, the industry profited more than

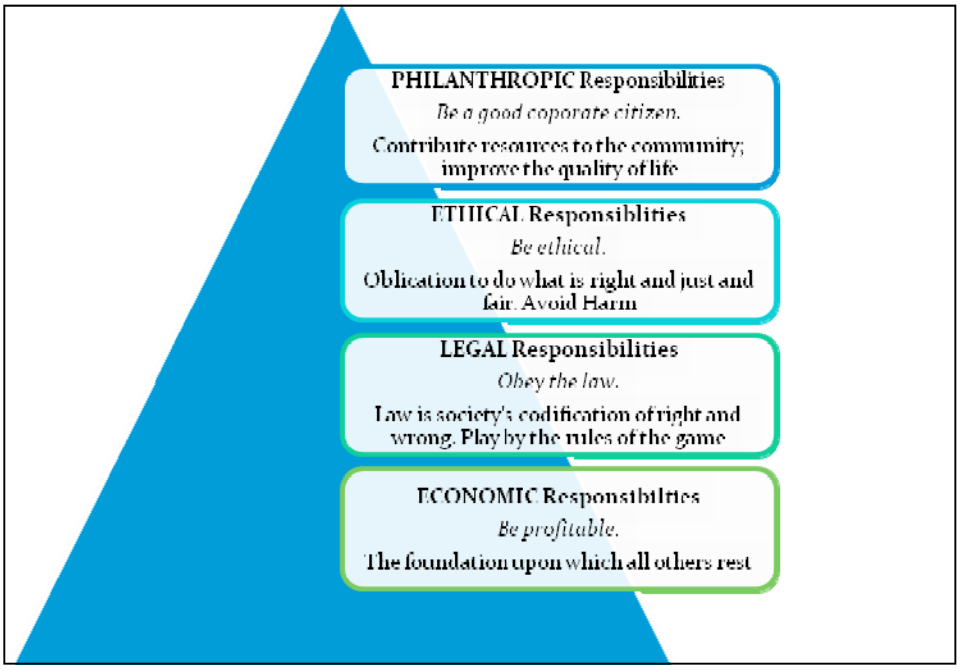



**Figure 1 The Pyramid of Corporate Social Responsibility [1]**

usual during times of decreasing cost, but still kept the higher margins as costs began to rise. They have been reported as being concerned that "if we continue with these high prices we are going to have some serious social issues" (5). **One wonders where the concern for the public has gone as they now seem reluctant to spare the consumer increasing prices.**

Compounded on this was the matter of 'Bad Gas' in 2015. By October 2016, the CAC received 534[3] formal complaints from consumers who reportedly had their vehicles damaged by contaminated gasoline purchased at Jamaican pumps. The Government began discussions with the petroleum marketing companies and their retailers about compensation to motorists who were affected by contaminated gas. The report to Cabinet did not identify a guilty party responsible for contaminating the gas. So, commensurate with their legal responsibilities, the industry was not beholden to consumers. However, several recommendations were made in the same report that should be adopted. These recommendations could "enable a far better system than we now have" (6), and could restore the confidence of consumers in the industry. **Furthermore, Minister of Science, Energy and Technology, Dr. the Honourable Andrew Wheatley suggested that "as a goodwill gesture, [the government and the industry] put forward some form of compensation package"(6).** The CAC, as the chief agency responsible for consumer protection and a member of the committee that proposed the recommendations, believes that compensation is more than a "goodwill gesture" but the right thing to do.

**Moving the Discussion Forward**

The petroleum industry was clearly meeting its legal and economic responsibilities, but it seems it was falling short of its ethical responsibilities. The companies were maximizing profits, while respecting the law and regulators. But is it right to keep mark-ups this high given the climb in crude oil prices? Does it really meet the expectations of proper behaviour when the industry withholds compensation from customers harmed by a faulty product they distributed? Proper business behaviour should be about more than mere "fairness", a term that usually means competitive yet legal business to business relations. **Businesses must be encouraged to do right by their customers, as well as their employees, the environment and the wider society, in ways that may not be enshrined in law but nonetheless represent right and moral behaviour.** In this way they can be assured they are truly playing fairly. The conversation in the community should seek to move forward.

**The CAC will soon be embarking on a study to examine aspects of CSR[4] in the Jamaican economy on the whole as part of its work going forward.** Evaluating the extent of CSR in the Jamaican market place, and not just proper economic and legal behaviour, is critically important. The CAC contends that proper consumer protection means ensuring that businesses are behaving ethically and demonstrating high overall CSR. Poor ethics, in particular, could mean that a business is endangering the life and property of consumers, and jeopardizing the sustainability of the Jamaican economy.

Furthermore, an economy that is plagued by unethical behaviour, economic irresponsibility and disregard for legislation is one that cannot attract sufficient foreign direct investment to spur it further. Investors are very cautious in risking capital with firms that are likely to experience scandals and sanctions or do not meet their own ethical standards. This study, along with the resultant measurement and interventions can help regulators protect both consumers and the economy at large. Consumers will be encouraged to expect and demand better products and services; companies will have to raise their standards and improve their competitiveness to meet this demand; and the economy on the whole will experience sustainable growth. As such, the CAC will be doing its part to ensure truly fair relations between consumers and providers, a critical component if Jamaica is to be among other things, the place of choice to do business.

[1] Author's emphasis

[2] The CAC has consistently collected petroleum product prices since 2003. The mark-ups observed on petroleum products *viz a viz* refinery billing prices remained relatively consistent with minor variability between 2003 – 2015, despite the introduction of new products (E10 in 2009 and ULSD in 2013).

[3] 382 with receipts and claim documentation and 152 without receipts and claim documentation

[4] The Philanthropic dimension will be excluded in favour of the consumers' perception of businesses meeting their economic, legal and ethical responsibilities. The CAC also hopes to determine business' perception of consumers behaviour.

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# Implications of concurrent application of competition law and administration of regulation by a single ICT sector regulator


Dr. Golding

*By Dr. Paul Golding*

INSTITUTIONAL design is an important element of a successful competition law and policy system. Within the telecommunications sector, countries have considered four main institutional design options when faced with the task of creating telecommunications regulatory entities: (i) single-sector regulator, (ii) multi-sector regulator, (iii) converged regulator, and (iv) no specific regulatory authority, but rather a general competition authority with responsibility for overseeing the telecommunications sector. The Telecommunications Handbook (2010) specifies the characteristics of each of the four institutional designs:

- **Single-Sector Regulator:** The sole function of the single-sector regulator is to oversee the telecommunications sector.

- **Multi-sector Regulator:** Multi-sector regulators oversee not only the telecommunications sector, but other industry sectors with common economic and legal characteristics (e.g. water, energy and transportation). The Office of Utilities Regulation in Jamaica is one such entity which has chosen this type of organizational structure.
- **Converged Regulator:** With a converged institutional design, regulators oversee all communication services i.e. telecommunications, including radio, broadcasting and media (and in some instances postal services) which are under the umbrella of one agency. Jamaica's new ICT policy has proposed a change in design from multi-sector to converged regulator.
- **No Specific Telecommunications Regulatory Authority:** An alternative institutional approach is a non-specific telecommunications regulator. In this case, the application of competition and antitrust rules are applied rather than detailed sector specific rules and institutional designs. There is no actual functioning example of this model in any country.

The aforementioned institutional designs are generally self-explanatory, however, in the literature there is an apparent confusion between single-sector and converged regulator, which is worth highlighting. Single-sector regulator concentrates primarily and narrowly on the telecommunications sector. The converged regulator's approach redefines and broadens the sector beyond telecommunications to include broadcasting and information technology under one entity. This new converged regulator is often mistakenly referred to as a single-sector regulator; the correct nomenclature however is Single ICT Sector Regulator. The converged or single ICT sector regulator is increasingly viewed as a best practice based on significant ongoing changes taking place in the market.

**Market Trends**

The telecommunications and ICT industries are undergoing a significant wave of change, which is directly impacting the choice of institutional design. The consulting firm Oxera (2015) explains that alongside the growth of network capacity (e.g. fibre roll-outs), the increased use of the Internet Protocol (IP) for content services have enabled traditional telecoms operators to deliver an ever-increasing array of innovative content-based services (including linear broadcast TV and on-demand services) over their existing network infrastructure. At the same time, technological advances have allowed cable networks — previously designed for one-way only broadcast use — to provide two-way voice and data offerings at increasingly high speeds. The result has been a convergence in the traditional media broadcast and voice/data network industries, with both the traditional telecoms and traditional pay-TV operators now offering consumers a range of bundled service packages. These include dual-play (e.g. voice + broadband, or voice + pay TV), triple-play (voice + broadband + pay TV), or quad-play (including mobile services).

Additionally, an increasing number of operators are opting to bolster their core capabilities by acquiring adjacent service providers. This includes transactions that combine fixed-line operators with mobile operators, network operators with channel providers and/or network operators with content producers.

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**Figure 1: Convergence/Integration and Divergence/Disintegration**

| Layers | Industries | | | |
|---|---|---|---|---|
| | IT | Telecom | Broadcasting | Other Media |
| Content | Software based content | Telecom based services and content | Broadcast programs | Film, music, newspapers etc. |
| Transport | Software | Network Services | Transmission | Cinemas |
| Equipment | IT Hardware | Telecom equipment | Broadcast equipment | Reproduction of films, printing etc. |

*Source:* Samarajiva & Henten (WDR) 2002

Similarly, while some operators are choosing to acquire established media businesses, others are opting to buy key content rights (e.g. live football rights) and to invest in developing their own content.

Another important driver of change in the sector is the emergence of new distribution technologies; in particular, Over-the-Top services (OTT). OTT are rapidly transforming the traditional telecommunications market with evidence of OTT entertainment services such as Netflix becoming a significant threat to traditional pay-TV retailers, while services such as WhatsApp, Viber and social media platforms such as Facebook and Twitter are major threats to traditional voice and data services.

In response to these changes, a number of jurisdictions have implemented or are considering the implementation of converged legislative framework. This is aimed at responding to opportunities and challenges created by convergence. The theoretical principle of converged legislation is that regulation should follow the logic of technological change and converge into one unified structure. This would represent the coming together of three historically different regulatory traditions- specific to communications, media and the internet – into one regulatory framework (ACMA 2011).

Despite the consolidation and convergence taking place in the market and the institutional design responses by regulators, the central role of regulators remain the maximisation of consumer welfare, which is best achieved through competition. Competition policy provides a set of tools to promote sustainable competition and to preserve a market environment in which competition can flourish (Telecommunication Handbook 2010). The central issue that this paper addresses is the competition conundrums that are likely to arise within the context of convergence and the implementation of a single ICT sector regulator. The application of aspects of the competition analysis framework will be used as an evaluation tool. The law governing issues relating to anti-competitive agreements, abuse of dominance and mergers and acquisitions is referred to as Competition Law.

**Market Definition**

The first step in competition analysis is to define the relevant market. The purpose of market definition is to determine the boundaries of a given market. Only then will it be possible to analyze the prospects for competition in the market, opportunities for particular firms to acquire and exercise market power and implications for consumer welfare. The definition of a market is based on the substitutability of differentiated products or services. Whether consideration should be given for two differentiated products to be in the same market depends on the extent to which they are reasonable substitutes. Two viewpoints are considered to make such a determination; that of the consumers and suppliers. The consumer's viewpoint looks at whether the products are functionally equivalent, while the supplier's perspective is the ease with which firms not already supplying the product or service in question can begin to do so.

A common feature of the converged legislative framework is the use of a layered regulatory model that is based on the network layers of next-generation networks or Internet

Protocol (IP) based technologies. Figure 1 illustrates the many possibilities for convergence between different industries at a horizontal level, as well as vertical integration between different levels.

Figure 1 further illustrates the wide range of possible services and technologies that can fall within the definition of a communications market and is indicative of the difficulty that regulators will have in defining markets. Additionally, as markets have become more concentrated, a number of operators can now own a range of inputs to offer triple or quad play in the retail market. This will pose challenges for regulators when applying ex ante and ex post margin squeeze test.

**Market Power and Dominance**

Regulators are not only required to define relevant market but also to identify whether one or more operators in these markets hold Significant Market Power (SMP); this is a position equivalent to dominance under competition law. There is no universally accepted definition of dominance, however a firm is generally considered to be dominant based on its market share. Under competition law, holding a position of dominance is not penalized; only abuses of dominance are deemed unlawful and consequently ex-post remedies are applied. The opposite is the case in telecommunications framework. Oxera (2015) in their briefing paper explains that telecoms regulations do not require any anti-competitive effects or demonstrated harm to customers, rather, such harm is hypothesises to exist in the absence of remedies. Regulators are therefore obliged to impose ex-ante remedies. This approach goes beyond what would be required under competition law and have been justified on the basis that unlike competition law, ex- ante regulation seeks to actively promote market entry. This represents a contradiction between competition law and regulation especially in a converged market.

**Content**

Media regulation is traditionally concerned with the regulation of content, and in the broadcasting sector, licensing provides the basis for regulation on social policy and cultural criteria—in exchange for the conferring of a limited number of broadcasting licences. Government objectives for media regulation have traditionally concerned freedom of speech, pluralism, impartiality, representation of ethnic groups, protection of vulnerable social groups such as children and the promotion of cultural heritage (ACMA 2011). Whereas the telecoms regulatory framework provides regulatory authorities with power to oversee fixed and mobile markets, including broadband, it explicitly does not provide these powers in relation to pay TV or content markets.

As explained in the preceding section Market Trends, premium TV content such as sports rights are becoming a key driver of customer demand for communications services. Oxera (2015) argues that when content is bundled with voice, broadband and/or mobile services, concerns arise over potential leverage of market power from one market to another. These concerns could arise from the vertical integration occurring within the value chain, as operators go from providing retail network access to providing, and in some case producing, the content distributed by hose networks. In this case, any firm enjoying sufficient market power at one level might find that it has the ability and incentive to leverage that power into other parts of the value chain through the use of foreclosure strategies. Consequently, regulators will need to decide whether content should be brought within the scope of ex-ante regulatory framework.

**Conclusion**

This paper discussed the implications of the concurrent application of competition law and the administration of regulation by a single ICT sector regulator. What is apparent from this discussion is that the value chain developed around the broader internet ecosystem is radically different from the traditional linear telecommunications value chain. The telecommunications value chain is now a subset of the broader more complex internet value chain, which provides exciting new market possibilities, but also regulatory problems needing to be addressed.

# The Role of Market Definition in Disruptive Innovation

*By Verlis Morris and Desroy Reid*

A DISRUPTIVE INNOVATION is a product or service which rises to challenge established companies in a market, even though the challenger/ disruptor is oftentimes a smaller company with fewer resources. The process by which this is done is known as "disruption."

The disruptor's product normally caters to consumers who are not currently served by the incumbents' products. As the incumbent focuses on its core customers by improving its products or services, inevitably, it ignores some customers who were previously satisfied with the original products. To enter the incumbent's market, the disruptor generally offers a cheaper, simpler and/or more convenient alternative to that of the incumbent's. In the initial stages incumbents are sometimes unaware of the disruptor because their profits are unaffected as they continue meeting their core customers' demands. As the disruptor's product or service improves, however, it also starts to meet the demands of the incumbent's core customers. Eventually, a significant number of these core customers switch to the disruptor's product. At this point, disruption has occurred. The incumbent now recognizes the serious threat posed by the disruptor but it may be too late as they are either deposed or displaced.

Disruptive innovation has forced competition authorities to review how they assess competition. Particularly, it has impacted the role market definition plays in this assessment. Market definition had always played a leading role in the assessment of conducts that harm the competitive process. In a properly defined market it is easier to determine whether the actions of incumbents are likely to harm or promote the competitive process. Incorrectly defined markets often lead to erroneous decisions being made about the market power of firms and this will likely have a negative effect on competition. The evolution of markets resulting from innovation has made it increasingly difficult to define markets. In an industry where rapid innovation takes place the boundaries of the market are ever changing and therefore defining the market under these circumstances becomes an even more difficult task.

Adding to this difficulty, competition agencies must determine whether an innovation is sustaining or disruptive. Sustaining innovation occurs when companies continuously make incremental improvements to their products or services. An example of sustaining innovation is the continuous upgrades and updates to mobile phones in terms of speed, picture quality, memory etc. These advancements have made it possible for the phone companies to remain relevant and competitive in the mobile phone market. On the other hand, disruptive innovation, changes the game all together, rendering current services or products obsolete and bringing previously marginalized customers into the game. An example of a disruptive technology is the transistor radio. The transistor radio shook the market for radio so hard that the existing technology at the time, analogue radio, soon became obsolete. The strategy by which the disruptor, Sony, entered the market has been documented by

Clayton Christensen[1] in his discourse "The Innovator's Dilemma."

Incumbents have come to recognise that sustaining innovations may be insufficient to remain competitive or even viable. They have to be mindful of disruptive innovations as well. On identifying a disruptor, the incumbent may: (i) merge or acquire the disruptor; (ii) prevent the disruptor from gaining a foothold on its core customers by restricting its access to critical input; or (iii) ignore the disruptor.

In the case of the merger/acquisition, the competitive process could be harmed if the incumbent's aim is to bin the disruptive innovation after the merger/ acquisition and continue along the traditional path.

provide in the future.

Incumbents may also opt to block the entry of the disruptor, where possible, and this situation must also be dealt with by competition agencies. Entry into established markets can be made increasingly difficult by the actions of incumbents. For example, in the electricity industry a disruptor may supply solar energy systems which may be viewed by mainstream customers as inferior because the system can only produce electricity during the daytime. This product can be improved, however, if the disruptor's customers are able to access the incumbent's infrastructure so that they are able to send excess electricity to the grid during the daytime, which they then may use at night. In this


Incumbents can also harm the competitive process, in the second case, by restricting the disruptor's access to technology or infrastructure essential to improving its product. This access is integral to the disruptor's ability to start competing for mainstream customers. Therefore, competition agencies' role in the first two instances would be to avoid the pitfalls of relying on market definition when making their assessment.

O'Connor (2013) highlighted why relying on market definition may lead to faulty conclusions, which may further harm competition.[2] Traditionally, in a merger review of incumbents, one of the measures of assessing market power requires allocating market shares which depends on first defining the market. However, in the case of a merger between an incumbent and a disruptor, a measure of market share will unlikely shed any light on the competitive impact of such a conduct. The share of the disruptor would likely pale in comparison to the share of the incumbent. A decision based on market share would result in the erroneous approval of the merger since the aim of the merger was to prevent future competition. Such an assessment would ignore the significant competitive constraint the disruptor may

instance, if the incumbent restricts access to its infrastructure then the competitive process is harmed because of the limiting effect it has on future competition. In the absence of competition consumers face higher prices, fewer choices and a reduction in the rate of innovation.

In these cases, one alternative to assessing the market is the First Principles Approach (FPA) proposed by Salop[3] (2001). The FPA would consider the effect the disruptor is likely to have on the market. It evaluates the competitive effects of the conduct and does not overly rely on proxies of market power such as market share. By doing this the disruptor's potential impact is considered and a truer economic analysis of the alleged anticompetitive conduct is done than that which would prevail had market definition been used in its traditional form.

Since history indicates that disruptors bring significant improvement to social welfare, competition authorities have to devise means by which they assess incumbents' conducts towards disruptors.

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*Endnotes*

[1] This process is what Clayton Christensen (1997) dubbed "disruptive innovation."
[2] O'Connor Daniel (2013). "*An antitrust analysis of Google's Waze Acquisition: Disruptive Competition and Antitrust Merger Review"*
[3] Steven Salop (2001), "The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium," Antitrust Law Journal Vol. 68, p.188-202.

# Essential Facility Doctrine:

## the duty to supply a competitor*

*Contributed by Barbados Fair Trading Commission*

THE OBLIGATION of a firm to deal with an entity which it prefers not to has been a topic that has been passionately debated in the competition policy arena. While it is generally accepted that a company has the right to do business with who it sees fit, there is the caveat that under certain circumstances, it is essential for an owner of a facility or a particular service to grant access to an outside entity. This is typically observed in sectors such as telecommunications, energy and transportation where specific legislation is introduced to deal with access issues which may negatively affect the competitive nature of the markets. This is based on the premise by some regulators that some facilities are infeasible or practically impossible for other enterprises to replicate and as such an access obligation is warranted.

While this is frequently seen and accepted in sector specific regulations there are instances where markets outside the ambit of those covered by the regulatory powers are negatively affected by a likely entrant's inability to replicate a required facility or service. The enforcement of access obligations under these circumstances has come to be known as the essential facility doctrine and it is normally pursued by the competition authority.

The essential facility doctrine emanates from the landmark *US v Terminal Railroad Association of St. Louis*[1] case (Railroad case). The defendant Association owned the railroad terminal and the only bridge link to the terminal. A potential entrant, with the intention to provide competition to the Association was denied access to both the bridge and the railroad since it was argued that the entrant should build its own facilities to compete. The US Supreme Court interpreted Section 2 of the Sherman Act to hold the case as one of monopolization and ordered the Association to provide access to essential facilities , the bridge and the railroad terminal allowing the new entrant to compete effectively. Successively, other Supreme Court judgements have deduced Section 2 of the Sherman Act to explain that the denial of access to competitors by the owner of an essential facility can be in breach of that section.

The competition policy community has been largely divided on whether the obligation of a property owner to share his property to an unaffiliated entity encourages competition. One interpretation of this derives from the EU Commercial Solvents[2] case. In this case the Court found that the actions of a dominant firm constitutes an abuse if it, as a supplier of a raw material, ceases to supply an existing customer where the refusal would result in the customer going out of business.

While the Commercial Solvents ruling appears to be, for the most part, similar to Railroad case, there is nonetheless a nuanced interpretation of the two cases. In the Railroad case the Court did not speak of the criterion of a prior relationship between the facility owner and access seeker, whereas the Commercial Solvents ruling appears to have required a prior relationship.

In the more recent case of Trinko[3] in 2004 the US Supreme Court disagreed that Verizon was required to share its local telephone network stating that the situation differed from the Aspen Skiing case[4] where the denial of access by the facility owner violated Section 2 of the Sherman Act since there existed a

* *The article does not cover the broader discussion with respect to intellectual property rights.*

prior relation between the two skiing companies. In the EU however, the landmark case of Oscar Bronner[5] puts a different spin on the requirement of a previous relationship. In Oscar Bronner, Bronner was an Austrian publisher of a daily newspaper who sought access to the home delivery system of its larger competitor, Mediaprint. The European Court of Justice ruled that Mediaprint was not in a dominant position since the home delivery of newspapers was not the market and therefore there existed other avenues for Bronner to distribute its newspaper such as through kiosks, shops and by post.

From this decision emerged a test known as the Oscar Bronner test. The test requires that the essential facilities doctrine should be applied only under exceptional circumstances where:

1. The refusal was likely to eliminate competition in the market on the part of person requesting the service;
2. The refusal is incapable of being justified; and
3. The facility in itself is indispensable to carrying on that person's business, in as much as there is no actual or potential substitute in existence for the facility.

To put some of the concerns into perspective in his opinion in the Oscar Bronner case Advocate General Jacobs stated that in the long run it is generally procompetitive and in the interest of consumers for a company to retain for itself its own facilities which have been developed for the purpose of its business. The Advocate General was of the view that if it becomes easy for a firm to wait to use the facility of a competitor the incentive to invest and innovate is significantly reduced. In effect there is a thin line between granting access rights to promote competition in the short to medium term on the one hand and the likelihood of reducing incentives to invest and innovate on the other. These are serious considerations to be explored when addressing the matter of access to facilities.

**The Barbados Experience**

The essential facility doctrine and its impact on competition has also featured in Barbados where the Barbados Fair Trading Commission (the Commission) has conducted two investigations where the essential facilities doctrine was applied. In the one case that we will discuss, the Commission received a complaint from the oil company Sol (Barbados) Limited (Sol) against the Government owned entity, Barbados National Oil Company Limited (BNOCL). Sol's complaint was based on the allegation that BNOCL had abused its dominance as the sole importer of heavy fuel oil (HFO)to foreclose the market for the delivery of the same to the island's lone electricity provider, Barbados Light and Power (BL&P). The allegation centred on BNOCL's refusal to offer a throughput rate for access to its pipeline which runs directly to the electricity company's generation plant. At the time of the complaint Sol held the exclusive contract to supply the HFO to BL&P which they fulfilled by trucks travelling between the BNOCL oil terminal and the BL&P electricity generating plant. However, this contract was set to expire in May 2006 and was opened for the first time to a competitive bidding process.

Given the information received, the Commission was of the view that the upstream market for importation and wholesale supply lacked competition since the BNOCL was designated by Government to be the sole importer and wholesaler of HFO. Given its designation it was therefore clear that the BNOCL held a dominant position in that market.

With regard to the downstream product, the market was considered competitive as evidenced in the bids for the contract by entities such as the oil company Texaco and BNOCL and the intention of the other market participants such as Esso who also expressed interest in bidding but withdrew as a result of the BNOCL's refusal to provide through put rates and consequentially denying access to its pipeline.

After examining the market the Commission was of the view that the supply of HFO by truck, when compared to that of the pipeline, was economically infeasible on the grounds that it was inefficient for trucks to deliver HFO. In addition the Commission also took into consideration the logistical and safety constraints since the trucks shared the road with regular vehicular traffic.

The Commission then concluded that three breaches of the Act had occurred. The breaches were:

1. BNOCL had taken the unilateral decision to exclusively supply all HFO to the BL&P, regardless of the preferences of the BL&P;
2. BNOCL had denied the competing oil companies the opportunity to compete for the purchase and subsequent supply of heavy fuel oil after importation for on-sell to BL&P; and
3. BNOCL having constructed a pipeline facility, now essential to the economic transportation of heavy fuel to BL&P, was seeking to deny its competitors access to said facility.

In the Commission's final decision the BNOCL was ordered to cease and desist its anti-competitive activity. BNOCL appealed the Commission's decision the judge ruled that the Commission failed to properly define the market in addition to not having sufficient evidence that use of the pipeline was essential to the transportation of fuel oil to BL&P and that the BNOCL maintained a monopoly position. Much of the decision was based on the introduction of the Oscar Bronner test by BNOCL's legal team.

The Commission appealed, and the Court of Appeal[6] found that while the market definition is the most critical aspect of competition law, it was nonetheless evident that there was not a viable substitute to HFO and it was therefore unnecessary to pursue complex economic methods to test for substitutes when none existed. The Court of Appeal also agreed with the Commission that it was impossible for delivery of HFO by trucks to compete with a pipeline due to greater efficiency and better safety control in using the pipeline. On the issue of the essential facilities doctrine the Court noted that there was no express prohibition against the denial of access to an essential facility under section 16 of the Fair Competition Act. The Court of Appeal however observed that Art. 102 of the European Community (EU) Treaty, section 2 of the Sherman Act in the US and section 46 of the Trade Practices Act in Australia, also do not explicitly refer to essential facilities doctrine. In these jurisdictions however, while the doctrine is not expressly stated the courts have recognised that there are implied provisions regarding the essential facilities doctrine under unilateral conduct provisions of their legislation.

Therefore in determining whether BNOCL's conduct constituted a breach of the essential facilities doctrine the Court of Appeal was satisfied that BNOCL's actions met the criteria of the Oscar Bronner test. In the Court's opinion the criteria was satisfied because the refusal to provide access to the pipeline would have, without doubt, eliminated all competition as the pipeline became the only viable method for supplying the market since transportation by truck and construction of another pipeline were economically infeasible.In addition, the Court argued that the defendant's action provided no justification except for the fact that the intentions were to eliminate competition from the market and that the BNOCL action's would have harmed business activity in that market.

From the discussion above, it is clear that in Barbados the jurisprudence supports the essential facility doctrine and the use of the Oscar Bronner test. Perhaps the jurisprudence will be persuasive in the wider region as the Caribbean moves towards encouraging and promoting the competitive environment.

*Endnotes*

1 1912 Supreme Court's decision in United States v Terminal Railroad Association of St. Louis 224 U.S 383
2 *Commercial Solvents v Commission [1974] ECR 223. [1974] 1 CMLR 309*
3 *Verizon v. Trinko*, 540 U.S. 398 (2004),
4 Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985)
5 *Case C-7/97, Oscar Bronner v Mediaprint, [1998] ECR 7791 (ECJ)*
6 *The Fair Trading Commission v Barbados National Oil Company Ltd. (Civil Appeal No. 20 of 2009)*

# Consumers are being framed: what are you doing about it?

*By Desroy Reid*

HAVE YOU ever bought a product because of the "awesome bargain" that you thought you were getting, then after a moment or two regretted your purchase and wondered what you were thinking? It may have been shoes, grocery items, etc. If you have, you may have been FRAMED. Framing theory suggests that the way in which products are presented to an audience (called "the frame") influences the choices they make as it affects how they process that information.

One of the tenets of competitive markets is that buyers and sellers are well-informed.

A consumer looking to buy a product would want to have information on the prices for all competitors, the quality of the product etc. They would want this information in the simplest form and not have their decision influenced by anything that has nothing to do with the product. The consumer would then, based on this information, make a decision. Decisions taken by fully informed consumers yield a higher welfare than ones that are based on incomplete information. Accordingly, anything done to distort information available to consumers, whether by way of omission or incompleteness reduces their welfare. Additionally, this distortion could adversely affect market competition.

Fundamentally, framing does not contravene any law but it does impact markets and how they function because of how it affects information. Misleading advertisements generally use some type of framing; however not all framing used in advertisements are misleading.

**Framing in Motion**

The language, images and music etc of advertisements can be used to adjust the meaning of advertisement messages, which often influences people's choices. Take language for example, people will have different emotional reactions to advertisements depending on the type of language that is used and how the words are crafted. Here is an example of language framing used by a breath mint advertiser: "Your perfume turns him on. Will your breath turn him off?" Notice how a wonderful scent is framed to get you thinking of making more wonderful scents by purchasing breath mints – even though your breath has nothing to do with your perfume?

Framing is used prominently in advertisements. Marketers and sales people are good at getting persons to buy things – after all it's their job.

You may have had the experience of salespersons selling vacation/ adventure park packages with numerous benefits to be received if you BUY NOW. In the moment you are dazzled by the experience promised and the savings to be had and so you make the purchase. A couple months go by and, as is often the case, you did not get a chance to use the coupons or you did get to use it only once before it expired. The frame for these packages is that they offer you significant discounts, and everybody love discounts especially to something that is fun

and exciting. Additionally, the pitch of the overall savings or the "big value relative to the small money" which you would be missing is another of the frames used. In most instance, no mention is made of the fact that you would have to visit the parks/hotels etc. numerous times to really get the full benefit of these packages – visits you may very well cannot afford given your budget.

## Finding the Frame

Whether consumers are able to make objective comparisons often depends on how alternatives are described, or "framed." The existence of framing is sometimes so discrete that unassuming consumers are sucked into the message unsuspectingly. You may sometimes see prices and quantities stated in units of measurement that you find difficult to discern. For example, the repayment structure of a loan can be defined in terms of various time units – so 60% per year becomes less attractive than 2% per week – even though the latter is a larger figure when annualized. Also you may notice nutritional contents on some food products are specified in various units of weight or volume all of which may not be readily understood by consumers but nonetheless hold some relevance to them. For example, the entire bag of crackers is not one serving but the information on the back is only for a serving, which may be of a significantly different portion than the bag.

### Positive and Negative Framing

Some advertisements prompt you to ACT NOW or face the dire consequences of not acting, while others will state the awesome benefits you will gain from having the particular product NOW. In the first instance, the marketers are using negative framing by having you focus on the negative, that is, "if you don't" to capture your imagination and in the second they are using positive framing i.e. what would happen "if you do."

Here is an example:

If a doctor, who also happens to be selling a drug to treat cancer, told you that you had leukemia and that "if you don't" take the drug your chances of dying would be 10% (negatively framed), you probably would be less optimistic about your chances of survival, however if he told you that you had leukemia but "if you do" take the drugs you had a 90% chance of surviving (positively framed) you may be more upbeat about your chances of surviving and the effectiveness of the drugs. Note, however, this is the same information presented differently in both instances, but your reaction to either framed message may be different.

### Incomplete information

In the first instance there is no mention of the fact that you will have a 90% chance of surviving or a 10% chance of dying in the second. This manipulation of statistics through percentages is one popular frame that is successfully used by marketers. That is, one advertiser can promote a pharmaceutical product as having a 90 percent success rate and a competitor can use the same statistic to (correctly) claim that the drug fails to work in 1 out of 10 cases.

Do consumers realize that information about the other outcomes is missing? This strategy of making some information obvious and hiding others pushes consumers to make decisions they otherwise may not make. Marketers/salespersons know this and use it to their advantage by constructing different outcomes of using products that are equivalent when full information is considered but could evoke different reactions if presented in fragments.

## Conclusion

It is said that the framing effect is used to get the proper reaction from consumers but how far should consumers' emotions be pushed to influence their buying decisions?

Regulators have long advocated for consumers to make comparisons by shopping around and arming themselves with as much information as is necessary to make their best decision. To assist in the provision of simplified information, the regulators have been given the responsibility to enforce strict guidelines especially those relating to food labels. For example, in the banking sector, there are guidelines that regulated banks have to follow when quoting interest rates etc, even though this may not be the case for unregulated sectors such as microenterprises. In the food industry standard units of measurements are required for product labels with nutritional information.

One must not deny the powerful effects of framing and their influence on people. The fact that we are aware that they exist should give us some measure of control when we do make our purchasing decisions. Recognizing that our brain is sometimes unconsciously influenced will make it easier to avoid the pitfalls of framing

*Desroy Reid is a Competition Analyst at the FTC.*

# What kind of activities breach the Fair Competition Act?

- **Exclusive Dealing**
  This is a practice whereby a supplier (manufacturer/ distributor) seeks to prevent its customers (wholesaler/retailer) from dealing with any other supplier (competitors).

- **Price Discrimination**
  This is a practice whereby a supplier charges different prices for the same product to different customers or categories of customers where the cost for supplying the product is similar.

- **Tied Selling**
  The practice whereby a supplier, as a condition of supplying a particular product, requires or induces a customer to buy a second unrelated product.

- **Resale Price Maintenance**
  The practice whereby a supplier (manufacturer/ distributor) seeks to force its customers (wholesaler/retailer) to resell the goods at a particular price.

- **Double Ticketing**
  This is the practice whereby a seller charges the consumer the higher of two or more prices displayed in respect to a product.

- **Sale Above Advertised Price**
  This is the practice whereby a seller advertises a product at a certain price; however, it is sold to the consumer at a higher price.

- **Market Restriction**
  The practice whereby a supplier seeks to force a dealer to make goods available only in a rescribed area rather than in any area that the dealer may choose.

- **Abuse of Dominance**
  This occurs when a dominant firm in any market impedes the maintenance or development of effective competition in a market. For example, the dominant firm may:
  (i) restrict the entry of any person into that or any other market; or
  (ii) impose unfair buying or selling prices.

- **Price Fixing**
  This occurs when competitors in a market agree to set the price at which their goods are sold to consumers.

- **Bid-Rigging**
  This refers to agreements between bidders which may affect the process of competition and transparency. For example, bidders may agree not to submit bids or to submit bids arrived at by a prior agreement.

- **Misleading Advertising**
  This refers to any false or misleading representation about a product or service that is made to the public by a person in the course of business.

- **Predatory Pricing**
  This occurs when a firm temporarily charges particularly low prices in an attempt to eliminate existing competitors. The predator will incur temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits.

# FTC Statistics

## Number of complaints received by the FTC during the period April 1, 2014 - September 30, 2016

| PRODUCTS AND SERVICES | Financial Year 2014/2015 | Financial Year 2015/2016 | April-September 2016 |
|---|---|---|---|
| Automobile | 27 | 21 | 9 |
| Business Practices | - | - | - |
| Clothing/Accessories & Textiles | 1 | 2 | 2 |
| Computer | 1 | 1 | - |
| Construction/Home Repair Supplies | - | - | 1 |
| Education | 12 | 9 | 3 |
| Energy | 2 | 2 | - |
| Financial Services | 7 | 11 | 8 |
| Food/Supplements & Beverages | 4 | 4 | 2 |
| Funeral Supplies | 1 | - | - |
| Gaming & Contest | 1 | - | - |
| Gardening Supplies/Equipment &Horticultural Products | - | - | - |
| Government Services | 1 | 1 | - |
| Household Appliances & Accessories | 6 | 6 | 3 |
| Household Furnishings | 1 | 1 | - |
| Insurance[1] | 5 | 2 | 1 |
| Leisure & Recreation | 1 | 2 | 1 |
| Medical Supplies, Services & Devices | 2 | 2 | - |
| Office Furnishings/Equipment & Supplies | - | - | - |
| Personal Care | - | - | - |
| Petroleum Products & Accessories | 2 | - | - |
| Professional & Specialist Services | 8 | 5 | - |
| Real Estate | - | - | 1 |
| Telecommunications | 27 | 22 | 11 |
| Tourism | - | - | - |
| Transportation Systems | 1 | 1 | - |
| Utilities | 1 | 2 | - |
| Other[2] | 8 | 4 | 1 |
| **TOTAL** | **119** | **97** | **43** |

[1]**Insurance** - Motor Vehicle, Health, Life and Peril

[2]**Other** - Baking, Payment Services, Legal Services, Agricultural Products & Agro-Processing, Hardware & Electrical Tools, Media, Packaging, Publications and Industrial Machinery & Products

# ENERGY SAVING TIPS

PETROLEUM CORPORATION OF JAMAICA

# YOUR ENERGY ADVISOR

## REFRIGERATOR

- Don't open the refrigerator too often; take everything you need at one time.
- Cool hot foods before putting them inside a refrigerator.
- Don't place your freezer or refrigerator near a heat source like a stove or dryer; this will make it burn more energy.
- Regularly clean the compartment at the back of your freezer to remove dust.
- If the refrigerator is a manual-defrost model, defrost it regularly so it can run efficiently.
- Organize the contents of your refrigerator; this reduces time spent looking for what you want.
- Do not hang towels or other things on the warm condenser coil at the back of the refrigerator. Keep this coil ventilated at all times.
- If you are buying a new refrigerator, consider an inverter model for greater energy efficiency.

## WATER HEATING

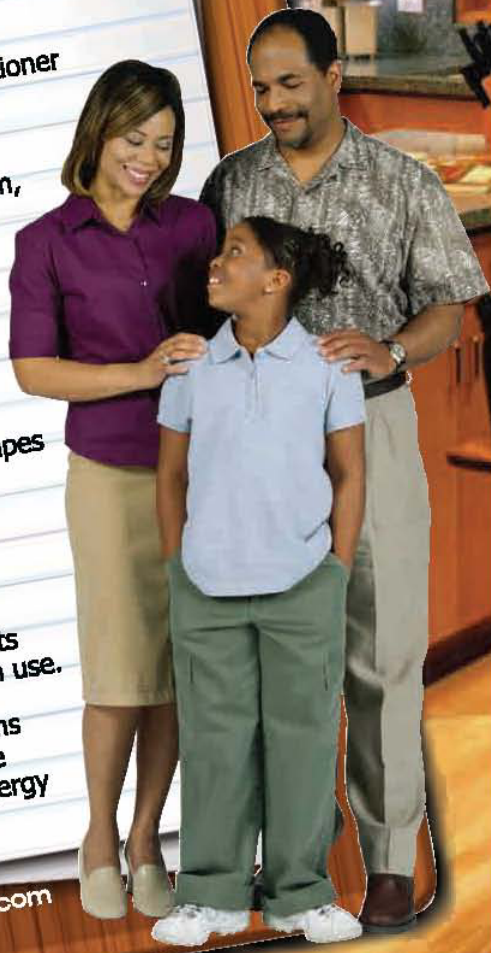
- If you are buying a water heater, get a solar water heater, the energy from the sun is free.
- Install aerators in faucets & low-flow showerheads which use less hot water.
- Install a timer on your electrical water heater to manage usage.
- Take more showers than baths; use less hot water.

## AIR CONDITIONING

- Keep your air conditioner properly cleaned and serviced.
- Keep doors and windows closed when air conditioners are on.
- Use a fan instead of air- conditioner whenever possible.
- Switch off air conditioners a while before you leave a room, the area will still be cool.
- Select the highest thermostat setting that's comfortable; 25.5°C is recommended.
- Do not block air conditioner vents with drapes or furniture.

## APPLIANCES

- Iron once per week if possible.
- Switch off television sets and radios when not in use.
- Use your audio systems wisely. The louder the volume, the more energy is used.



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