

# **COMPETITION ADVOCACY FOR A KNOWLEDGE-BASED SOCIETY**

## **INTRODUCTION**

### **WHAT IS COMPETITION**

Those of us who are old enough to remember when the Jamaican market place comprised a few large monopolies and was governed mainly by Government Regulations, will remember certain institutions like the Prices Commission and the various commodity boards which determined the prices of goods and services and general conditions of the market; monopolies, public and private thrived. Then came liberalization; and firms were free to compete with each other in open markets, characterized by falling tariff and non-tariff barriers.

This kind of free open competitive market environment is expected to result in economic efficiency and sustained economic growth. Ultimately consumer welfare will be enhanced; and indeed consumers can attest to the benefits which have been derived from the liberalization of the telecommunications sector. If the market fails, however, these benefits will not be achieved. Thus, rules had to be developed to regulate the new competitive environment. At a minimum, competition policy and law seek to prevent anti-competitive conduct such as:

- collusive activity among competitors, geared to, among other things, fix prices, carve out markets for the provision of goods and services (i.e. cartel activity);
- abuse by firms which have market power of that market power, referred to as abuse of dominance;
- arrangements which result in concentrations, or mergers that have the potential to substantially lessen competition.

In the words of Shanker Singham, writing in the Brooklyn Journal of International Law, “a well-developed competition policy helps create certainty to benefit most enterprises, but should focus on those areas where there are the most pressing competition problems”.<sup>1</sup>

In other words, the competition policy and Law which a country adopts must suit that country’s particular circumstances. It might be

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<sup>1</sup> Brooklyn Journal of International Law vol. xxvii: 1 pg. 40

appropriate to mention at this point that currently the Jamaican Fair Competition Act does not contain merger control provisions. It was felt at the time of promulgation of the Act, that in the context the rapidly developing global market, Jamaica's small firms should be allowed to render themselves competitive by merging, without being subject to the rigors of Competition Law. A couple of relevant questions at this time must be:

“When will we be ready to introduce merger control into our Competition Law?” Will we ever be ready to introduce merger control?

Effective competition enforcement I must stipulate, relies on a number of institutions and circumstances, including strong academic infrastructure; up-to-date information systems; keen and active professional associations; a sound judicial system and an informed judiciary; accessible and available business records; a political environment in which the market is able to perform optimally; and lastly, but very importantly, adequate resources.

## **DEFINING COMPETITION ADVOCACY**

A recent report published by the Advocacy Working Group of the International Competition Network defines Competition Advocacy as “... those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities, by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.”

Let me underscore what competition advocacy is not – it is not enforcement. Thus, by this definition, when the competition authority seeks to penalize an entity proven to be acting anti-competitively; when it issues a Cease and Desist Order in respect of anti-competitive conduct, that is not competition advocacy. That is enforcement. Whereas one would hope that the enforcement process would go some way to educating some sector or sectors of the Society, one needs to appreciate the fact that enforcement is not advocacy, even though it could be said that enforcement does provide a focal point for Competition Advocacy.

To speak of Competition Advocacy is to refer to those initiatives taken by the competition authority towards public authorities or entities, with a view to influencing the regulatory framework and its implementation in a competition-friendly way. One important goal of Competition Advocacy is to induce Government officials to consider competition principles when

implementing marketing reforms, deregulation and privatization. All these reforms, might be mere words if they do not go hand in hand with Competition principles. It is an open secret in the Region, that Mexico's telecommunications market is considered to be one of the most anti-competitive markets in Latin American, despite privatization. The dominant player was shielded from competition for two years; so naturally, it has consistently exploited its dominant market power to restrict its competitors' ability to compete.

May I make bold to say we have done a lot better here in Jamaica?

A solid example of the kind of partnership of which I speak is the relationship between the Office of Utilities Regulation (OUR) and the Fair Trading Commission, as the OUR prepares its regulatory framework for full liberalization of the telecommunications sector. To the extent that it is technically equipped, the Commission makes good use of all opportunities which it is afforded, to influence the relevant regulatory framework in a pro-competitive way.

Another area in which the Commission has been engaged in Competition Advocacy is the used-car Sector. We have been advocating for the establishment of standards to be applied in this sector. We have been advocating too for uniformity to be legislated regarding the obligation of sellers to inform the buyer about the payment of G.C.T. As a last example of the advocacy activities of the Commission as they relate to Government and public entities, I point to work now being undertaken to determine how competition friendly the new Insurance Act might be. Depending on what emerges the Commission would make the necessary approaches, in the interest and protection of competition.

Advocacy comprises all activities aimed at raising the awareness of all economic agents, a term used to embrace public authorities and the public at large, about the benefits of competition to the society as a whole and about the role competition policy can play in promoting and protecting competition in the market.

## **WHY COMPETITION ADVOCACY**

In this regard, let me point you immediately to our mandate under the Fair Competition Act, the statute under which the Commission is established. Section 5(2) states that "It shall be the duty of the Commission:

- (a) to make available –
  - (i) to persons engaged in business, general information with respect to their rights and obligations under this Act;
  - (ii) for the guidance of consumers, general information with respect to the rights and obligations of persons under this Act affecting the interests of consumers;
- (b) to undertake studies and publish reports and information regarding matters affecting the interests of consumers;
- (c) to co-operate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act.

Let us focus a little on the target groups identified by the Statute:

(1) Persons in business

The Act defines “business” in relevant part, as “any activity that is carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied ...”. Thus our executive agencies e.g. are subject to the jurisdiction of the Fair Trading Commission.

All persons in business need to know their rights and obligations under the Act. A few of the important rights include:-

- (i) the right not to give effect to certain provisions in an agreement e.g. exclusionary provisions;
- (ii) the right to refuse to be party to an agreement which makes its conclusion conditional upon the acceptance of any supplementary obligations which have no connection with the subject of the primary agreement; and
- (iii) the right to exercise any entitlement or enjoy an interest derived under any statute pertaining to intellectual or industrial property.

Broadly, obligations relate to the various prohibitions against anti-competitive conduct under the Act. Perhaps the most commonly breached obligation is in respect of representations made by business persons, in the promotion of their business interests.

Misleading advertisement continues to be the top source of complaints reaching the Commission, accounting for over 90% of complaints.

The need for competition advocacy is even greater where there is only one provider of a particular service being provided because the consumer has no alternatives. I recall the consternation of an officer at the Registrar General's Department, when she first heard that the Fair Trading Commission was investigating complaints about the service being offered by that entity. After meeting with that body, we are now quite confident that its officers understand why and how our paths cross.

- (2) The second group targetted by the Act for education is consumers. As is the case with business persons, consumers need to be educated as to their rights and obligations.

The Commission identifies the rights of consumers, in broad terms, as being embodied in the right to competitive prices and product choices. The Anti-competitive conduct of business persons can seriously erode that right; and therefore in their own interest and protection, consumers are obliged to be vigilant. They need to take advantage of all opportunities for learning about their rights. They have an obligation to themselves to employ good sense, common sense as they operate in the market place. As the cliché goes: "If it sounds too good to be true, it probably is not true." Consumers must examine the hidden text in promotional representations; examine goods purchased before leaving the store; inform themselves as to a merchant's refund policy before entering into, or certainly before completing a transaction. When your money has left your pocket it could be too late.

- (3) The third target group identified by the Act comprises associations or bodies of persons. It is in compliance with this mandate that the Commission seeks to work with bodies like the Bureau of Standards; the Advertising Council; the used-car dealers Association and other such groupings.

## TOWARDS A CULTURE OF COMPETITION

The concept of Competition Advocacy recognizes first and foremost, that it is not only private anti-competitive conduct like collusion and abuse of dominance, that can hinder competition but also regulatory intervention and rule making by public officials. In other words such interventions can go beyond what is strictly necessary and may impede competition.

Whereas private anti-competitive conduct can be addressed by enforcement of the Laws, public regulatory intervention is harder to influence. The competition authority must be able to persuade the relevant public officials of the value of adopting a competition-friendly regulatory framework.

Competition Advocacy, effectively conducted, contributes to the establishment of what is referred to as a “competition culture” which is characterized by the general attitudes and behaviours of consumers and producers and suppliers of goods and services. A weak competition culture will see consumers surrendering easily to the abuse of producers and suppliers who abuse their dominant positions. Such a culture will see producers being complacent, disinterested in innovating - smug in their position of privilege.

Contrarily, in a strong competition culture, consumers will be actively seeking better options; greater variety, cheaper prices.

It is the awareness of all parties about the rules of competition that will bring about a culture of competition. A judicial system which is familiar with competition principles is extremely essential to effective enforcement of competition laws, thus enhancing competition culture.

The Commission recognizes its specific role in educating all sections of the Society, toward such a culture and thereby contributing to the development of a knowledge-based Society.