



## Competition Advocacy in Jamaica

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### 1. Introduction

- 1.1 The Fair Trading Commission, Jamaica's competition agency, which was established in 1993, is mandated by the Fair Competition Act (FCA) to promote competition and enforce the competition law. Over the last two years, however, the Commission's ability to effectively enforce the law has been severely undermined. A 2001 ruling by the Court of Appeal established that the failure of the FCA to properly distinguish between the role of the Staff as investigators and that of the Commissioners as adjudicators conduces to a breach of natural justice. Thus, following an investigation and Staff Report pointing to the existence of an anti-competitive practice, the offending firm can only be encouraged to correct its behaviour. Fortunately, there is some significant degree of co-operation from businesses. The Act is being appropriately amended. While waiting for the legislative process to take its course, the Commission has thrown its energies largely into consumer protection and the task of competition advocacy.
- 1.2 In Naples 2002, the International Competition Network adopted the following definition for competition advocacy:

“Competition advocacy refers to 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 by increasing public awareness of the benefits of competition.”
- 1.3 From the definition above it is clear that activities undertaken to enforce competition law would not be considered as competition advocacy. Competition advocacy activities are non-enforcement activities which are geared towards cultivating a competition culture and achieving competition neutrality throughout an economy. Competition advocacy therefore encompasses any activity which is geared towards influencing market reforms as well as those activities aimed at raising the awareness of the public at large about the benefits of competition. The

need to educate and inform the various stakeholders has also been included in regional trade agreements; the draft chapter on FTAA obligations includes express provisions regarding the promotion of competition advocacy. Some of the Commission's competition advocacy activities are explored in this paper.

## **2. A Foundation for Competition Advocacy**

- 2.1 It is said that to be effective in competition advocacy, a competition agency has to have structural and operational independence, sufficient resources and credibility. The Commission is a statutory body which is entirely funded from the Government coffers and is accountable to the Government through the Minister of Commerce Science and Technology. In this regard, the Commission is not structurally independent. The Commission enjoys operational independence however, in that it has the freedom to comment on the practices of other government agencies and on regulatory matters. Further, unlike the competition law of some countries, which might be silent on the matter of competition advocacy, the FCA empowers the Commission with advocacy faculties, in both general and specific terms.
- 2.2 Section 5 of the Act fixes the Commission with a duty to make available to consumers and businesses, information concerning their rights and obligations under the Act. The Section also authorizes the Commission to undertake studies and to publish reports on matters affecting the interests of consumers. The Commission is also duty bound to assist associations in developing and promoting the observance of standards of conduct while ensuring compliance with the Act. The Commission's advocacy role has also been recognized in at least one piece of sector-specific legislation, i.e. the Telecommunications Act.
- 2.3 With respect to sufficient resources, the work of the Commission like many of its counterparts in other developing countries, suffers from a combination of a relatively small staff complement, lack of requisite technical skills and limited finances. Notwithstanding these limitations, the Commission has sought to allocate its financial resources in the most optimal manner and the Staff has invested a considerable amount of time in trying to learn by doing and in educating themselves.
- 2.4 From the early days of its existence, the Commission has built its credibility by earning the reputation of being a staunch advocate of competition policy and its benefits, so much so, that it has been criticized as being anti-consumers and anti-small business when some of its decisions and policies appear to conflict with the short term interests of these groups. When this happens the Commission has sought to educate the public on why such a decision was taken and how in the long run it will make for a more competitive economy, thus ultimately benefiting both consumers and business interests.

- 2.5 The Commission is cognizant however, that its credibility is linked to its ability to effectively enforce the FCA. In light of this fact, it has been assiduously lobbying the legislators to expedite the amendments to the FCA.

### **3. Competition Advocacy in Practice**

- 3.1 The Commission's advocacy activities take several forms. These include: educating the judiciary and legal fraternity; educating businesses and consumers; promoting legislative and regulatory reform; assessing the Government's privatization transactions and conducting advocacy activities in the regulated sectors.

#### ***Educating the Judiciary and the Legal Fraternity***

- 3.2 All decisions of the Commission are appealable to the Supreme Court. Further, the FCA provides for Private Right of Action, which allows any enterprise or individual who has suffered loss as a result of an anti-competitive practice to take legal action against the offending party. Currently, there is a lack of experience and knowledge in competition matters in the judiciary and the legal fraternity. The Commission is of the view that if this is not addressed, then it is likely that the FCA may be enforced inappropriately, thus creating bad precedence and potential economic inefficiencies.
- 3.3 In an attempt to protect the market from the effects of flawed Court decisions the Commission has organized several training programs with a view to enhancing the understanding of economic analysis and the use of economists as expert witnesses. In the most recent seminar, judges were exposed to various substantive issues in competition law enforcement. Case studies were used to illustrate the analytic methodology the judges should expect from the parties in a competition case. In addition to discussing the substantive issues, the presenter engaged the judges in a discussion on their role and the role of various other actors in competition cases: expert agencies like the competition agency; economic and other expert witnesses; and the parties.
- 3.4 In another initiative directed at the Jamaican Bar Association the Staff of the Commission conducted a course on the topic of market definition and assessment of market power. The lawyers were introduced to market definition concepts such as demand-side and supply-side substitution; product and geographical markets; and the hypothetical monopolist test.

#### ***Educating Businesses and Consumers***

- 3.5 Although it has been ten years since the establishment of the Commission there is still no culture of competition in Jamaica. Many firms are ignorant of the effect of their actions on the market. Consumers, for the most part, fail to heed the "caveat emptor" principle when shopping and are often reluctant to "shop around" for the best deal. The Commission is therefore deluged with complaints of matters which

could have been avoided if consumers had applied due diligence when making their purchases. Against this background the Commission has undertaken several outreach programs. These include industry seminars/workshops and consumer days on which the Staff visits shopping malls and interacts with merchants and shoppers. The Commission also meets regularly with various trade associations and companies.

- 3.6 Other avenues for public education activities take the form of press conferences, television and radio interviews, and addresses given by the Executive Director and other members of Staff to service clubs and tertiary level institutions. Some of the Commission's initiatives aimed at educating businesses and consumers about their rights and obligations are described below.

### Petroleum Sector

- 3.7 In 1994 when it came to the Commission's attention that prospective marketing companies, who would like to purchase petroleum from the country's sole refinery, could not readily ascertain information on volume requirement for direct purchaser status, the Staff approached the refinery; outlined the role of the Commission and the objectives of competition. After a period of consultation with the Staff the refinery revised and agreed to make available, criteria for companies who wish to purchase directly from the refinery. The refinery also advised the Staff that once prospective marketing companies can satisfy the financial, technical and other clearly specified criteria, they would be considered eligible for direct purchaser status.

### Used Car Sector

- 3.8 Over the years the commission has received numerous complaints arising out of the used car sector. In general, customers are dissatisfied because of misrepresentations as to the age and quality of vehicles. In cases where lease financing is offered, there are numerous problems and misunderstandings related to these financing contracts. Following a study of the used car sector and subsequent consultations with the Jamaica Used Car Dealers Association, the Commission outlined to the Dealers the issues which need to be addressed to ensure that customers are adequately informed in relation to all aspects of the purchase of vehicles.
- 3.9 After analyzing some of the complaints received the Commission realized that many of the used car customers failed to apply the art of "smart shopping". The Commission decided to alert consumers as to the potential problems they may encounter when purchasing vehicles and also to advise them of their rights and obligations with respect to the Used Car Dealers. This was documented in the form of published Guidelines.
- 3.10 In its study of the used car sector the Commission realized that there is no legislated standard to determine the model year of vehicles and that importers, in conjunction with suppliers and the Jamaica Customs Department, were the ones who determined the model year. The Commission lobbied the relevant Ministries and agencies to have a standard formulated. While there is still no legislated

standard, a specific government agency has recently been assigned the task of identifying the correct model year of motor vehicles entering the country.

### Financial Sector

- 3.11 In a response to complaints received, the Commission advocated for a review of certain aspects of banking policy. After consultation with the Jamaica Bankers Association and its members it was agreed that a fact sheet in reader-friendly language would be attached to the face sheet of all loan documents presented to individual consumers. That fact sheet will contain information the average person would consider material. For example, the sheet would detail, at the very least, the effective interest rate, whether or not there are pre-payment penalties and the total amount of the loan.
- 3.12 The banks also agreed to indicate whether or not their posted exchange rates are opening rates only. In other words, the consumer should be put on notice that the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate stated is fixed for the day and he is entitled to obtain the foreign exchange at that rate at anytime and in respect of any amount.
- 3.13 With respect to the advertising of interest rates, the banks agreed that where "add-on" rates are used, they should be designated as such. It was generally agreed however, that it would be more useful to state the effective rate of interest when advertising. This would minimize confusion and the average consumer will be better able to compare rates among banks.

### Airline Sector

- 3.14 It came to the Commission's attention that airlines were advertising fares without disclosing the relevant taxes and other Government charges. The Staff of the Commission felt that the use of the phrase "applicable taxes will be added" did not adequately prepare consumers for the fact that the price of a ticket, inclusive of taxes, could be as much as 53% higher than what was advertised. Arising out consultation with representatives from the individual airlines and the Board of Airline Representatives of Jamaica, it was agreed that airline advertisements as of March, 2004, would reflect as accurately as possible the total cost of a ticket.

### **Legislative and Regulatory Reform**

- 3.15 There are express provisions in the FCA, which deal with the relationship between the legislative authority and the Commission. The legislature, through the responsible Minister, can request the specialized opinion of the Commission on the competitive effects of proposed regulatory reform. It should be noted however, that consultation with the Commission is discretionary rather than mandatory.
- 3.16 Like many other countries, Jamaica has had a long history of protectionism and co-operation among firms. There are still some government regulations in place which distort the competitive process and create barriers to entry by way of

government sanctioned monopolies and preferential procurement procedures. For instance, there are legislations which designate commodity boards as the sole exporter and importer of agricultural products; and allow the boards to fix the prices of these products. In a bid to promote competition neutrality in Jamaica, the Commission conducted a study of the agriculture sector and based on its findings recommended that the commodity boards' authorizing legislations be amended. These recommendations have been met with resistance; one commodity board sought and was granted exemption from the FCA.

- 3.17 Even in cases where there is no resistance the process of amendment can be quite protracted. The Commission 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 Commission advocated for the relevant Regulations to be amended to allow for competition if not *in* the market, at least *for* the market, i.e., for more than one taxi company to operate simultaneously at the airports or for a condition to be inserted whereby taxi companies can compete for the chance to provide the service for a specified duration. The agency complied with the Commission's request and new Regulations which allow for more than one approved concessionaire are now in effect.

### ***Privatization***

- 3.18 Since the mid-1990s the Jamaican government has embarked upon a process of divestment and privatization. While the Commission views the divestment of government shareholdings as an important step towards greater private sector participation in economic development, it realizes that there is a need to ensure that the gains from the removal of government restrictions are not subverted by private restriction upon competition. Unfortunately the FCA does not apply directly to privatization transactions and as such the Commission does not always receive advance notice of proposed transactions. Despite this however, the Commission has managed to review several privatization transactions over the years. Unfortunately in cases where the Commission has tried to prevent the granting of concession or privileges to the purchasing party, it is viewed as an interloper.
- 3.19 In the last two years the Commission has examined the following privatization transactions:

#### ***Privatization of the Sangster International Airport (SIA)***

- 3.20 In 1993, the Jamaican government approved a proposal to privatize the airport's terminal facility (landside) only, by way of a long-term lease, in order to "fast-track" the project. It was also proposed that the airside would be managed under contract by the same operator so as to provide a seamless operation at the airport. In this model, the Government would retain control of the airside and the responsibility for any future capital development. In 1998, however, the government approved the privatization of the entire airport facility in line with

current trends in the airport industry rather than concluding a lease of the landside and a management contract for the airside.

- 3.21 The ownership and management of SIA by a single operator raised competitive concerns, as the operator would be dominant in the market for many services that would be offered at the airport. There were some airport services which were subject to economic regulation by the Civil Aviation Authority (CAA) and the Commission felt that this would curtail any attempt by the Airport Operator to abuse its dominance with respect to the fees charged for these services. There were other commercial activities, however, which were not subject to price regulation and for which the Airport Operator would be dominant. These activities include the provision of essential facilities to airport users, for example, ground handling facilities. The Commission felt it was therefore necessary to ensure, to the extent possible, competition in all non-regulated activities at the airport. To this end, the Commission recommended the inclusion of provisions in the contract for the privatization of SIA, that would have the following effects:
- (a) To unambiguously stipulate that all areas of commercial (non-aeronautical) activities at the airport, with the exception of airport charges that are subject to economic regulation by the CAA, will come under the jurisdiction of the Fair Competition Act; and
  - (b) To impose an obligation upon the Airport Operator to operate the airport in a way that ensures competition. If competition within the market has to be limited, there must be competition for entry into the market. Entry, in this case, should be determined according to fair, transparent and non-discriminatory procedures.

### Concession Agreement for Railway Services

- 3.22 The Commission was asked to conduct a detailed examination of the implications of the privatization of Jamaica's railway services based on a proposed concession agreement, to determine the extent to which the relevant licence can be accommodated under FCA. The proposed concession agreement, which offered a twenty-five (25) year licence, was assessed in relation to the criteria set out under section 17(4) of the FCA. Specifically, the exclusive agreement would not be in contravention of the FCA if it is an agreement which the Commission is satisfied—
- (a) contributes to—
    - (i) the improvement of production or distribution of goods and services;  
or
    - (ii) the promotion of technical or economic progress,  
while allowing consumers a fair share of the resulting benefit;
  - (b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned on paragraph (a);  
or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.”

- 3.23 Upon its assessment of the agreement the Commission concluded that consumers would be allowed a fair share of the benefits if:
- the selection of the operator/contractor was done in a fair and competitive manner to ensure that the most competent operator was awarded the contract;
  - there are strong and clear performance standards with the requisite penalties if the standards are not met;
  - there was some form of price regulation; or
  - there is sufficient competition in the market to ensure that consumers benefit.
- 3.24 The Commission defined the market to include road transportation. Given that the agreement sought to introduce a “new” service alongside existing transportation alternatives, it did not afford the concessionaire the possibility of eliminating competition in respect of a substantial part of the services concerned. As long as the existing options are available, the consumers could always choose not to use the railway services and would be no worse off. Of course, if demand for services is low, citizens may lose out due to the government’s expected investments in funding the infrastructure acquisition and the subsidies that will be paid out to the licensee. Nonetheless, the commuter will not be made worse off.
- 3.25 The Commission felt that the concession agreement would contribute to the improvement of production or distribution of goods and services. As competition in the market would not be reduced, consumers were likely to be ensured of a fair share of the benefits. The criteria set out in Subsection 17(4)(a) were therefore met and the agreement could be accommodated under the FCA.

## ***Advocacy in Regulated Sectors***

### **Electricity Sector**

- 3.26 In light of the fact that the electricity sector received an exemption from the provisions of the FCA at the time of its privatization in 2001, the Commission’s role in this sector is confined to that of advocacy. Recently, the Commission was asked to comment on the new energy policy and the drafting instructions for a new electricity Bill. In its comments the Commission sought to reiterate the importance of making the electricity sector, which is soon to be liberalized, subject to the provisions of the FCA.

### **Telecommunications Sector**

- 3.27 At the time of liberalization of the telecommunications sector, the Office of Utilities Regulation (OUR) was also given the responsibility for the promotion of competition in the sector. Since then, the Commission has sought to ensure that the OUR take competition principles into account in its regulation of the sector. The Commission’s advocacy role in the telecommunications sector is both formal



and informal. For instance, under the Telecommunications Act, the Office of Utilities Regulation is required to consult with the Commission before making any ruling with respect to dominance in the telecommunications sector and competitive safeguards. The Staff of the Commission was also asked by the responsible Minister to sit on the Committee which assesses the applications for a fourth cellular licence in Jamaica.

- 3.28 On a more informal basis, the Commission's commitment to contribute towards the improvement of the regulatory framework of the sector, has resulted in its participating in most of the OUR's consultative processes. The Commission has submitted papers on issues such as: the liberalization of the directory information market; assessment of price-cap and reference interconnect offers; universal access/service; and the allocation of numbering resources. The two agencies have also formed a consultative committee in which matters of competitive significance are regularly discussed and threshed out.
- 3.29 Although the OUR and Commission share responsibility for the promotion of competition in the telecommunications sector, there is nothing in the Telecommunications Act which precludes consumers and competitors from lodging telecommunications related complaints with the Commission. Recently, as a result of an increased number of complaints concerning advertising in the telecommunications industry, the Commission invited representatives from the three leading companies in the industry, to discuss the possibility of formulating a code of conduct for advertising. All the parties were amenable to the formulation of the code and it was agreed that:
- (c) Parties would agree to withdraw offensive advertisements upon complaint by a party; and such withdrawal should be done within 24 hours; failing which the Commission would be consulted as a last resort.
  - (d) Each party would appoint a specific representative with designated telephone numbers to deal with complaints relating to advertising.
  - (e) The code should cover situations in which advertisements are technically correct and the information is sound, but the approach is unprofessional.
  - (f) Parties should approach each other instead of carrying out an acrimonious bantering in the media.

#### **4. Conclusion**

- 4.1 The Commission is gaining ground in its struggle to establish a competition culture in Jamaica. This is evident in the fact that although it is currently unable to enforce the competition provisions of the FCA, many companies have been anxious not to violate the spirit of the FCA. Companies are increasingly seeking the opinion of the Commission as to whether proposed changes in their operations would offend competition. Firms have also begun to complain about false and

misleading advertising by their competitors, signifying that they are more aware of what actions are likely to have an impact on the competitive process.

- 4.2 The advocacy work of the Commission is far from over however, as even among persons who are aware of the Commission's existence and the FCA, there is ignorance as it relates to the benefits which can arise from competition. It is highly anticipated that when the FCA is amended the agency will have the ability to more effectively enforce competition law thus demonstrating the benefits of competition. This should build the agency's credibility and contribute to the building of a competition culture in Jamaica.