

**COMPETITION POLICY IN A DEVELOPING COUNTRY SETTING –
A PERSPECTIVE FROM JAMAICA**

**Dr. Peter-John Gordon
Chairman
Fair Trading Commission
April 2, 2003**

INTRODUCTION

For decades, in the twentieth century, governments of developing countries have felt that selective support of firms by way of industrial policy intervention would be the best way to stimulate the competitiveness of firms and to improve their nations' welfare. Increasingly, however, they have come to accept that the adoption of a free market system holds the best prospect for a country's economic development and the improvement of the welfare of its citizenry. A competitive market is presumed to increase the efficiency of competing firms thus delivering the optimal combination of low prices and high quality. Recognition of this fact led the Jamaican government in the early 1990s to introduce several policy measures which are associated with such terms as liberalization, deregulation, divestment etc.

The move towards a liberalized market economy however, can bring with it not only fierce and vigorous competition but also some amount of anti-competitive practices, as firms jostle for

economic advantage. National competition law should therefore accompany the liberalization of the economic environment in order to ensure that the gains from the removal of government restrictions are not subverted by private restriction upon competition. In Jamaica the passing of the Fair Competition Act (FCA) in 1993 as well as the establishment of the Fair Trading Commission (FTC) demonstrate a clear understanding of this reality.

The Fair Competition Act

The main objective of the FCA is the maintenance and encouragement of competition in the conduct of trade and business and in the supply of goods and services in Jamaica, with a view to providing consumers with competitive prices and a variety of products. The FCA applies to all economic activity in Jamaica. There are however, some exemptions which can be itemized as follows:

- (a) collective bargaining;
- (b) action taken to exercise/establish a right by way of patents, copyright or trademark;
- (c) conduct authorized by the Commission;
- (d) activities expressly approved or required under any treaty or agreement to which Jamaica is a party; and
- (e) activities exempted by the Minister and thereafter ratified by the Parliament.

In order to achieve its objective the FCA focuses on three principal elements of potential abuse by producers and or traders. These are (a) horizontal agreements; (b) vertical market restraints; and (c) abuse of a dominant position. These are briefly elaborated upon below.

Horizontal Agreements: The FCA prohibits all forms of horizontal arrangements that have the effect of restricting competition. These arrangements generally refer to agreements between firms competing with similar products in the same relevant market and are effected through, for example, agreements to fix prices, reduce output, share the markets amongst themselves, or allocate customers to individual suppliers in a market. Such arrangements are prohibited by the FCA and cannot be authorized by the Commission.

Vertical Market Restraints: The FCA prohibits arrangements between operators at different stages of the production and marketing chain, which substantially lessen or have the

potential to substantially lessen competition in a market. If such an arrangement is found to have the effect or likely to have the effect of substantially lessening of competition, it will be allowed if the Commission is satisfied that, *inter alia* it contributes to the improvement of production/distribution; the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefit.

Abuse of a dominant position: A dominant company is defined in the FCA as one which “occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.” Firms in this superior position can often determine market price, and control production and/or distribution in a manner that is detrimental to the market interests of its competitors. Abuse of a dominant position speaks to conduct such as exclusive dealing, tying arrangements, market foreclosure through vertical integration etc.

Competition issues are closely inter-related to consumer welfare issues as restrictive business practices result in higher prices and/or restriction of choice. The FCA includes sections covering deceptive merchant practices.

The Fair Trading Commission

Its structure and functions

The FTC is comprised of two arms: a quasi-judicial arm which comprises five appointed Commissioners; and an investigative arm represented by the Staff of the Commission. The latter is headed by an Executive Director. The investigative staff is comprised primarily of lawyers and economists who are supported by complaint and research officers.

The Staff undertakes, on its own initiative or at the request of any person, investigations which enable it to determine whether an enterprise is engaged in business practices that are in contravention of the Act. The Staff is also engaged in educating the public as to their rights and responsibilities under the FCA. The Commission advises the Minister on matters relating to the operation of the Act. It is authorized to, *inter alia*, summon and examine witnesses; call for and

examine documents; hear evidence; and in certain instances having made a “finding” issue directives to a company that it believes to be in breach of the Act.

The FTC’s interaction with the Public

For the most part the FCA and its enforcement body the FTC have received a positive feedback from the Jamaican public. Consumers, as to be expected, welcome the efforts of the FTC to protect consumer rights and to ensure that the benefits of competition i.e. lower prices, higher quality and increased choice are realized. Business entities welcome the efforts of the FTC when they are the beneficiaries of the FTC’s intervention, but view the FTC as a hindrance to business when the FTC prevents them from engaging in anti-competitive conduct. Concerns have been raised about the predictability and transparency of FTC action.

Initially, the Staff’s focus was that of a consumer protector providing a means of redress for consumers that have fallen victim to deceptive merchant practices. This resulted in a kind of quasi-client/attorney relationship between the Staff and individual consumers. While individual consumers were receiving redress, the behaviour of businesses in general remained un-altered; with identical complains being made time and time again against the same respondents.

The FTC is now putting more emphasis on prevention rather than on remedy. Information is a crucial ingredient in this strategy. The FTC in its consumer protection work promotes the concept of the knowledgeable consumer. Information is supplied either directly by the FTC or by encouraging others to provide it (through moral suasion or enforcement of the FCA). The Staff aggressively monitors advertisements in both the print and electronic media to ensure compliance to the FCA.

Summary of selected cases brought before the Fair Trading Commission

Desnoes & Geddes Ltd. (D&G)

Through newspaper reports, the Staff became aware of exclusive sales and promotional arrangements between D&G and several distribution outlets. The Staff therefore initiated an investigation into these arrangements. The contractual arrangements which were investigated

related primarily to the non-promotion of competing products at selected outlets; supply of sales data on competing brands; non-sales and non-promotion of competing products at sponsored events; recommendations that competing alcoholic products be sold at premium prices at sponsored events; and post-term preferential clauses.

The Staff terminated its investigation, following the conclusion of a Consent Agreement between itself and D&G which was approved by the Commissioners. In that Agreement D&G agreed, inter alia:

- With regard to agreements relating to sponsorship at events:—
 - No agreements shall exceed three (3) years in duration, nor provide for an option to renew and/or rights of first refusal; and
 - The required notice period for termination without cause in such agreements shall vary, depending on the amount of sponsorship contribution made, in accordance with agreed ranges.
- With regard to promotional arrangements with outlets:—
 - D&G may execute exclusive promotional agreements with a limited number of outlets only, which number has been agreed with the FTC;
 - No exclusive promotional agreements with outlets shall have a duration of more than twelve (12) consecutive months. None of these agreements shall provide for an option to renew and/or rights of first refusal. All agreements may be terminated with a reasonable notice period, which period has been agreed with the FTC; and
 - None of these exclusive promotional agreements shall restrict or limit non-D&G products from being normally displayed for sales purposes;

Blue Cross of Jamaica Limited (BCJ)

BCJ, a health insurance company, in collaboration with Advance Integrated Systems (AIS), introduced and implemented an electronic claims processing system, referred to as Provider Access System (PAS), to replace its manual claims system. Complaints received from Health Providers alleged that the BCJ required that Providers pay to AIS a transaction fee of 1.75% of each claim adjudicated through PAS and that all Providers should sign on to PAS; with the intention that the manual system would be phased out.

A preliminary investigation of the complaint revealed that BCJ's conduct could potentially inhibit competition in the market for the development of alternative system as well as result in significant cost to Health Providers due to the mandatory use of the system. Further, the exclusion, from the BCJ's Provider list, of Providers who are not able to install PAS is likely to result in a reduction of

the customer base for such Providers and significantly affect their ability to compete and expand in the market for the provision of health services.

Following the commencement of a formal investigation into the matter, the Staff met with BCJ who agreed to certain conditions that the Staff believed were sufficient to address the competition concerns of the complaint. BCJ agreed that it would make available to Providers either an Internet based system or some other system for which Providers will not be required to pay a transaction fee. It would also retain the manual system to facilitate Providers who do not have access to fixed-line telecommunications services or who provide health services to only a small number of persons insured by BCJ (averaging fewer than 40 per month). BCJ also agreed to make the relevant technical specifications available to any party who wishes to develop an alternative claims processing system which is compatible to its own. This agreement was sanctioned by the Commission.

Caribbean Cement Company (CCC)

A complaint was made against CCC charging that its practice of constantly raising prices was an abuse of its dominant position. The Staff retained an external consultant to examine the company's business practices in order to ascertain whether or not the price increases resulted from inefficiency or were otherwise justifiable.

The Consultant opined that there was an under-utilization of assets and that the company was not taking advantage of modern technology available in the marketplace which could substantially increase its efficiency, He further advised that major capital expenditure would be required to effectuate improved productivity which, hopefully would lower cost in the long run. The upshot would be a lower price to the consumer.

The company did not completely agree with the consultant's findings but overall was amenable to reviewing its operations. Given that undertaking, the Staff with the permission of the Commission decided to suspend its investigation but continued to monitor the company's operations. The Staff has no power to discontinue an investigation on its own.

Jamaica Union of Travellers Association (JUTA)

The Commission received complaints from two tour operators that JUTA, a third operator, was monopolizing the designated parking spaces for tour buses at the Norman Manley International Airport (NMIA). Investigations into the complaints revealed that JUTA operated the only taxi concession at both international airports as authorized under the provisions of the governing Act. Recognizing that JUTA had exclusivity in the provision of taxi services at the international airports, the FTC sought legislative amendments to the relevant Regulations. The FTC asked that the Regulations be amended to allow for competition *in* the market or at least competition *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 Airports Authority of Jamaica complied with the FTC's request and new Regulations which allow for more than one approved concessionaire took effect on July 31, 2002.

The Banking Industry

As a result of allegations that documents often signed by bank clients were not written in "reader-friendly language" the FTC brokered an agreement with the Bankers Association of Jamaica. The agreement sought to cover the areas of:

1. Clarity in banking documents

It was agreed that a fact sheet in layman's language would be attached to the face sheet of all loan documents for individual consumers. The fact sheet would contain information that the average person would need to have. It would detail, at the very least, the effective interest rate, whether or not there are prepayment penalties and the total amount of the loan.

2. The posting of the exchange rate

The banks would indicate whether or not these rates were opening rates only. In other words, the consumer should be put on notice if the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate posted is the set rate and he would be able to obtain his foreign exchange at that rate.

3. The advertising of interest rates

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 as the add-on rate is deceptively lower. This is expected to minimize confusion and the average consumer would be better able to compare rates among banks.

Media Association of Jamaica

The staff of the FTC and the Media Association of Jamaica have reached a settlement concerning that Association's "Recognition Agreement". Prior to the advent of the FCA, media houses by means of this Agreement would pay a fixed commission and extend credit to only "recognized" agents.

To be "recognized" an agent had to apply to the MAJ and satisfy it as to certain billing and other structural capabilities. Having been duly satisfied, the MAJ would then pay a fixed commission of 18% to that agency in addition to extending to it a credit period for advertisements placed in the various media. Should the agency fail to pay its bills timely to even one media house, all media houses would deny that agency credit.

It was the view of the staff of the FTC that the agreement between the media houses to fix the amount of the commission constituted both a conspiracy to restrain competition; and price-fixing. The unequal treatment of the unrecognized agents also invited the scrutiny of the staff. It was felt while the MAJ could certainly put in place reasonable standards for recognition, it is anti-competitive to penalize media houses who choose to extend credit and pay commissions to those agents who did not meet those standards. Commercial entities must not be deprived of their ability to engage in independent contracting vis-a-vis trading partners.

In light of the staff's views, the MAJ entered into negotiations with a view to arriving at a form of Agreement which would not offend the terms of the FCA. The parties developed a Recognition Agreement which conformed to the terms and spirit of the FCA. The MAJ agreed, as part of the settlement with the FTC's staff, that it would institute a 90-day period for the processing of applications for recognition and, should an application be denied, that denial may be appealed to a panel of three-persons who are unconnected to the media.

Additionally, there is the possibility of provisional recognition where an agency, new to the marketplace, may nonetheless be afforded the legal benefits of a recognized agency. Provisional

recognition automatically expires at the end of one (1) year, at which point the agency may apply for full recognition. This agreement was ratified by the Commission.

Recommendations for Developing Countries

General

It is important that a newly formed competition agency make the market place aware of its presence. As such it is necessary that the competition legislation allow the agency to investigate on its own initiative and not simply react to complaints. The Agency should attempt to develop a close relationship with other domestic and international bodies which can provide assistance with the gathering of necessary information. Given the usual lack of technical expertise in this specialized field of competition law in developing countries it is important that the staff of these agencies participate in the various internships and other training opportunities offered by international competition agencies or other international bodies.

It is also important that the Competition Agency be adequately funded. The Agency will be viewed as a "paper tiger" if highly visible restraints on competition cannot be seriously investigated. This will erode any existing respect for the Competition Agency. Further, if selective investigations are undertaken, the companies being investigated will cry foul and argue that they are being singled out because of political and/or other reasons.

Legislative Errors to Avoid

The competition legislation should not be so vague that no businessman, lawyer or judge can figure out what is legal from what is illegal. Terms such as "unduly", "substantially" and "reasonable", if not explained in the Act or subsidiary legislation, can become problematic when it is time to enforce the relevant provisions. Further, in order to ensure that the provisions of competition law do not restrict the ability of firms to compete freely; and that their enforcement does not leave too much to the interpretation and discretion of the overseeing agency, the law should be explicit about what is allowable/exempted and under what conditions. This is particularly important given the limited financial, information and human resources at the disposal of competition agencies in small economies and the power and influence of many of the firms whose activities they have to monitor.

The FCA “vests” the Commissioners with the dual role of investigators and adjudicators. In January 2001, the Jamaican Court of Appeal ruled that this results in a breach of natural justice whenever the Commission conducts a Hearing. This has created severe problems for the FTC in the enforcement of competition law and policy. There is great resistance to the embodiment of these two functions into a single entity, even when there are clear guidelines established to ensure that a single person is not both investigator and adjudicator. This challenge has been successfully met elsewhere in the world, in particular at the Federal Trade Commission of the USA. The FCA is being amended to address the question of natural justice raised by the Courts. The intent is that there will be a clear distinction between the role of the Commissioners as an adjudicating body and the role of the Staff as investigators. We anticipate future challenges, but like competition agencies elsewhere we intend to prevail.

Agency Errors to Avoid

The Competition Agency should not be vague in the explanation of its enforcement agenda. Rules, guidelines and public presentations should serve the purpose of giving due warning to firms and their advisers as to what conduct will attract enforcement attention. It is likely that having been warned many firms will voluntarily curtail the anti-competitive conduct rather than risk enforcement action. Once the enforcement agenda is established however, the Agency has to follow through on its pronouncements. Otherwise, the firms that had complied with the Agency’s guidelines will be unlikely to do so again. This means that the pro-competitive gains from the first pronouncement would have been diluted or lost.

Conclusion

The FTC, after ten years is still going through the teething pains associated with the administration, implementation and enforcement of competition law. It is committed however, to the designing of a strategic action plan for identifying and developing options which will remedy any legal and institutional constraints which it currently faces. Above all it is committed to creating a “competition culture” within the Jamaican economy.