CONSUMER WELFARE WITHIN COMPETITION POLICY[1]

Kevin Harriott[2]
Competition Bureau Chief
Jamaica Fair Trading Commission

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> *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness.- That to secure these rights, Governments are instituted among men."- The Declaration of Independence, 1776.*

Ladies and gentlemen, good afternoon. These famous words, taken from the American Declaration of Independence, establish the true relationship between Governments and the welfare of men; that Governments exist solely to serve the interests of the public. There is no better way to lay the foundations for the discussion I was asked to lead on the topic "consumer welfare within competition policy." I will initiate the discussion by describing the basic elements of competition policy.

A. What is Competition Policy?

Competition policy comprises legislation and polices geared toward enhancing competition in domestic and international trade. The primary components of competition policy are (i)

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[2] Kevin Harriott is the Competition Bureau Chief at the Fair Trading Commission, Jamaica. The views expressed are not necessarily those of the Commission nor its Commissioners. Send comments to kharriot@gmail.com

competition law; and policies covering (ii) deregulation/liberalisation, (iii) privatisation, (iv) international trade, (v) national industrial policy (NIP), (vi) intellectual property rights (IPRs). I now describe each component in a little greater detail.

(i) *Competition law* reflects the Government's position on trade within national borders;
(ii) *Deregulation/liberalisation* reflects the Government's position on the removal of regulations which constrains the operation the market process;
(iii) *Privatisation* reflects the Government position on the transferring of the ownership of a business from the Government to the private sector;
(iv) *International trade policy* governs trade across national borders;
(v) *NIP* describes the Government's strategy to offer preferential treatment to specific sectors of the economy; and
(vi) IPRs, which includes law pertaining to patent, copyright, trademark and geographical indication, establishes the exclusive right for individuals to use IPRs for commercial gain.

B. Inherent Conflicts in Enforcing Competition Policy

Implementing competition policy is somewhat challenging since there is an inherent conflict between competition law and the other policies which embody competition policy. The main source of the conflict is the fundamental difference in the approach taken by the various legislations to achieve the common goal. Specifically, competition law takes an *effects-based* approach whereas the other components of competition law take a *conduct-based* approach. With an effects-based approach, conduct is assessed on a case by case basis and prohibited only if it is likely to harm the competitive process; while under a conduct-based approach, conduct is prohibited or allowed without assessing its likely effect. It is for this reason that conduct-based approach, more than effects-based approach, is likely to lead to enforcement errors: either by prohibiting welfare enhancing conduct or failing to prevent conduct which reduces consumer welfare. I now highlight the inherent conflict between competition law and the other policies within competition policy.

Competition law and international trade policy

International trade policy strictly prohibits *dumping*. Dumping, by definition, occurs whenever a manufacturer of a product charges a price in the export market that is lower than the price charged in the domestic market. Dumping is an example of a broader class of conduct referred to by economists as *price-discrimination* whereby a supplier charges different prices to different groups of consumers of the same good. Economists, based on extensive studies on the matter, have found that price discrimination could improve consumer welfare under certain conditions, by making the good available to a greater number of consumers. It was found also, that price discrimination could harm competition. In the interest of consumer welfare, therefore, it is best to assess the likely effect of price discrimination on competition before prohibiting it; as to strictly prohibit dumping will unduly deny consumers of the established benefits of price discrimination.

To appreciate the benefits that consumers are being deprived of, by enforcing the anti-dumping provisions in international trade, one need consider only the likely reduction in consumer welfare that would result if price discrimination was strictly prohibited in domestic trade. Price discrimination is a fairly common conduct across many industries such as telecommunications, airline services, groceries and entertainment, to name a few. If price discrimination was strictly prohibited, an airline could not charge economy class passengers a lower airfare than first class passengers. The likely result would be a significant increase in the airfare for economy class and many persons who could have afforded to travel economy class with price discrimination would be unable to do so without price discrimination. Similar arguments could be advanced for the motion picture industry where the price of admission to movie theatres is higher for adults than it is for children and senior citizens; and for the telecommunications industry where the price of making a call is higher during weekdays than it is during weeknights and weekends.

Competition law and Intellectual Property Rights (IPRs)

IPRs temporarily prohibit the use of any patented resource without the expressed consent of the rights holder and thereby prevent other suppliers from entering or expanding in markets in which a patented resource is a crucial input. This blanket exclusion conflicts with competition law which discourages conduct that creates entry barriers.[3] Such a conflict was recognised by the Jamaican and Barbadian policymakers which, to differing degree, exempted agreements involving the use of rights established under IP law from the scrutiny of the competition authority.

Competition law and NIP

National Industrial Policy describes the Government's strategy to offer preferential treatment to specific domestic industries. The tourism industry and manufacturing sector are examples of segments of the economy which have benefited from preferential treatment. The Jamaican Government, for some time, has offered incentive programs and granted concessions to business interests which operate in the tourism industry. Examples of these programs and concessions include the Hotel Incentives Act (lasting 10-15 years); the Resort Cottages Incentives Act (7 years); Attraction Incentives (up to 5 years); relief from Income Tax, Customs Duty and GCT; and assistance with fast-tracking applications of foreign nationals (Planning Institute of Jamaica .2008. Economic and Social Survey of Jamaica, pp. 17.3).

It is clear that the Government, through industrial policy, could improve the competitiveness of selected domestic markets. Some policymakers mistakenly cites the policy's success in the targeted industry as evidence of the policy's effectiveness. That however, is an inappropriate benchmark against which the policy should be assessed. The appropriate benchmark should be whether the resources allocated under the NIP could be reallocated to other industries and generate an even greater level of public benefits. Essentially, the effectiveness of any industrial policy depends crucially on the ability of policymakers to maximise public surplus from the allocation of the public's productive resources across the various industries. History has shown that policymakers could never have at their disposal, the level of information that is required to efficiently allocate resources across the various industries within the domestic economy. Conceptually, and in practice, it has been demonstrated that the process of competition is the most effective means of allocating public resources across the economy.

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[3] It could be argued that IPR law is consistent with competition law in that while it hinders competition in the market, it also promotes competition for the market.

For goods which are more highly valued by consumers, the competitive process will increase prices relative to other goods. The higher price will increase profit margins to suppliers and thereby attract new investments to the respective industry. The relative ease with which new businesses enter a competitively organised industry, and with which existing businesses expand, will ensure the timely reallocation of resources away from industries in which resources are least needed to industries in which they are most needed. Similarly, for goods which are valued the least by consumers, the competitive process will decrease the prices relative to the prices of other goods. The decrease in the price will lower the profit margins to suppliers and make it less attractive for investors to remain in the industry. The relative ease with which businesses exit a competitively organised industry will ensure the timely reallocation of resources away from industries in which they are least needed to industries in which they are most needed.

National Industrial Policies direct productive resources to select industries irrespective of whether consumers value the goods produced therein. Contrastingly, the competitive process organises productive resources in such a manner that more resources are allocated to produce the goods which consumers value the most; and less resources are allocated to industries which consumers value the least. Competition orchestrates the use of public resources by changing the relative prices of goods and services across the industry. Competition directs more resources to industries in which the prices are relatively high and fewer resources to industries in which the prices are relatively low.

C. Fundamental Principles of Competition Policy and Consumer Welfare

Having described competition policy, I now address the central arguments of the discussion. It has been my experience that the relationship between competition policy and consumer welfare is governed by three fundamental principles.

> *Principle 1.* Competition policy exists within the realms of consumer welfare and not the other way around.
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> *Principle 2.* Competition policy should encourage only conduct which promotes consumer welfare.
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> *Principle 3.* Competition policy imposes an obligation on consumers, not only on merchants.

PRINCIPLE 1: Competition policy exists within the realms of consumer welfare and not the other way around.

I confess that initially, I had some difficulties drafting this paper, despite the fact that I have approximately nine years experience in competition law enforcement, from the perspective of both an academic at the graduate level and as a practitioner at the competition authority in Jamaica. Subsequently, I discovered that my difficulties stemmed from the perverse relationship implied by the topic "consumer welfare within competition policy." Specifically, this topic suggests that "competition policy" is the greater good and that "consumer welfare" is merely a component of the policy. Nothing could be further from the truth. The truth is that, consistent with the American Declaration of Independence, consumer welfare is the greater good within which competition policy plays a subservient role. Accordingly, I will address the topic of "competition policy within consumer welfare."

To see the role of competition policy in promoting consumer welfare, we need to recognize that most modern societies are organized such that at any given point in time, the vast resources of the society are under the control of a few individuals who are selected to form the Government. The Government design policies to safeguard public welfare. Policies reflect the Government's position regarding the use of public resources in a specified aspect of public welfare. For example, competition policy could be defined as a set of polices and law geared toward ensuring that competition is not restricted in a manner which would be to the detriment of public welfare. In promoting competition, the Government seeks to establish market conditions which generate the greatest public benefits from goods and services consumed domestically, as a result of domestic and international trade.

If we accept that consumer welfare is directly related to the extent to which the unalienable rights of the public are secured, I argue that competition policy promotes consumer welfare by securing the public's right to pursue happiness. The public derives happiness from a variety of sources such as travelling to far away places; dining at a five star restaurant; shopping; watching the West Indies clobber Zimbabwe; or participating in Carnival. Although the source of happiness is likely to vary considerably among men, it seems reasonable to argue that the pursuit of happiness usually requires the consumption of goods and or services. Competition policy promotes public welfare by facilitating their pursuit of happiness by way of access to goods and services.

PRINCIPLE 2: Competition policy should encourage only conduct which promotes consumer welfare

As a consequence of Principle 1, it is my position that any provision which does not promote consumer welfare should be excluded from competition policy. Competition law satisfies this basic requirement. What I am saying is that it would not be okay simply for competition law to have some of the provisions protecting consumer welfare; i am saying that every provision should protect consumer welfare.

Competition law protects consumers directly and indirectly. The substantive provisions of competition legislation are grouped under two broad headings: consumer protection and competition protection. The groupings are misleading, however, in the sense that it suggests that consumer protection and competition protection are distinct objectives. In practice, however, both sets of provisions are alternative means of achieving the common goal of promoting consumer welfare.

Consumer protection provisions directly promotes consumer welfare by prohibiting merchants from engaging in deceptive practices such as misleading representation, double-ticketing and bait-and-switch.

Competition protection provisions ensure that economic activities are organised by the competitive process. By relying on the competitive process to organise economic activities, rather than itself, the Government, recognises that famous warning attributed to Samuel Johnson:

"The road to hell is paved with good intentions"

The competition process provides the greatest incentives for merchants to offer consumers the best quality goods and services at the lowest possible prices. The competitive process generates the greatest possible level of public surplus. By protecting the competitive process, therefore, competition protection provisions indirectly promote consumer welfare.

PRINCIPLE 3: Competition policy imposes an obligation on consumers, not only on merchants.

We have already established from principle 2 that the competitive process provides the strongest incentives for merchants to supply quality goods at the lowest possible prices. As a direct consequence, the revenue earned in competitive markets are sufficient to cover only the costs of doing business; that is, merchants operating in competitive markets earn zero economic profits. There is always an incentive, therefore, for merchants to alter market conditions to allow them to earn revenues in excess of their costs. To discourage such conduct, Governments establish national competition authorities such as the Fair Trading Commissions in Barbados and Jamaica; and regional authorities such as the CARICOM Competition Commission.

The important message I would like to leave with you this afternoon is that even if merchants conduct themselves in accordance with the various national and regional legislation governing competition policy, it is still not automatic that merchants will offer consumers the best deals on goods and services. What would still be crucial for this to happen is the active participation of consumers in the process.

To participate in the process, consumers must be informed and must contribute to the success of the competition process by "shopping around", and acquiring the goods and services of only those merchants which offer the highest quality goods and services at the lowest prices. In so doing, merchants which are unable to offer the best deals to consumers risk becoming unprofitable.

The fact that active consumer participation is required for a successful policy is by no means unique to competition policy. By way of analogy, consider the rule of Government. It is clear that CARICOM member states are guided by the principle of democracy, i.e. the rule of the people, by the people and for the people. What is less clear is the reason that democracy thrives in CARICOM. Some might be tempted to argue that democracy exists because of the Constitution, the highest law in the land. I believe, on the other hand, that the Constitution only facilitates the democratic process but falls short of actually establishing it. Without the active participation of the people, true democracy would not exist. Without the active participation of the public, the public could very well find itself being governed by "democratically elected dictators" rather than by the democratic process.

But what does it mean for the public to actively participate in the democratic process? Among other things, active participation requires that the public inform themselves about the platforms offered by political parties and vote for the party whose policies are most consistent with their welfare. Accordingly, participating in the democratic process requires effort on the part of the voting public

Concluding Remarks

I have offered a view of competition policy which may differ from how it may be viewed by many. Specifically, I have argued that competition policy, without more, is insufficient to promote consumer welfare. The view I have offered is not to be misinterpreted as a limitation of competition policy; to the contrary, this view sheds light on the empowering character of competition policy. For in pursuit of his happiness, a consumer will acquire goods according to his willingness and ability to pay for these goods. The goods that will make one consumer happy will not necessarily make another consumer happy. Consumer preferences vary from individual to individual and from time to time.

Accordingly, without the continuous input from the public, it is unlikely that any system for distributing goods to consumers could accurately reflect consumer preferences. In a seamless manner, the competitive process captures consumer preferences and reallocate productive resources to reflect these preferences. Consumer preferences are reflected by the relative demand for each good. All other things constant, an increase in the demand for a good will result in an increase in the relative price of the good. The increased price will increase the expected returns from supplying the product. The competitive process ensures that more resources are allocated to produce goods that consumers prefer the most.

The pure genius of competition policy is that it does not impose on consumers, the goods and services that the Government believes will promote consumers' welfare. The true role of competition policy is to foster an environment in which consumers are empowered to pursue their happiness by guiding merchants to produce affordable goods and services with the quality and variety demanded by them.

Someone once remarked that "The consumer is King!"

The consumer will not reign, however, unless he claims the throne. To claim his throne, consumers must play an active role by keeping themselves informed about the goods they would normally purchase and ensure that they purchase the good from only the merchants which offer the best deals.