

# FAIR TRADING COMMISSION



## The Most Appropriate Body

### To Determine (at First Instance) Alleged Contraventions of the Fair Competition Act

Symposium held on July 16, 2009

## Summary of Proceedings

### Introduction

On July 16, 2009, the Fair Trading Commission (the “Commission”) held a symposium in order to revisit the arguments and solicit views from the public as to the most appropriate body to determine alleged contraventions of the Fair Competition Act (the “FCA”) at first instance.

The objective was to air the different factors that ought to be considered in deciding on the most optimal structure, to discuss these factors with policy makers and stakeholders, and to create a document that encompasses all considerations.

The Honourable Mr. Justice Forte, P., as he then was, in the *Jamaica Stock Exchange v. Fair Trading Commission case*<sup>1</sup> highlighted factors which, in his view, rendered the existing adjudicative process a breach of natural justice. From his judgment, the following challenges relating to the FCA are identified:-

- (a) The FCA merges the investigative and adjudicative functions in the same body, i.e. the Commission;
- (b) The FCA does not allow the Commission to delegate its functions; and
- (c) The FCA allows the Commission to arrive at a finding without being mandated to give individuals who may be affected by its decision an opportunity to be heard.

To place the discussion into its proper context, it should be noted that the effect of the *Jamaica Stock Exchange* case (supra) appears only to relate to those relatively few provisions of the FCA in which the Commission would be required to make a finding (see ss.19-21 and 33). Under the present construction of the FCA, all other contraventions are determinable at first instance by the courts.

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<sup>1</sup> Supreme Court Civil Appeal No. 92/97, delivered January 29, 2001.

The Symposium began with a thematic recognition that the primary aim of competition agencies is to be effective and that this is directly related to the institutional framework or agency structure that is utilized<sup>2</sup>.

Three positions were ventilated. While the presentations contained points of consensus, they constituted distinct suggestions as to how to best meet the current challenges. The first supported the establishment of an independent specialist tribunal to determine all matters falling under the FCA; the second, that the Commissioners and the courts continuing to make findings or determinations under the applicable sections; and the third, that all matters should be determined by the courts.

### An Independent Specialist Tribunal

The arguments in *favour* of the establishment of an independent specialist tribunal were as follows:-

- (1) Procedural fairness is more important than efficiency and effectiveness of the chosen adjudicative process and the cost involved because in a judicial review challenge “...the court will only concern itself with...whether the structure and the decisions are procedurally fair to the persons affected by them”; and

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<sup>2</sup> Competition Policy Implementation (CPI) Working Group of the International Competition Network, 2007-2009.

- (2) This option would deal with the concerns associated with the other two alternatives as the tribunal would be “independent” in the sense that it would operate completely separate from the Commission. It would have its own staff, offices and “specialist skills”, would deal only with competition matters and over time develop the requisite expertise in this area.

The arguments *against* the establishment of such a tribunal were as follows:-

- (1) The cost of competition enforcement, which is related to the institutional structure utilized is expensive, especially in developing countries. UNCTAD in 2005<sup>3</sup> indicated that the average budget of developing countries in this regard varied from 0.06% - 0.08% of the government’s non-military expenditure. Applied to Jamaica for the fiscal period 2004-2005, this would have amounted to JM \$118,000,000 to JM \$157,000,000 compared to the Commission’s budget of JM \$35,845,490 in 2004. The suggestion is that a tribunal would be a considerably more expensive option compared to having matters under ss. 19-21 and 33 of the FCA determined by the Commission;
- (2) In light of the time it takes to investigate anti-trust/competition cases, it is unlikely that in Jamaica more than two cases would be ready for a hearing before a tribunal within a single year. It would, therefore, seem

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<sup>3</sup> “Assessment of Competition Policy in Jamaica”, August 2005.

that the number of cases that would be heard by the tribunal would not justify the cost of its establishment and funding;

- (3) Jamaica generally lacks the supportive anti-trust legal scholarship and practice, including consultancy firms and law practices that specialize in these matters, from which to empanel persons who are able to exercise the requisite specialist expertise, skill and knowledge to effectively adjudicate these types of matters or even to do a satisfactory job in this regard. This is unlikely to change in the foreseeable future;
- (4) It would be harder and would take a longer time to create the requisite specialist expertise in lay persons sitting on a tribunal than in the courts;
- (5) Members of a tribunal who meet only periodically are unlikely to be afforded the opportunity to grow and learn from the full experience of a competition agency without the current structured mechanism such as Commissioners meetings and Retreats at which generic competition issues are discussed. The current mechanism forces its members to constantly inform themselves of the various principles and general competition issues which they may be called upon to utilize in the adjudicative process. A tribunal would not have this benefit;
- (6) A tribunal, being unable to carry out investigations, would be left to balance evidence presented by opposing interests which would likely result in excessive caution in making adverse findings, decisions which are less soundly based and less well tailored remedies;

- (7) A tribunal that is too greatly endowed with the power to enforce its decision, as is currently contemplated, may run afoul of the separation of powers doctrine in the absence of security of tenure and independence from the executive as persons exercising a judicial function;
- (8) In Jamaica, tribunals have not been effectively supported and often lack the necessary administrative support to operate efficiently and/or effectively;
- (9) Further, a 2006 report by Cambridge Economic Policy Associates Limited on Jamaica's Regulatory Impact<sup>4</sup> stated that the "experience... [of] having a separate body is associated with....numerous delays (and consequent costs) caused by a strong incentive on the parties to delay implementation of more competitive structures and practices.";
- (10) According to the 2006 report, this alternative would result in the investigative body becoming, in effect, a prosecutor whose objective would be to win cases instead of serving as an impartial fact finding body;  
and
- (11) There are challenges with the *Jamaica Stock Exchange* case (supra) which brings into question its sustainability as it relates to the natural justice principle. The suggestion is that the Commission does not have the power to conduct an investigation that is unfair and that fairness may require the person being investigated to be heard orally. Further, as

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<sup>4</sup> "PPIAF – Jamaica Regulatory Impact Study", October 2006.

acknowledged by Forte, P. anyone being investigated can assert his right to be heard orally if he so wishes. It is also important to note that in a subsequent case, *Olint Corp Limited v. Financial Services Commission* 2006 HCV 01365, decided December 24, 2007, the Supreme Court at p. 71 opined, as it relates to the *Jamaica Stock Exchange* case (supra), that “...it does not appear that consideration was given to the effect of the appeal mechanism in the Act which provided for the court to be final arbiter and therefore with the wide powers given to the court in the Act there was fairness when the entire scheme was looked at as a whole...had this been urged upon Forte P. he would have concluded that there was not likely to be a breach of the principle of natural justice...”.

### The Commissioners and Courts

The second alternative is to have the Commissioners continue to determine matters under ss.19-21 and 33 (with the appropriate amendments to the legislation), and having all other matters determined by the courts.

The arguments in *favour* of this alternative were as follows:-

- (1) As noted in the UNCTAD and Cambridge Economic Policy Associates Limited (referred to above) , this alternative is relatively the most cost efficient

one. Having an additional body to adjudicate matters outside of engaging in competition policy is, therefore, economically wasteful;

(2) Of fundamental importance is achieving the best substantive decision.

Institutional design (structure) affects performance which in turn affects outcome. The best outcomes or decisions are most likely to be achieved if the structure involves the Commissioners. The Commissioners would have developed experience and expertise in the area, and would ultimately be best at determining the relevant matters;

(3) The current arrangement facilitates the requisite repeated interface among

Commissioners in relation to competition issues as compared to the periodic interaction of a tribunal;

(4) This structure would best facilitate the mutual growth and development (and

competencies) of the adjudicators of competition matters and the staff of the Commission. Traditional Commissioners meetings allow for intellectual interchange between Commissioners and staff with a view to achieving a deeper understanding of, and implication for, competition law and policy which is supported by interim deep reflection and research by all concerned;

(5) The Commissioners would be better able to effectively influence the broader

development of competition policy and practice in Jamaica through advocacy and education. Having an additional body to adjudicate matters outside of engaging in competition policy can be considered wasteful;



(6) Other jurisdictions such as the USA, Australia and New Zealand have systems that involve combined investigative and adjudicative functions that have withstood natural justice related scrutiny;

(7) In any event, the challenges presented by the *Jamaica Stock Exchange* case (supra) may be remedied by:-

- a. Amending the FCA to remove the Executive Director as an ex-officio Commissioner and placing the post in the category of staff; by recognizing the staff as the body solely responsible for investigating contraventions of the FCA or allowing the Commission to delegate its investigatory authority to the staff; and stipulating that the Commissioners are solely responsible for adjudication with respect to the relevant sections;
- b. Establishing thick firewalls and prohibiting *ex parte* communications between Commissioners and staff (with the appropriate sanctions attached) in order to prevent contamination of the adjudication process where relevant;
- c. Allowing for the hiring of staff to solely assist in the adjudication process with certain and transparent regulations and procedures to ensure that the natural justice requirements are met;
- d. Providing explicitly in the FCA that a hearing is required before a finding is made by the Commissioners; and

- e. Continuing to recognize the supervisory function of the courts over all administrative and inferior tribunals particularly to deal with issues of law.

The arguments *against* this alternative were as follows:-

A Jamaican court is unlikely to conclude that a procedure similar to the one existing in the USA, where the same agency performs investigative and adjudicative functions is procedurally fair because:-

- a. The US system has existed for some time and has developed a track record. The public and the US courts appear to be satisfied that it works. A Jamaican court may not take a similar position in the absence of a track record by a similarly structured Jamaican agency;
- b. The smaller an agency the more difficult it is to successfully implement a rule against *ex parte* communication. The size of the Jamaican agency is relatively small when compared to the US agency. When all or most of the investigating staff may be involved in a case, a Jamaican court is less likely to accept that there has been no private contact;
- c. Similarly, as distinct from a situation in which there is a large number of complaints (as in the USA), where there is a relatively small

number of complaints (as in Jamaica), a Jamaican court would be much more concerned about the risk of all Commissioners and staff having some *ex parte* knowledge or involvement in the relevant complaint;

- d. There are cultural differences between the Jamaican judge and the US judge as the former may be much more cynical and suspicious as it relates to public officials and therefore, much less likely to accept that an *ex parte* communication rule has been or is likely to be scrupulously followed;
- e. The expressed recommendation by Justice Forte in *Jamaica Stock Exchange* case (supra) was obiter but it is likely to be persuasive to a subsequent local court; and
- f. Procedural fairness considerations would outweigh all other considerations including whether this alternative is the most efficient and effective.

### The Courts

The arguments in *favour* of having the courts determine matters under the FCA were as follows:-

- (1) The dominant approach (which is almost universally true for small jurisdictions) is to have the competition agency perform investigative functions with the adjudicatory and enforcement functions being performed by the courts;
- (2) The courts have demonstrated *some* understanding of competition law as was observed, for instance, in the *Jamaica Stock Exchange* case (supra) as it related to the question of whether the Jamaica Stock Exchange was an appropriate object of the operations of the FCA. Most would agree that on that question the court was correct;
- (3) There are challenges relating to the current administrative arrangements for enforcing competition policy;
- (4) As more competition matters come before the courts, judges will develop greater knowledge and expertise in competition law as the courts react to the submissions placed before them; and
- (5) It is the only way to effectively develop the jurisprudence on competition law in Jamaica.

The arguments *against* having these matters determined by the courts were as follows:-

- (1) The courts have also demonstrated a “woeful ignorance of competition law” and lack the requisite expertise. It is likely that a competition matter would come before a judge who is hearing one for the first time;
- (2) Developing the requisite expertise would become lost in the court system;

- (3) The courts are often criticized as overburdened, slow and cumbersome and competition matters would require a long time before they are resolved; and
- (4) Knowledge of competition law by lawyers is still inadequate.

### Discussion Session

Some participants appeared to be of the view that the *quality* of the substantive decisions ultimately reached was the most important consideration and questioned the approach of placing procedural fairness above efficiency and effectiveness.

One participant expressed the view that there was much frustration associated with attempting to explain issues to an adjudicating body that did not understand the issues involved and that this made her inclined to the view that the Commissioners should continue to determine the relevant matters. She also stated that this area requires, as is facilitated by the current structure, intense immersion especially given that competition analyses can become quite complex.

It was also opined that the adjudication process requires judicial skill and that the courts are equipped to understand the concepts and deal with any evidence placed before it in this regard.

The viability of establishing a single tribunal to determine matters relating to the FCA and other legislation was also discussed. It was concluded that although there were potential cost benefits associated with this option, the essence and hence, proper development of this specialist area, would be lost if such a tribunal were to be established.