THE CASE FOR MAINTAINING A SINGLE COMPETITION AGENCY FOR INVESTIGATION AND ADJUDICATION OF ANTI-TRUST CASES

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The Fair Competition Act (FCA) and the structures it creates were ruled to be in breach of natural justice in the Appeal Court in Jamaica. An adjustment to the FCA and the support structure is therefore required.

While the canons of the jurisprudence in which the FCA is expected to operate must be respected, there are multiple ways of satisfying this basic principle. The FCA is expected to impact the Jamaican economic landscape as a vital part of the infrastructure of a market economy. How the FCA is amended to bring it in conformity with the rules of natural justice will have grave implications for the structures that support it. The underlining structures, which the Act creates, will determine the efficacy of the FCA to accomplish the broader objective of making the Jamaica marketplace a competitive one.

The FCA is an attempt to codify in legal terms underlying economic structures and conduct. It is impossible to fully articulate a complete set of occurrences which are possible and the appropriate actions, which should follow. The structure, which the Act creates, is therefore vital in so far as this structure will impact the execution of the intent which the Act is suppose to give meaning to. The appropriate structure for the Jamaican situation must be cognizant of the environment in which it will operate. The structure will affect the conduct of the officials charged with the responsibility of enforcing the FCA and the performance of the Jamaican economy.

Richard Whish (a lawyer) writes on page 1 of his book Competition Law (4th edition) "competition law is about economics and economic behaviour, it is essential for anyone involved in the subject to have some knowledge of the economic concepts concerned. As Brandeis J once said 'A lawyer who has not studied economics…is very apt to become a public enemy'. In the early days of competition law in the European Community the role of economics was insufficiently recognized, at a time when the politics of market integration were in the ascendant; however that position has changed substantially, and competition lawyers now regularly work together in complex cases with economists who specialize in matters such as market definition, the determination of market power and the analysis of particular types of business behaviour." An adjudicator of competition matters who is a lawyer is expected over time to bring more than his/her basic legal training to the adjudicatory process. (S)He is expected to have an appreciation of the complex economic matters which is before him/her; and (s)he must combined this insight with his/her legal training to inform decisions. If all that was required for adjudication was legal training, then that adjudication would be best served in the courts. The adjudication process is best served by having a panel of adjudicators who specialized in different disciplines i.e. who see the world through different prisms. However, it is not sufficient to bunch a group of different professionals together periodically and think that somehow their skills within their various disciplines will lead to the best outcome for competition law and policy. There needs to be an appreciation of the various disciplines and how they operate together. An orchestra is not simply a collection of musical instruments. These instruments need to articulate together in order to make good music.

We are in search of a structure, which is both effective and efficient. Effectiveness speaks to obtaining the best possible outcomes while efficiency speaks to obtaining those outcomes at the least possible cost. When we speak of adjudicative effectiveness we are referring to a process

that would most likely lead to the best possible outcomes in terms of a competitive economic landscape. Different structures will prove to have different levels of effectiveness depending on the environment in which they are applied.

We will argue that the best possible competition outcomes from the adjudication process are most likely to occur in Jamaica, and in similar countries, when adjudication, in the first instance, is conducted by a panel of differential professional skills, which is provided with an institutional structure that keeps the different professionals in constant contact with competition issues and each other. The process of constant engagement with competition issues not only increases the individual competences but also helps to heighten an appreciation of how the different professional skills impact on each other to facilitate the best possible competition outcomes. We also argue that such an arrangement is the least costly, i.e. the most efficient.

Listed below are some arrangements that have been adopted in other countries. After these arrangements have been outlined, a brief discussion will follow as to the suitability of these structures for the Jamaican landscape.

UNITED KINGDOM

Overview of the legislative framework

1. The UK's Office of Fair Trading (OFT) operates under the Competition Act 1998. The OFT is headed by the Director General (DG) who enforces and applies the provision of the Act. The DG reports directly to the Secretary of State. The Act also establishes the Competition Commission, the members of which are appointed by the Secretary of State.

Structure of the legislation

2. There are two main prohibitions under the Act. Chapter I prohibits agreements (whether written or unwritten) which prevent, restrict or distort competition and which may affect trade within the UK. Chapter II prohibits conduct by undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the U.K.

3. Chapter III of the Act gives the DG the power to investigate Chapter I and Chapter II prohibitions. After investigations, the DG has the power to give directions to bring an infringement to an end; to give interim measures during an investigation; and to impose penalties on undertakings for infringing the prohibition.

4. Where the DG has conducted a preliminary investigation and finds an infringement of the Act, he will send the party or parties a written statement setting out the matters to which he has taken objection, the action he proposes to take and the reasons for it. The DG must allow the person receiving the notice an opportunity to make representation to him. The person receiving the notice may request a meeting with officials of the Office of the DG to make oral representations, to request elaborate on the written representations already made in this regard and, if he requests will be given an opportunity to inspect the

DG's file on the case. If at the conclusion of the investigation, the DG maintains that there is an infringement of the Act, the DG will impose appropriate sanctions. The DG may seek a court order to enforce his directions if a person fails to comply. Breach of such an order would be punishable as a contempt of court. Thus, the DG is given powers to investigate, make findings and enforce his findings. However, he does not perform adjudicative functions as he does not sit in a quasi-judicial manner to hear matters between two parties.

5. Chapter IV establishes the Competition Commission. Section 46 provides that "any party to an agreement in respect of which the Director General has made a decision may appeal to the Competition Commission against, or with respect to the decision." The party appeals to an appeal tribunal of the Competition Commission. Decisions of the Commission can be appealed to the Court of Appeal in England and Wales and in Northern Ireland, and the Court of Session in Scotland. Thus the Competition Commission is separate from the work of the OFT.

AUSTRALIA

6. The Australian Competition and Consumer Commission is an independent statutory authority which administers the Trade Practices Act 1974 and the prices Surveillance Act 1983. It is the only national agency which deals generally with competition matters. In seeking to prevent anti-competitive conduct and to ensure adherence to fair trading principles the Commission takes action through compliance education programmes, investigations, litigation or enforceable undertaking, if necessary, to overcome market problems.

7. The prohibitions of anti-competitive conduct under the Trade Practices Act apply to virtually all businesses in Australia. In broad terms, the Act covers anti-competitive and unfair market practices, consumer protection, mergers or acquisitions of companies, product safety/liability and third party access to facilities of national significance. Its objective is to enhance the welfare of Australians by promoting competition and fair trading, and providing safeguards for consumers.

8. The Australian legislation is modeled on the anti-trust laws of the United States of America. Under this model the Commission has an investigatory role. It also has the powers to consider the authorizations of anti-competitive practices on the basis of public benefit. The Commission has no powers of enforcement and when enforcement action is necessary, must apply to the Court for the appropriate remedies. Persons affected by anti-competitive practices may either pursue the matter in Court privately or complain to the Commission which, on investigating the matter and determining that there is a breach, pursues the matter on their behalf. In this model the Executive director is not a member of the Commission but is a member of the staff. The Commission is primarily an investigatory body and the Court is the decision-making body.

Structure of the Legislation

The Australian Competition & Consumer Commission

9. Part II Section 6A of the Trade Practices Act establishes the Commission as a body corporate. Section 7 of the Act stipulates that the Commission shall consist of a Chairperson and other members appointed as full-time members by the Governor-General. Section 8 gives the Minster power to appoint associate members of the Commission while Section 10 provides for the appointment of a Deputy Chairperson. The Commission has a Chairman, Deputy Chairman and four other full-time Commissioners. There are a number of associate part-time Commissioners, some of whom are ex officio appointments from other Commonwealth state and regulatory agencies. They are from varied backgrounds and advise the Commission on matters in their areas of expertise.

Powers of Delegation

10. Section 25 and 26 among other sections of the Act enable the Commission, by resolution, to delegate to a member of the Commission (either generally or otherwise) any of its powers under the Act other than its powers to grant, revoke or vary an authorization. By virtue of Section 27, staff necessary to assist the Commission are persons appointed or employed under the Public Service Act 1921.

11. Under Part IIIA of the Act the Commission has power to arbitrate on access disputes concerning essential facilities. It also has the power to adjudicate on merger proposals and under Part VII of the Act, it may make a determination as to whether there is sufficient public benefit to grant exemptions.

12. Part XII Section 155 of the Act gives the Commission the power to summon and examine witnesses or require that documents be produced in instances when the Chairperson believes that the information is relevant to the making of a decision by the Commission.

13. The Commission should not be confused with either the National Competition Councilor or the Australian Competition Tribunal, which are completely separate bodies established under the Trade Practices Act.

The National Competition Council

14. This body, created by virtue of Part 11A section 29A of the Trade Practices Act, was established in November 1995. Its functions include carrying out research into matters referred to the Council by the Minister and providing advice on such matters. The Council consists of the Council President and up to four other Councilors who are appointed for a term of up to five years by the Governor-General.

The Australian Competition Tribunal

15. The Australian Competition Tribunal is established under Section 30 of the Trade Practices Act. It consists of a President and such number of Deputy Presidents and other members as are appointed by the Governor-General. A presidential member must be a judge of a federal court. For the purpose of hearing and determining proceedings, the Tribunal is constituted by a presidential member and two non-presidential members.

16. The Tribunal is a review body. A review by the Tribunal is a re-hearing or a re-consideration of a matter and it may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the decision.

17. Part XII Section 163A of the Trade Practices Act gives the Federal Court of Australia jurisdiction to hear and determine proceedings in relation to any matter arising under the Act.

NEW ZEALAND

Overview of the Legislative Framework

18. New Zealand's legislation comprises the Commerce Act 1986 and the Fair Trading Act 1987. This legislation is modeled on the Australian legislation and the structure of its Commission is identical to that of Australia. The Commission has a primarily investigatory role although it also has powers to determine application for authorizations of certain restrictive trade practices and mergers. It undertakes the role of decision maker concerning authorization and the role of investigator for contraventions of the Act.

Structure of the Legislation

19. The Commerce Act 1986 is divided into seven parts. These parts deal respectively with the Commerce Commission, restrictive trade practices, authorization and clearances; enforcement, remedies and appeals and miscellaneous matters. The main prohibitions are contained in Part II of the Act which relates to exclusionary provisions, arrangements designed to substantially lessen competition in a market and resale price maintenance.

20. Part I Section 8(2) of the Commerce Act establishes the Commission as a body corporate. Section 9 of the Act stipulates that the Commission shall consist of a Chairperson, Deputy Chairman and 3 other full-time members appointed by the Governor-General on the recommendation of the Minister. Section II gives the Minister the power to appoint associate members under limited terms.

Powers of Delegation

21. Section 105 enables the Commission to delegate its powers under the Act to a member of the Commission.

22. By virtue of Section 18 of the Act, the Commission appoints its own officers and employees necessary to assist it in its investigations.

23. Under Section 58-61 the Commission has the power to make a determination as to whether there is sufficient public benefit to authorize prohibited trade practices. It also has the power to adjudicate on proposed business acquisitions/mergers, among other things. These powers comprise its decision-making role.

24. Section 98 of the Act gives the Commission power to summon and examine witnesses or require that documents be produced when the Commission considers this necessary or desirable to carry out its functions.

25. Section 80 of the Act allows the commission to institute proceedings in the High Court for payment of penalties by persons who have contravened Part II (i.e. the Prohibitions) of the Act. The Commission is responsible for carrying out investigations and bringing proceedings for contravention of the Act.

26. The Fair Trading Act was established in 1987. Sections 9-13 prohibit persons in trade from engaging in misleading or deceptive conduct generally. Sections 17-24 prohibit unfair trading practices, and Sections 27-33 provide for consumer information and safety standards.

27. The role of the Commission is to provide information about the Act and take action against the offenders where necessary. Its role is investigatory and enforcement is brought about by an application to the Court, by the Commission, for the appropriate remedies.

CANADA

Overview of the legislative framework

28. The Canadian Competition Act is administered by the Competition Bureau and is headed by a Commissioner of Competition. The Bureau is organized into separate branches which deal with the provisions of the legislation covering Civil Matters, Criminal Matters and mergers and Fair Business Practices. The Civil matters Branch investigates competition cases reviewable by the Competition Tribunal. These matters include abuse of dominant position; refusal to supply; exclusive dealing; tied-selling and market restriction and consignment selling; delivered pricing; and specialization agreement provisions of the Competition Act. The Criminal matters Branch investigates possible criminal offences relating to anti-competitive behaviour. These include conspiracy to fix prices; price discrimination and predatory pricing; price maintenance and bid-rigging.

The Fair Business Practices Branch applies the provisions of the Act that deal with false or misleading advertising and other deceptive practices, as well as three laws promoting fair representation in the marketing of consumer products.

Structure of the legislation

29. The Governor in Council appoints the Commissioner of Commission. Section 10 of the Act gives the Commissioner the power to inquire into matters on the application of citizens, the Minister or on his initiative. Sections 11-21 give the Commissioner additional powers of investigation such as the power to obtain a warrant to search, or to get a subpoena. Under Section 22 the Commissioner may discontinue the inquiry but must make a report in writing to the Minister, and the Minister may instruct the Commissioner to make further inquiry. Pursuant to Section 23, the Commissioner may, in addition to, or in lieu of conducting an inquiry, remit a matter to the Attorney General.

30. The Competition Tribunal is established by the Competition Tribunal Act. It consists of between four and eight judges of the Trial Division of the Federal Court appointed by Governor in Council on the recommendation of the Minister. Under Section 8 of the Competition Tribunal Act, the Tribunal is given jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII (Restrictive Trade Practices) of the Competition Act. The Commissioner makes an application to the Tribunal which is given the power to make appropriate orders of levy fines. Decisions of the Tribunal are treated as judgments of the Trial Division of the Federal Court and are appeasable to the Federal Court of Appeal.

31. In this structure all investigatory functions rest with the Commissioner of the Canadian Competition Commission and all adjudicative functions are carried out by the Courts or the Competition Tribunal.

UNITED STATES OF AMERICA

32. The US model for assuring separation of functions and protection against bias is largely reflected in certain provision of the US Administrative Procedure Act (APA), 5 USC 551, et seq. The procedures of the APA exceed the minimum requirements of due process under the US Constitution. The APA provides that its requirements may be preempted by express specifications in an agency's organic statute. Congress has enacted numerous statutes that vary from the APA by imposing more stringent or less demanding requirements on particular agencies. In issuing procedural rules, some agencies choose to adopt provisions that exceed the requirements of either the APA or the agency's statute. Thus, there is considerable variation among US agencies with respect to the procedural provisions that implement separation of functions and interdict bias.

33. The APA provisions that separate investigative and adjudicative functions are found in 5 USC 551, 554, 556 and 557. All of these provisions are fully applicable to the United

States Federal Trade Commission (USFTC) and are elaborated in the procedural rules promulgated under section 6(g) of the USFTC Act, 15 USC 56(g), which empowers the agency "to make rules and regulations for the purpose of carrying out the provision of this Act." The most important provision for present purposes are the rules set out in 16 CFR Part 2, Subpart A relating to investigations, and those in Part 3 relating to adjudications. Some additional relevant provisions appear in Part 0 and 4. The thrust of these rules is to separate the performance of investigative and prosecuting functions from the functions of fact-finding and decision-making on the merits of adjudicative complaints.

34. It is significant, however, that the demarcation of functions mandated by the APA and the agency's regulations do not apply to the Commission itself, or its members but rather to the Commission staff. Thus, although the Commissioners make the ultimate determinations on adjudicative complaints, they are not prohibited from participating personally in investigative functions, including investigational hearings. Rule 2.8(b). They may also, if they choose, personally conduct adjudicative hearings in place of an Administrative Law Judge (ALJ). Rule 3.42(a). In practice. USFTC Commissioners never themselves engage in investigative and adjudicative functions in the same case.

35. With respect to the adjudicative functions of the USFTC, the rules specify that an adjudicative proceeding is commenced against a respondent "when an affirmative vote is taken by the Commission to issue a complaint" (Rule 3.11(a)). Section 5(b) of the FTC Act provides specifically that a complaint may be issued "whenever the Commission shall have reason to believe that any person is acting unlawfully and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public." Upon issuance of a complaint, investigative staff takes on the role of prosecutor (Rule 0.16) and an Administrative Law Judge (ALJ) is assigned to preside over the adjudicative proceeding itself.

36. The ALJ conducts adjudicative hearings, resolves disputes concerning discovery and compulsory process, rules on motions and otherwise controls the course of the proceeding (Rule 3.42(c)). During adjudicative proceedings, the prosecuting staff is authorized to employ compulsory process without Commission approval but subject to the control by the ALJ (Rules 3.34, 3.38). Upon completion of evidentiary hearings the ALJ closes the hearing record and thereafter issues an initial decision (Rule 3.51(a)). The ALJ's decision is required to include findings of fact, conclusions of law, an order disposing of the case (either by dismissing the complaint or by imposing an appropriate remedial order on the respondent) and a statement of reasons or basis for the determinations reached (Rule 3.51). The decisions of the ALJ become binding only if the Commissioners accept them. The prosecuting staff or the respondent may appeal the initial decision to the Commission.

37. The USFTC has adopted Rule 4.7 to prohibit various forms of ex parte communications, including those barred by the APA under 5 UCS 554 and 557. Mirroring the definition in section 551(14) of the APA, Rule 4.7(a) defines "ex parte communication: as "an oral or

written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include request for status reports on any matter of proceeding."

38. Rule 4.7(b)(1) then provides that, when a proceeding is in "adjudicative status" then except for such ex parte communications as are authorized by law, no outside person, and no Commission personnel who participate in investigative or prosecuting functions in adjudicative proceedings, may communicate ex parte on the merits of the pending or a factually related case with any Commissioner, the ALJ, or any agency employee who is or is expected to be involved in the decisional process in the proceeding. Rule 4.7(b)(2) bars such communications flowing the other direction, from Commissioners, the ALJ, or personnel involved in the decisional process to outside persons or to Commission personnel who participate in investigative or prosecuting functions in adjudicative proceedings. Rule 4.7(c) describes the procedures that apply if a prohibited ex parte communication occurs, and 4.7(d) specifies the sanctions that may be imposed on a party who knowingly makes a prohibited communication. Rule 4.7(e) defines in detail what constitutes 'adjudicative status" and when it commences, while Rule 4.7(f) describes various non-adjudicative Commission functions to which the prohibitions in subsection (b) do not apply.

39. The APA disqualification clause that appears in 5 USC 556. Rule 3.42(g) permits an ALJ to disqualify himself and permits any party in the proceeding to file a motion seeking disqualification of the ALJ. Such a motion, if rejected by the ALJ, is referred to the Commission for resolution. Similarly, Rule 4.17 permits any party in an adjudicative proceeding to file a motion seeking disqualification of an individual Commissioner. Such a motion, if rejected by the named Commissioner, is referred to the full Commission for resolution without the participation of the Commissioner in question.

DISCUSSION

In both the United Kingdom and Canada there are separate bodies that conduct investigations and hearings. In the case of the United Kingdom the Office of Fair Trading, which conducts investigations, is empowered to make findings on the basis of those investigations, is a separate entity from the Competition Commission which acts as an arbitrator after the Director General of the Office of Fair Trading has made a finding. In Canada the Canadian Competition Bureau carries out investigations and then makes an application to the Competition Tribunal (which is comprised of between four and eight judges of the Trial Division of the Federal Court) for a ruling.

The Canadian tribunal is made up of judges (lawyers who have been appointed to the bench). This certainly robs the tribunal of non-legalistic inputs in the decision-making process, which other jurisdictions seek so much to incorporate. The idea of having a panel, which is, not comprised solely of lawyers, is an attempt to bring a broader prospective to the adjudication process. While it is true that specialist training is required for all who participate in adjudicating

anti-trust cases; this training is laid on top of a particular foundation. Recall that what is being attempted is the codifying of economic principles and practices into a legal framework. This is not a seamless process and it is for precisely this reason why a purely legal panel is not the most appropriate tribunal for hearing competition matters at first instance. Having different foundations on which the specialist anti-trust adjudication knowledge is placed enriches the quality of the decisions, which are likely to be made. The rule of reason has to be applied in many circumstances, a broad foundation of different disciplines upon which competition enforcement is placed is more likely to result in the best outcome.

In the United Kingdom, the tribunal is brought to bear on the process only if an affected party wishes to challenge the ruling of the Office of Fair Trading.

The idea of having a Director-General or the head of an investigation not closely supervised is dangerous. Regulatory capture is a well-documented occurrence. A Director-General reporting to a Minister is not a sufficient structure to prevent regulatory capture. When a single individual is placed in a position where he is empowered to determine whether there should or should not be an investigation, or when he is solely responsible for the investigation with no supervision that individual becomes a prime target for regulatory capture. The establishment of a Board of Management, which is separate from the Body responsible for adjudicating, is a possible solution, but an expensive one.

The creation of two separate bodies, one for investigations and one for adjudication, presupposes an abundance of skill and knowledge in the area of competition policy and practice. This is not the case in Jamaica today, and is unlikely to be the case for the foreseeable future. A body of adjudicators who only meet for purposes of adjudication is unlikely to be afforded the opportunity to grow and learn from the full experience of the Competition Agency.

Countries which have several law schools, universities, competition law and policy consultancy firms and law practices which specialize in anti-trust matters, will have a host of persons who on a daily basis are immersed in competition issues, might be able to empanel persons from these groups who might be able to do a fairly decent job of adjudicating on the facts of a particular case; such persons will bring competence developed out of intense engagement with anti-trust scholarship and practice to the adjudication process. Jamaica lacks these resources. Persons, who are asked to adjudicate competition matters without an appropriate institutional structure to learn the skills and developed the competencies required, are unlikely to do a satisfactory job.

UNCTAD did an assessment of the Competition Policy in Jamaica as part of a peer review process in August 2005. This study was followed by an examination of Jamaica's Regulatory Impact commissioned by the Government of Jamaica and conducted by Cambridge Economic Policy Associates Ltd., which turned in its report in October 2006. Both of these studies addressed the issue of the structure of the FTC in light of the Court of Appeal ruling that the current law is in breach of the rules of natural justice. Both studies commented on the cost of competition enforcement, which is not unrelated to the structure utilized. UNCTAD reported that a recent study of competition authorities in developing countries "indicates that their average budget varies from 0.06% to 0.08% of their government's non-military expenditure…. Such ratios applied to Jamaica for the fiscal year 2004-2005 would represent JM$118,000,000 to

JM$157,000,000. … The budget of the FTC is also limited; it ranged from JM$31,498,320 in 2001 to JM$35,845,490 in 2004."

The regulatory impact study identifies: "the key issue is whether to create a new body which would act as an adjudication tribunal, or to make changes in the existing FTC to remedy the issues raised in the Stock Exchange case before the Court of Appeal." The report recognizes that "difficulties arise because of the small size of the Jamaican economy and the limited number of people qualified in this area." One option the report notes would be to divide the FTC into two separate bodies: "a tribunal ("Tribunal") comprising the Commissioners plus some support staff, and a bureau ("Bureau") headed by an executive bureau chief." The reports go on to state "this structure would have the benefit of dealing directly with the issue of natural justice identified by the Court, and would thus reduce the degree of legal uncertainty…. The two major precedents for this separation of investigation and adjudication are both Commonwealth countries: South Africa (Competition Commission (1 commissioner, 91 staff) and Competition Tribunal (10 Members, 19 other staff) and Canada (Competition Tribunal (14 members plus fourteen full time staff) and Competition Bureau (1 Commissioner, Budget Can$49.1 million))." The establishment of two separate bodies as indicated by the practices of South Africa and Canada are not inexpensive in terms of money and personnel. "Canada and South Africa are both much larger economies than Jamaica, with more depth of expertise in competition matters. They find it easier to support large staffs and some duplication of activities." Such a system in Jamaica will not be efficient. The report also points out "the experience has been that having a separate body is associated with a highly legalistic approach with numerous delays (and consequent costs) caused by the strong incentive on the parties to delay implementation of more competitive structures and practices."

Given the length of time required to investigate anti-trust issues, it is very unlikely that in Jamaica more than 2 cases would be ready for a hearing within any single year. Notions that a tribunal could be appointed and a small stipend paid to members of the tribunal as the only cost involved, is to completely misunderstand the nature of the beast that we are dealing with in competition enforcement. Inefficiency is the least of the problems that are likely to arise. The more insidious problem is that of ineffectiveness. Persons who are unconnected to competition matters and who are called upon once or twice per year to adjudicate anti-trust matters are likely to prove to be incompetent. They are most likely to read through the FCA the evening before a hearing and then try to figure out the issues involved in the case from first principles.

Another option examined by both reports is a reorganization of the FTC (and the appropriate adjustment in the FCA) to give a clear separation between investigatory and adjudicatory functions. The Regulatory Impact Assessment Report goes on to state in Clause 6.2.2. *inter alia*:

"Most other competition authorities do manage to combine the roles of investigation and adjudication, ensuring that natural justice is served by a combination of measures, such as the publication of working practices and decision criteria, consultation on draft findings, backed up by appeal processes."

The report warns in Clause 6.2.3.: "what may be legally acceptable in one jurisdiction may not be legal elsewhere. As we cannot advise on matters of Jamaican legal practice, our evaluation of

these options relates purely to the non-legal aspects of the options, in particular, their relative cost and effectiveness."

On the grounds of relative cost and effectiveness both reports favour the retention of both functions within the FTC. The point needs to be made here that while legality has to be maintained, it cannot be the only issue in determining the structure of the Competition Architecture in Jamaica. Firms wish to minimize costs, but this cannot be the only objective, because if it were then they would purchase no inputs, human, machinery or raw material. The aim of the firm is to meet some other objective subject to the constraint of meeting that objective at the least possible cost. We could satisfy the principle of natural justice by separating the functions of adjudication and investigation into separate bodies, but would the ultimate aim of ensuring a competitive economic landscape be achieved by such a move? We argue that it would not, in the case of Jamaica. It should not be beyond us to design the appropriate checks and balances, which would allow the rules of natural justice to be upheld while creating the institutional framework which is most likely to satisfy the objectives of competition enforcement. Especially since most countries of the world have managed to do so.

The Regulatory Impact Assessment Report goes on to state: "In Canada, the Tribunal has developed a reputation for high cost and delay. A peer review by the OECD in 2002 recommended that Canada moved to a unitary system. It declined to do so, instead deciding to reform some of its procedures in order to reduce the delays. The 2004 report by the OECD reserves judgment on the effectiveness of the changes."

On the question of effectiveness the Regulatory Impact study had this to say:

"In its relationship with the Tribunal, once it had decided to bring a case, the Bureau would no longer be an impartial fact finding body and would become, in effect a prosecutor whose objective would become to "win" cases. The inability of the Tribunal to commission its own research would mean that it would be balancing up sets of evidence selected by opposing interested parties, much as in criminal and civil legal cases. This inability to carry out investigations could be expected to lead to some combination of the following: decisions which were less soundly based; less well-tailored remedies; and excessive caution in arriving at adverse findings."

The idea of a tribunal simply "balancing up sets of evidence selected by opposing interested parties" is cause of grave concern if the tribunal does not possess sufficient competence in competition enforcement. Competition enforcement like most disciplines has its own vocabulary (which unfortunately uses the same English words as everyday speech but with some times very specific and even different meanings). To have a tribunal hearing a case thinking that it understands what is being said when it does not is dangerous. If a completely different set of words were being used the tribunal would be clued into the fact that it does not understand what is being said and may ask for an explanation. The danger is that it might think that it understands when it really does not. Statements made in the Court of Appeal case of the FTC vs. the Jamaica Stock Exchange clearly revealed that the court did not understand some of the economic concepts used – this is not to imply that the Court did not reach the proper finding in law about the issue of natural justice, which is the big-ticket item from that case. However, if the

substantive issue being examined was an anti-trust issue, these concepts would move to centre stage. Not to imply that a court would be as careless as the average person in the street (which is what a separate tribunal made up of none experts would approach) one needs only poll persons after a political debate as to the winner, i.e. after they have gone through the process of "balancing up sets of evidence selected by opposing interested parties" to recognize that presentation rather than facts seems to be the deciding factor in declaring a winner; and presentation varies in the eyes of the observers depending on their particular predilections. It is difficult to believe that the average person could sufficiently comprehend a technical disagreement between two chemists to discern which is correct. Some independent understanding of the issues involved (even the building blocks) would be a precondition for "balancing up sets of evidence selected by opposing interested parties."

The Jamaican FCA is modeled very closely on the Australia/New Zealand model. A major difference is that the Jamaican Act does not grant the Commission the power of delegation. In the case of Australia/New Zealand the Commission can delegate some of its powers to a single Commissioner. Investigations can be delegated to a single Commissioner who would conduct these investigations using the Staff of the Commission. The Australian Competition and Consumer Commission (ACCC) does have some adjudication functions. "In carrying out its adjudication functions, the ACCC assesses applications for authorisation and notification of certain anti-competitive arrangements. When such arrangements provide benefit to the public, exemptions from the competition provisions of the *Trade Practices Act 1974* may be afforded." [The Australian Competition and Consumer Commission web site: http://www.accc.gov.au/content/index.phtml/itemId/871076]. It should be noted that some issues are adjudicated in the courts. The ACCC must apply to the courts for penalties to be applied or conduct to be stopped. The ACCC does not have the power itself to punish offenders or order them to stop their conduct.

In earlier discussions the FTC had proposed an adjustment of the FCA to allow delegation of the investigative powers of the Commissioners of the Jamaican Fair Trading Commission to a single Commissioner. This Investigating Commissioner would then supervise the Staff of the Commission in the investigation process. Any adjudication panel would then consist of the other Commissioners i.e. the Investigating Commissioner would be excluding from the adjudication process. This proposal was made in an attempt to satisfy the dictates of natural justice. The FTC was subsequently persuaded that such a structure might pose too high a level of legal risk. The FTC adjusted its position to one where the FCA would recognize the Staff of the Commission (which currently is not recognized) as the body solely responsible for conducting investigations and the Commissioners solely responsible for adjudication. Other changes to the FCA would have to be made to facilitate this e.g. placing the Executive Director solely in the category of staff, and the establishment of very thick fire walls to ensure that there is no contamination of investigatory or adjudicatory processes.

The arrangements for the USFTC are the bases for the Australia/New Zealand model. It is proposed that the FCA uses this model as its benchmark. It is not anticipated that the additional step of the Administrative Law Judge (ALJ) be included. Since the finding of the ALJ must be ratified by the Commissioners and either party to a hearing can appeal the ALJ's decision to the Commissioners, one could not make a convincing argument that the Commissioners are not

involved in the adjudicative process. The US regulation of prohibiting ex parte communications during an adjudication process, with a clear definition of what constitutes an adjudication process, if adapted here should meet the canons requiring the separation of investigative and adjudicative processes. There should be clearly articulated sanction for the breaches of the ex parte communication prohibition as well as sanctions (whether through the courts or the minister in charge) for any attempt to peddle influence by Commissioners and/or Staff. The FCA should give the Commissioners the power to hire staff that is independent of the Staff of the FTC to assist the Commissioners in the adjudication process. Procedures and regulations should be promulgated and published so as to give certainty and transparency as to how a unified FTC would carry out the processes of investigation and adjudication while respecting the rules of natural justice.

It is worth noting that the USFTC has successfully withstood several challenges as to the constitutionality of its structure on the grounds of the breach of natural justice. The legal principle of "justice must not only be done, but must be seen to be done" is likely to be evoked. It is worth noting also that what one sees is often a function of one's education. A process of educating the public in general (and the legal fraternity in particular) to the fact that the proposal, which is guided by the US structure, does in fact satisfy the rules of natural justice should be recognized as necessary. While other structures could be adopted which would seem to satisfy this old adage more obviously, or at least the part that speaks to justice seeming to be done, structures do matter in terms of the end results. Appearances, while important cannot be the overriding principle, which influences the design of this most important part of our economic infrastructure. The issue at heart is which structure is most likely to deliver real justice. Without opening up a discussion which has been going on from the time before the prophets of the old testament, as to what is justice, we have to ask, if we have adjudicators who are either too narrow in their focus or not sufficiently knowledgeable with the subject matter to at least pose the right questions, can we truly arrive at justice?

To delegate the investigative function to the Staff would remove the need for two separate entities, which is costly and unnecessary. The prohibition of ex parte communication between the Commissioners and the Staff on matters which are likely to end up for a hearing before the Commission once a formal investigation has commenced should satisfy the dictates of natural justice. The Commissioners would not be completely separated from the Staff on all matters of the FCA. The Commissioners would still be able to influence the broader development of competition policy and practice in the country, through advocacy and public education. The Commissioners could also be involved in those matters that would be heard by the courts and not the Commission. The Commissioners would remain embraced in the culture of competition. To separate the adjudicators from the FTC completely is to miss this great opportunity for mutual growth and development of the Staff of the FTC and the adjudicators of competition matters.

The current FCA deals with two types of matters, those that would require a hearing by the Competition Agency and those that do not (resolution being sought through the courts). The processes used in both sets of matters are complementary. There is no legal difficulty in the Commissioners becoming very involved in matters that are to be determined in the courts. Dealing with these matters on a monthly basis (and often times more frequently) provides an opportunity for the Commissioners and the Staff to collectively develop an appreciation of

competition matters. Commissioners' meetings often resemble academic seminars, where there is no distinction of rank; merely the exercise of intellect by equals seeking a deeper understanding of and implication for competition law and policy. Many of the issues raised remain unresolved for a very long period of time, as Commissioners and Staff take time to reflect and research issues. In many cases there is no consensus formed, but there has been much scholarship applied, with persons thinking long and hard about various issues. Over time as the Commissioners are exposed to more and more of these issues their knowledge and skill (i.e. their competences) increase.

To form a tribunal which is totally divorced from the FTC would rob the adjudicators of any structured mechanism which would force them to constantly inform themselves of the various principles which they might have to utilize when called upon to adjudicate a particular case. It is difficult not to arrive at a conclusion that the skill set of the adjudicators who are totally divorced from the FTC and who would not have been forced to think through some of the issues before they are called upon to pronounce, would be equal to that of adjudicators who are attending at least 12 seminars (Commissioners' meetings) each year and weekend retreats where competition issues (not cases likely to be heard) are discussed.

To empanel adjudicators 2 or 3 times per year in a formal hearing (very similar to a court) where there is a clear hierarchical relationship between the adjudicators and the Staff of the FTC is not a conducive mechanism for the education of the adjudicators. There can be little exploratory probing geared purely at a sharpening of the intellectual capacity or understanding of the principles of competition law and policy; there can be no 'teaching' of the adjudicators in that setting. The breadth of knowledge and understanding which the Commissioners presently get by being involved in matters which cannot be brought before them would be lost. The usefulness of this experience would be removed. It is difficult to conclude that totally independent adjudicators would be equally matched to the Commissioners of the FTC. Persons who are empanelled 2 or 3 times for the year are not likely to spend much time thinking about competition issues, nor would they see as many issues as Commissioners do.

The Jamaican society has been slow to fully appreciate what Adam Smith reveled in 1776 when he inquired into the wealth of nations. Specialization, which facilitates the division of labour, led to increased productivity and wealth. Within the medical field in Jamaica specialization is well established. Few other areas embrace specialization and its implications to the same extent. Anit-trust law and Industrial Organization (the branch of economics used in competition law enforcement) are specialized areas of law and economics. It is unlikely that engaging lawyers or economists who have paid little attention to these specialties, who apply the rudiments of their disciplines from first principles, will result in the level of competence required to propel the Jamaican economy to world class levels.

A competent military has to stay combat ready all the time, not wait for a conflict to break out. Fighter pilots are required to practice at least 3 times per week to keep a status of combat readiness. Sports teams spend many hours in practice before taking to the sports pitch for a relatively short period of time – months/years of training in order to prepare for a 90 minute match. There is clearly an appreciation that practice and constant sharpening of one's skills are important for competent performance when it matters. A structure, which has an adjudicatory

panel, which meets only when there is a hearing, ignores the principle that some mechanism is required to keep competence at an acceptable level and this mechanism needs to operate when there are no performances.

For the mechanism of keeping the FTC together with an investigatory arm and an adjudicatory arm to work properly, some issues of governance need to be addressed. The current practice in Jamaica of Boards of Directors resigning when there is a change of Minister should not carry over to any quasi-judicial body. To view any adjudicatory panel simply as a Board of Directors is wrong, especially when there is a huge learning curve involved. The interest of competition law is best served if members of an adjudication panel, be they Commissioners or members of an independent tribunal, enjoy overlapping appointments. This means that the terms of appointment would not be synchronized. If the panel consists of five members, each appointed for five years, then in any one year there would be no more than one new member, unless there are unforeseen circumstances. This would mean that appointments would cross over the tenure of the Minister under whose portfolio anti-trust enforcement falls. Adjudicators need to be seen more as judges and less as political appointees. Such a system of overlapping appointment would ensure the competence of the adjudicators is not compromised and we do not end up in a situation where five newly appointed persons are expected to rule on a complex anti-trust case within days of their appointment.

This paper has dealt with the issue of adjudication at the level of first instance. Justice clearly dictates that an appellant process be incorporated. The courts are best suited to play the role of an appellant body for anti-trust issues. There should be strict rules as to the areas open for appeal. The review of the courts should be restricted to legal issues

Many persons have interpreted the Court of Appeal ruling in the FTC vs. Stock Exchange case as an instruction by the court to set up a separate adjudication body. This is a misreading of the judgment. The competence of the court is to determine whether or not the standard of natural justice has been met. The court can even offer suggestions as to remedies. However, suggestions are not instructions. The court ordered that the law which gives investigatory and adjudicatory powers to the same individuals (the Commissioners) fails the test of natural justice. The court did not rule that a change in the FCA to recognize the Staff as repository of investigations and the Commissioners as the group responsible for adjudication would not satisfy the test of natural justice. We are here dealing with institutional design. There are issues other than legal issues involved. Structure affects performance, and performance affects outcome. Unfortunately, the discussion to date around how to remedy the breach of natural justice has been purely a legal one, with very little, or no, consideration being given to other issues involved. We have had corner solutions suggested as the remedy i.e. solutions which look only at one issue – the legal issue, while ignoring all other considerations.

CONCLUSION

We start with the position that institution design (i.e. structure) affects performance and that performance affects outcome. In short the institution design which is used to correct the breach of natural justice will affect the outcome of competition advocacy and protection.

Two broad models to correct the breach in natural justice which is inherent in the FCA are available for consideration. One is a separation of the adjudication and investigation functions into two separate bodies. The other is to separate the adjudication and investigation functions within a single body with the appropriate firewalls to ensure that the rules of natural justice are preserved (this is the model that is most common in other jurisdictions and the one which this paper advocates).

Efficiency (least cost) which will come from a single entity and effectiveness (better outcomes) which will be encouraged by having the adjudicators connected to an entity which is active in the pursuit of competition policy in its broadest interpretation. While initial competence in the selection of adjudicators is important, a mechanism of engagement in competition policy outside of the occasional arbitration, which is likely to arise, is essential for competition knowledge and skill to grow among adjudicators. The establishment of a parallel organization, merely as a mechanism of having the Commissioners engaged in competition policy outside of adjudication (a pre-condition for appropriate adjudication) is wasteful. The shortage of such competences within the Jamaican society makes this point even more critical.

We contend that an adjustment of the FCA to assign the functions of investigation and adjudication to different entities within the Fair Trading Commission, with the appropriate provisions and regulations to ensure that the functions are separated, with the court acting as an appellant body on issues of law, is the best structure and least cost for the enforcement of competition law. We further argue that this structure passes the test of natural justice.

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