
THE ENFORCEMENT OF JAMAICA'S COMPETITION LAW¹

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November 10, 2009

¹ This paper was presented at the Caribbean Law Institute Centre Inaugural Symposium: Current Developments in Caribbean Community Law – Session IV: Capitalism and Governance: The Regulation of Competition within the Community

Foundation and Historical Context of Jamaica's Competition Policy

From a colonial economy based on the production of banana, sugarcane and coffee, the Jamaican economy has evolved to one that is relatively large and diversified. It underwent significant structural changes starting in the second half of the 1980's; a period in which the government adopted a number of structural adjustment measures and market-oriented policy reforms. These measures included the privatization of state-owned enterprises, the deregulation of certain sectors and the removal of price controls.

There was also the reform of the foreign currency and exchange rate policy, which made foreign currency more accessible to the general public. There was as well significant tariff reform which eliminated quantitative restrictions, removed the requirements for excessive import licensing and reduced tariff levels substantially. The lifting of import quotas and the removal and reduction of several trade barriers opened the doors for a flood of economic activities and business opportunities for the Jamaican entrepreneur.

In order for these business opportunities to be appropriately realized to the benefit of the economy, the government enacted competition legislation, which was viewed as being essential to the shift from an economy that is heavily controlled by the State to an economy relying on free markets and private enterprises. Accordingly, the Fair Competition Act (FCA) was enacted in March 1993; and the Fair Trading Commission (FTC) established shortly thereafter.

The doors of the FTC were opened in February of 1994, during a significant turning point for the Jamaican economy – a time of much economic activity and a time of unprecedented changes. These changes continued until well into the late 1990's with the commencement of the liberalization process of the telecommunications sector. As we all now recognize, technological advancement can totally revolutionize our way of life. Messages, documents, transactions, communication in general, can be just a “click” away. The changes in the telecommunications industry therefore further added to the slew of economic activity. There were new ideas, new services, and new ways of doing

business. There was a climate of business opportunities for entrepreneurs and of product choices for consumers.

The then new economic climate required a set of guidelines for the state of play in the markets; and the Fair Trading Commission as the guardian of this market-driven economy was set up to ensure that all markets within Jamaica's economy function competitively and that the competitive process is not derailed by anti-competitive practices. The so-called "freeing up" promised enormous benefits to the economy, to the business community and to consumers but for these benefits to be realized the proper legal systems and structure had to be put in place.

Jamaica's Competition Law regime

The objectives of the FCA are "to encourage competition in the conduct of trade and business in Jamaica; to ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy; and to ensure that consumers are provided with better products and services, a wide range of choices at the best possible prices".

The thrust of the FTC as outlined in its mission statement is to "*provide for the maintenance and encouragement of competition in the conduct of trade, business, and the supply of services in Jamaica, with a view to providing consumers with competitive prices and product choices*".

It has been demonstrated time and again, that when markets are allowed to function competitively, the interest of each firm is to serve consumers better than its rivals. This rivalry leads to better deals for consumers through lower prices, better products and increased choices; and ultimately leads to the efficient use of resources and new business opportunities as suppliers strive to serve consumers better.

The FCA is therefore designed to protect and facilitate this rivalry among market enterprises. The law does not protect individual firms, but instead, it safeguards the

competitive process; and by doing so it regulates certain business activities to ensure that the Jamaican consumers benefit from the competitive process.

Function of the FTC

FTC's functions include investigating the activities of business enterprises in Jamaica, on our own initiative, at the request of any person or as may be required by the responsible Minister. In addition to investigations for enforcement purposes, the FTC also undertakes market studies to determine whether there are impediments to the effective functioning of markets.

Investigations and market studies generally examine all elements of a market or industry that can affect the state of competition. Accordingly, intra-market rivalry (proxy by the number of firms and their relative sizes), buyer and supplier power, level of substitutes and the state of entry conditions are carefully examined.

Provisions of the FCA

In addition to some consumer protection provisions, and save for provisions relating to merger review, the FCA contains all the traditional provisions found in competition law legislations. The substantive ones are those relating to abuse of a dominant position and those relating to agreements that have as their purpose or effect the substantial lessening of competition in a market.

While the FTC has jurisdiction to deal with consumer protection matters, such issues are now primarily handled by our sister agency, the Consumer Affairs Commission. This agency administers the Consumer Protection Act (CPA), which was passed in April 2005. The CPA deals extensively with a wide range of consumer issues relating to market transactions. After the better part of 11 years of dealing mostly with consumer issues, the FTC was able, in 2005, to shift its focus and increase its attention to competition related issues.

The provisions relating to abuse of dominance seek to prevent a dominant firm from using its market power illegally, to exclude rivals from the market or to prevent the entry

of potential rivals. It should be noted that the mere existence of dominance or monopoly power is not unlawful; and not all activities that result in a rival leaving the market are anti-competitive. What is considered unlawful is the set of activities that are used to maintain or enhance a dominant position and that are not based on superior economic performance. Further, activities of a dominant firm that improve its efficiency but that also lead to the exclusion of its rivals from the market are generally not prohibited.

With respect to agreements, these may take one of two forms. Firms at the same level of the market, that is direct competitors, may agree to avoid competing with each other, thus elevating prices and increasing their profits at the expense of consumers. A price-fixing agreement is a classic example. Similar detrimental results can be obtained by agreements to divide markets, to fix production levels and to coordinate capacity adjustments. The main objection to such agreements is that they raise prices above the competitive levels, impose unfair terms and conditions on buyers and serve to protect inefficient firms from the rigors of competition.

The other type of agreements that is addressed by the FCA includes those between firms operating at different levels of the market. For example a manufacturer may enter into an agreement with distributors of its products not to carry the products of its rivals. Such agreements can result in the exclusion of rivals from the market, impede their expansion or prevent new entry.

As indicated earlier, the FCA does not address mergers and acquisitions. This can be seen as a major deficiency of Jamaica's competition law. Currently Barbados is the only CARICOM Member State that has merger review provisions in its competition law. There are essentially two problematic effects of mergers: (1) they reduce the number of firms in a market thereby giving rise to the creation or enhancement of market power; or (2) they could increase the likelihood of collusion among market participants. While there are provisions dealing with abuse of dominance and collusive activities, it is felt that merger review provisions are necessary to allow for timely and appropriate intervention by the competition agency. Over the past two years we have had consolidations in two important industries in Jamaica - the cable television industry and

the health insurance industry. In the case of the health insurance industry, we now have two providers, down from three; with one provider having a significant market share and seemingly significant market power. Our concern is whether there is effective competition in that market, i.e., whether consumers are getting the best possible ‘deal’. With the cable television industry, complaints about the quality of service being offered and high prices being charged by the market leader, have increased since the ‘consolidations’.

Scope of Application of Competition Law

While the FCA is a law of general application, it specifically exempts a list of activities from its application. Some instances in which the FCA does not apply include:

1. collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
2. combinations of employees for their own reasonable protection as employees;
3. agreements that are authorized by the Commission;
4. activities expressly approved or required under treaty to which Jamaica is a party; and
5. such other business or activity declared by the Minister by order of affirmative resolution.

It should be noted that the law does not provide any guidance as to what factors the Minister should consider in granting this exemption nor the process that should follow to arrive at a decision. Currently, the activities of the Jamaica Public Service Company, Jamaica’s sole electricity provider, are exempt from the ambit of the FCA and in this age of technological advancements as well as challenging economic times for both firms and consumers, one must wonder whether competition in the distribution of electricity would not enure to the benefit of all consumers of electricity.

Impact of our work on the Jamaican economy

Notwithstanding our structural and legislation challenges, the FTC continues to undertake investigations and market studies with a view to ensuring that markets function

competitively. A very important function of competition agencies is competition advocacy, or non-enforcement activities. Many times markets are not as competitive as they could be because of Government policies, outdated legislations or consumers not being adequately informed. Market studies are very useful in uncovering competition impediments; and we have been using this avenue with much success.

Some of the sectors in which we have effected changes are: Airline; Veterinary Services; Furniture and Appliances; Motor Vehicle; Telecommunications; Dairy Products; Beer; Bread; Education; Remittance; and aspects of the Banking sector.

Over the years we have concluded a number of Consent Agreements with the view to stemming undesirable activities in sectors such as beer, furniture and appliances, sports, motor vehicle, telecommunications and pharmaceuticals. We also have several successes in litigating matters relating to misleading advertisement involving the motor vehicle, entertainment and real estate sectors.

The FTC has been instrumental in advancing a competition culture within Jamaica and our Judiciary as well as that of the CARICOM region. To date, we have hosted five Workshops; and our participants have included members of the Jamaican, Barbadian, OECS and Trinidadian Judiciaries as well as Judges of the Caribbean Court of Justice (CCJ). These workshops are conducted by recognized international experts in the field of competition law and policy. It is an ongoing programme that was launched in 2003, and having yielded some success, we intend to continue the process.

Interaction between competition and protectionism

I will now speak briefly about competition law and protectionism. The easiest example for Jamaicans to identify with is the evolution of our telecommunications sector. Prior to the “opening up” of the sector at the beginning of this decade we had one provider of telecommunications services. Now, for most services we have three providers (strong competitors) - we enjoy increased choice, great prices, good quality service in almost all related services – to the extent that we benefit from some of the lowest rates in the world,

for both local and international calls. For example, a call to Trinidad, Barbados or to most CARICOM countries is treated as a local call, provided that it is made through the same service provider. Should this be treated as one market?

Recent developments in the cement industry foreshadow the magnitude of the public harm that could result from prosecuting legitimate competitive conduct. In 2004, our Anti-Dumping & Subsidies Commission (ADSC) recommended that cement imported from Argentina, China, Egypt and Russia attract tariffs of 25.83 percent in addition to the 15 percent Common External Tariff (CET) which was already imposed. This resulted in a 40 percent tariff on cement imported from the specified countries and effectively stifled competition from imported cement. The FTC disagreed with the hike in tariffs. By March 2006, the Government suspended the 40 percent tariff; citing the inability of the local cement manufacturer, the Caribbean Cement Company Limited (CCCL), to adequately supply the demand for cement.

The FTC recently completed a study which, among other things, estimated that Jamaican consumers saved at least JA\$694 million on cement during the 16 month period March 2006 through June 2008 as a direct result of the suspension of the tariffs. Since the late 1990s CCCL tended to increase its cement price by at least 3% each year. Being a relatively small increase and being a key commodity in construction, many persons never noticed that the price was creeping up.

Of note too is that for the 2004/2005 Financial Year the construction sector experienced 10.5% growth, and the following year, i.e. the year in which CCCL experienced difficulties in supplying our market, the sector's contribution to GDP fell by 4.8%. Further, for each year since 2006, as reported in its Financial Statements, CCCL experienced significant increases in production costs and other expenses; and it should be noted that those costs are reported as being unrelated to the cost of retooling and expanding the cement plant. This has driven up their cement prices and such a factor ought to be given due consideration in the determination of the level of CET that should be applicable. Shouldn't consumers be provided with a choice at a competitive price?

The important lesson to be learnt from this, is that a tariff does not only make it more difficult for foreign enterprises to gain access to domestic markets; it also makes it more difficult for consumers to benefit from lower prices.

“Using State subsidies or ‘protectionist’ measures to artificially create firms that compete internationally redistributes taxpayers’ money to private operators at a loss to the economy as a whole. There is evidence that vigorous domestic competition promotes success in international markets. A firm that cannot compete in a national market is not going to be in a position to compete internationally.”²

Information and data gathering is critical to investigations and conducting market studies and therefore information sharing between competition agencies within the region will be critical to the investigation process of cross border activities.

With the establishment of the CARICOM Competition Commission we anticipate a new era of competition law administration in Jamaica and in the region; and we look forward to working with the relevant competition authorities as we strive to increase the welfare of consumers and to increase business opportunities for entrepreneurs within the region.

In closing I remind us that “competition drives efficiency, competition drives productivity, competition drives innovation; and competition drives job creation. Therefore let us together work assiduously so that the maximum benefit of competition law and policy is realized for the individual consumer as well as for our region.

Ladies and Gentlemen, I thank you.

² Declan Purcell, Head Advocacy Division, the Competition Authority, Ireland.