
THE INTERFACE BETWEEN COMPETITION LAW & REGULATION¹

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FAIR TRADING COMMISSION

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Introduction

Ladies and gentlemen, Good morning. I thank the Jamaican Bar Association for allowing us (the FTC) the opportunity to participate in the Continuing Legal Education Seminar today. I will address the interrelation between Competition and Regulation and the effects on the market within the context of the theme of this Seminar².

Because of our name, many persons who call us with complaints believe that what we are about is 'fairness'. But what is 'fair'? There are many interpretations, mine maybe different from yours, but I must make it clear that what we are concerned with is the proper functioning of our markets within the context of the ambits of our Fair Competition Act (FCA).

Should markets be regulated, should they be governed by competition only or do we need both?

There is no doubt that there is a need for both competition law and regulation; and of the very strong interconnection between them. Markets however will face problems when we do not strike the right balance. To quote Neelie Kroes, European Commissioner for Competition Policy, "If the current financial and economic crisis has taught us anything, it is that there is a high price to pay when regulation fails, and that competition policy is essential for keeping our economy working well".

¹ This presentation was made at the Jamaican Bar Association's Continuing Legal Education Seminar held at the Norman Manley Law School, Kingston, Jamaica.

² The theme was Regulatory Oversight of Commercial Activities – Legal Perspectives

The lesson for all policymakers and government agencies especially in these challenging economic times is that those who share common goals and objectives must work together. For example, the FTC and the OUR cannot afford to operate separately and independently, we must work together on all relevant issues, develop synergies and use these synergies in the most efficient manner. We need both and harmonization is critical.

In the mid 1990's there was a collapse of our financial sector. You may recall that there was much competition in the market for banking and loan services, but there was very little regulation. In hindsight it is clear that the manner in which the markets operated was not sustainable and it became necessary for the Government to create institutions such as the Jamaica Deposit Insurance Corporation (JDIC) and the Financial Services Commission (FSC) to regulate these products and services and the operations of financial institutions. Regulation alone is however not sufficient. Supervised rivalry among firms by the competition enforcer is critical to ensure innovation that comes from the competitive process.

We would not want a situation where the regulator defines the products and services being offered, but we need them to ensure that the products and services offered are realistic, fall within established guidelines and conform to a particular standard which yields to the benefit of consumers. For example, the unrealistic, unrestricted and exaggerated risk taking instruments promoted by several institutions both locally and internationally in recent times which many believe have caused a dramatic negative ripple effect throughout several economies.

In network industries such as the telecommunications sector, wharf services, and the provision of water, competition law alone does not create competition and therefore the need arises for a regulator. In most instances we find that the infrastructure in these sectors was built with state funds and the sector is usually controlled by a monopolist. This monopolist generally has no incentive to facilitate potential rivals and therefore may refuse to grant access, or when access is granted, it is done in such a way that there is very little room for competition. This amounts to refusal to supply under the Fair Competition Act.

The level and intensity of competition in the telecommunications sector would be substantially less or even non-existent if the granting of access was not mandated. The Regulator, the Office of

Utilities Regulation (OUR), was therefore essential in laying the foundation from which we now have an environment conducive to competition. But to ensure that the competitive process is efficient and effective the competition authority is essential to “regulate” the behavior of those firms in the market; and to ensure that they do not engage in activities that “chill” the intensity of competition.

But just as how regulation alone will not make the market function effectively, competition law will not automatically generate the ideal behaviour either. And therefore, there must be a balance, and the challenge that we face ultimately is getting that balance right. To do this there must be constant dialogue between regulator and competition law enforcer.

We need both Regulation and Competition

In many instances the FTC and the OUR work together to ensure that both regulation and competition exist, and function effectively. For example, there are complaints which the OUR refer to us where they require our expertise; and in the development of policy related to regulated sectors, the FTC is brought into the discussions in order to ensure that competition considerations are aired and discussed, in order that we, as Agencies that inform policy, do what is required to ensure that the relevant markets work to the benefit of consumers. The FTC has been an active and valuable participant in the formulation of Jamaica’s telecoms policy.

In the case of the electricity sector, while it is regulated by the OUR, the FTC is exempt from dealing with matters relating to this sector. But what about the distribution side; in these times of innovation and rapidly changing technology, where there now exists options for the distribution of electricity, what if consumers were allowed to choose their electricity provider based on things like quality and consistency of service? Are we as consumers comfortable and satisfied that regulation is working to our benefit in this regard?

We all seem to be pretty comfortable with the telecommunications sector, aren’t we? How many of us here today have our cellular phones with us? I am sure too that many of us has smart phones, and in some cases more than one. This is a product of competition.

It is therefore essential to understand that regulation and competition law are parallel processes, not competing processes.

With changes in the technological landscape over the years, and we see this especially in mobile services, we are finding in some instances that less regulation is required and in some instances that relevant policies that were established under a different set of circumstances should be changed.

Role of the Fair Trading Commission

Our role at the FTC is to ensure that markets within Jamaica are competitive; that there are no impediments to competition and that firms do not engage in activities that distort competition or negatively harm the competitive process.

Accordingly, the work of the FTC is categorized in three broad areas: ie competition law enforcement, competition advocacy, and public education.

1. *Competition law enforcement* refers to activities of the FTC aimed at prosecuting enterprises which contravene the FCA. The FTC's mandate covers restrictive business practices such as abuse of dominance, collusion, price fixing, resale price maintenance and tied selling. These prohibitions are aimed at safeguarding a competitive environment. By way of example some years ago Red Stripe entered into restrictive agreements with distributors which limited ability of other beer suppliers to promote their products. And there are other examples such as those with Cable & Wireless Jamaica Ltd.

2. *Competition advocacy* describes non-enforcement activities through which the FTC informs the Government and other public agencies, of how their conduct may be impeding the competitive process. Competition advocacy is crucial to the effectiveness of the agency in achieving its mandate as it has been shown that the Government's action may have inadvertent but substantial negative impact on the competitive process. A major aspect of this advocacy thrust is commenting on legislation. The FTC has submitted comments on policies relating to: The Dairy Development Board Act; legislation of the Jamaica Veterinary Medical Association; License-Exempt Spectrum; Electronic Government Procurement Roadmap and Implementation Strategy; the Timeshare

3. *Public education* refers to activities carried out by the FTC aimed at informing the wider public of the benefits of the competitive process and the obligations of businesses under the FCA. Public education is important because a more informed public increases the likelihood that anticompetitive conduct would be detected and successfully prosecuted and therefore reduces the incentives for private enterprise to engage in such conduct. Another benefit to having a more informed public is that there will be an increased incidence of self-policing; which in and of itself reduces the level of public resources utilized in enforcing competition law.

By protecting the competitive process, the FTC encourages healthy business practices by all participants in the Jamaican market. Whenever there is healthy competition in an industry, the society on a whole, benefits from the surplus generated. This is not to gainsay the fact that some domestic and foreign manufacturers (the inefficient ones) may be unable to profitably remain in a competitively organized market.

When do we regulate?

There is a standard 3-criteria test that is used; and regulation is used only in those markets where the 3 criteria are met and where significant market power is found. The criteria are: (1) very high barriers to entry; (2) the market structure does not tend over time to facilitate effective competition; and (3) competition law is by itself insufficient to deal with market failures.

As Miss Kroes has said “Our experience is that regulation which respects competition principles is the most efficient type of regulation. When regulation succeeds in enabling a competitive market, there is less worry about both for the consumers and for competition authorities. Even the most perfectly designed regulation will not eliminate the risk of abuses, so there will always be a role also for competition enforcement.”

There are valuable roles for both regulation and competition law in ensuring competitive markets and to make markets work for the benefit of consumers. The important part is to understand the limits and roles of regulation and competition law.

In our telecommunication industry the price of some services are regulated, while some are determined by the market forces. It has been proven that this formula works effectively. The challenge is knowing when to regulate and when to give control to market forces.

Roles of the FTC and the ADSC

I will now speak briefly about competition law and anti-dumping law. From a broad policy perspective both appear to pursue a common objective: ensuring that there is free and fair participation by various enterprises engaged in commercial activities.

A distinction between the two authorities is that the actions of the antidumping authority shield domestic producers from import competition whereas the actions of the competition authority encourage competition and thereby protect the welfare of Jamaican consumers.

It is quite possible that many of the cases which warrant antidumping sanctions may nonetheless be consistent with the competitive process.

For example, recent developments in the cement industry foreshadow the magnitude of the public harm that could result from prosecuting legitimately competitive conduct. In 2004, the ADSC recommended that cement imported from Argentina, China, Egypt and Russian attract tariffs of 25.83 percent in addition to the 15 percent common external tariff which was already imposed. The discussions among policy makers which ensued shortly thereafter resulted in a 40 percent tariff on cement imported from the specified countries and effectively stifled competition from imported cement. We disagreed with the hike in tariffs. By March 2006, the Government suspended the 40 percent tariff; citing the inability of the local cement manufacturer to adequately supply the demand for cement. The FTC recently completed a study which, among other things, estimated that Jamaican consumers saved at least \$694 million on cement during the period March 2006 through June 2008 as a direct result of the suspension of the tariffs (FTC, 2009).

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

In concluding, the current financial and economic crisis has clearly demonstrated the need for a balance between regulation and competition.

If we all think about it, we may agree that this crisis has shown that asking questions, facilitating competition, regulatory oversight and sticking to rules is important to making markets work to all our benefits.

Thank you.