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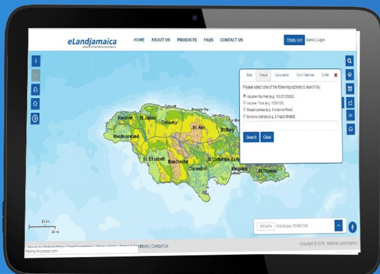

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Magazine Team
Edited, designed and coordinated by:
Paul Cooper*, Research Officer*
Ann-Marie Grant*, General Manager*
Kristina Barrett-Harrison, *Research Officer*
Verlis Morris*, Competition Analyst*
Desroy Reid, *Competition Analyst*

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Compete

Foreword

In this issue of **Compete,** we explore the theme "The Future Reimagined" which examines the way forward in attaining an ideal agency that addresses matters concerning competition and consumer protection in Jamaica. This theme is topical as Jamaica has started the process of combining the operations of its competition agency and its consumer affairs agency. Given the complementary functions of the agencies, this combination will exploit efficiencies by taking advantage of synergies.

We have included several articles that discuss aspects of having competition and consumer protection under a single agency. Articles such as "*Competition and Consumer Protection: Better Together*?" and "*Back to the Future*" explore issues relating to the linkages between competition and consumer protection policies as well as the optimal design for the agency. Other articles on the subject highlight the foundations of an effective competition agency and provide an examination of competition agency models.

We have also highlighted initiatives on procedural fairness and advocacy that are essential to strengthening competition policy in Jamaica. Review of mergers and acquisitions, a core function of competition law enforcement, was a significant part of our workload for 2019. And so, we have included a summary of those reviews to emphasize the main issues arising therefrom.

There are two articles on mergers. One explores the importance of reviewing mergers before consummation and integration; and the other explores the contours of market definition, a critical aspect for framing competitive effects.

We know you will enjoy this issue of **Compete** as much as we have enjoyed putting it together.

Happy reading!

Kristina Barrett-Harrison
Chairperson, Magazine Committee

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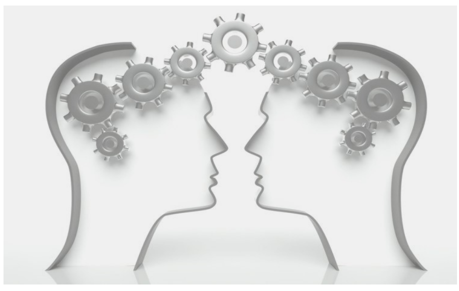

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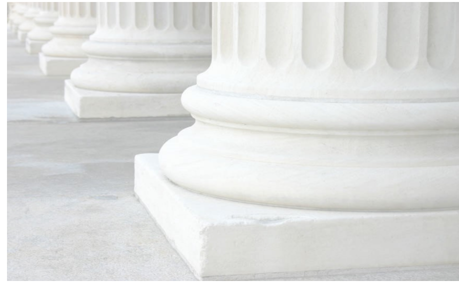

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New entity to undertake the functions of the FTC and CAC

BY way of a Cabinet decision in June 2018, approval was granted for the creation of a new entity to carry out the functions of the FTC and the Consumer Affairs Commission (CAC). The FTC was created by the Fair Competition Act (FCA) in 1993, as Jamaica's competition enforcement agency while the CAC enforces the Consumer Protection Act (CPA) which was enacted in 2005. At present, the FTC handles both competition policy and consumer protection issues while the CAC has oversight of consumer protection matters. The merging of the FTC and the CAC is a part of the Government's programme to transform the public sector, which emphasizes combining entities that have similar functions to achieve more effective service delivery.

Having a single entity that handles competition enforcement and consumer protection matters is common throughout the world and has existed for many years. Notably, of the 167 active competition authorities worldwide, 43 have responsibility for both competition policy and consumer protection. These include Australia, Barbados, Canada, Columbia, Ireland, Singapore, and the United States of America.

The process to combine the two agencies began in 2019, and it is expected that a new agency will be created in 2020.

FTC endorses cooperation on procedural fairness

THE FTC is one of over 70 competition agencies to endorse the International Competition Network (ICN) Framework for Competition Agency Procedures (CAP). While non-binding on participating competition agencies, the CAP is designed to strengthen procedural fairness in competition law enforcement. The framework is open to competition agencies that are willing to adhere to several substantive principles on procedural fairness and to participate in the Cooperation Process and the Review Process under the CAP, which encourage agencies to discuss their procedural issues.

Consistent with the principles of good governance, the main principles of the CAP include transparency and predictability in the application of competition laws and regulations, sound investigation process, and the provision of written decisions.

Under the principle of transparency and predictability, the CAP encourages agencies to ensure that the procedural rules that they apply to investigations and enforcement proceedings in their jurisdictions are publicly available, and are followed in conducting investigations and in enforcement proceedings. Concerning having a sound investigation process, the framework encourages agencies to inform any Person subject to an investigation about the legal basis for the investigation, and the conduct or action under investigation. Further, agencies should focus their investigation requests on information they deem relevant to the issues under review and provide reasonable time for Persons to respond to such requests.

For those agencies which oversee the decision-making process in their jurisdictions, the framework encourages them to issue such decisions or orders in writing. Additionally, such decisions or orders should include the findings of facts and the conclusions of law on which the decisions are based as well as the description of any remedies or sanctions. Participating agencies are further encouraged to ensure that they make all final decisions publicly available, subject to confidentiality rules and applicable legal exceptions.

The FTC intends to adhere to the CAP and recognizes its benefits to the effective enforcement of competition law in Jamaica.

FTC sharpens competition advocacy tool

DURING 2019 the FTC benefited from expertise in competition advocacy through the Laboratory of Economics, Antitrust and Regulation (Lear), under the World Bank-funded project - Foundations for Competitiveness and Growth. The project component is: "Increasing the Effectiveness of Competition Advocacy in Jamaica."

Competition advocacy refers to all non-enforcement activities of a competition authority that are geared towards the promotion of competition. These include market studies, public education seminars, and cooperation with other public bodies.

As a part of its competition advocacy programme, the FTC has undertaken a series of one-on-one discussions with government agencies and regulators whose responsibilities may affect competition or the structure of the market(s) for which they have oversight. The roles and objectives of the FTC and other government agencies and regulators often converge in the execution of duties. Information sharing concerning investigations, regulatory oversight, and policy development are a few of the benefits to be had through formal cooperation.

Accordingly, the FTC has formalized relationships with three government agencies through Memoranda of Understanding (MOUs). Agreements were signed in December 2019 with the Bureau of Standards Jamaica, the Betting, Gaming & Lotteries Commission and the Cannabis Licensing Authority. MOUs are to be signed with several other government agencies and regulators.

An overview of the review of mergers and acquisitions

A key function of the Fair Trading Commission (FTC) is to assess the likely competitive effects of agreements among entities engaged in business in Jamaica. These agreements include mergers and acquisitions ('mergers'). Since 2011, the Commission has reviewed six mergers.

Telecommunications Merger

The earliest review relates to the telecommunication sector when in 2011 Digicel Jamaica Limited acquired Claro Jamaica Limited.

Before the transaction, three mobile telephony providers participated in the market: Digicel Jamaica, Cable & Wireless Jamaica, and Claro Jamaica. Digicel Jamaica had the greatest number of subscribers while Claro, the most recent entrant, had the third-largest subscriber base.

The Staff determined that since Claro exerted the most significant competitive constraint on Digicel, the transaction would likely raise competitive concerns in the market for mobile telephony in Jamaica. In particular, the transaction increased the vulnerability of the market to unilateral effects. Accordingly, the FTC challenged the transaction through the Court.

Digicel contested the FTC's jurisdiction to review the transaction, arguing that it was already approved by the Minister with portfolio responsibility for Telecommunications. The FTC's jurisdiction to review the transaction was confirmed by a decision handed down by the Judicial Committee of the Privy Council in 2017. After the decision, the FTC decided against intervening based on the Staff's assessment that the market had changed sufficiently since 2011 to allay initial concerns of harm to consumers, to existing competitors and to potential new entrants into the telecommunications sector.

Broadcasting Media Merger

The next merger reviewed occurred in the Broadcasting Media sector in 2015 with the merger of the RJR Communications Group and the Gleaner Company Limited. The RJR Communications group was the leading entity in the radio and television segments of the sector. Similarly, the Gleaner Company Limited was the leader in the newspaper segment. The transaction, therefore, created a single entity, the RJR-Gleaner Communications Group, with significant control over the three main platforms for advertising in Jamaica: broadcast radio, television and newspaper. The FTC determined that the transaction raised competitive concerns in the market for advertising services and approved the transaction, subject to the implementation of measures designed to address the stated concerns.

Airport Management Services Merger

Jamaica has only two international airports facilitating international flights. In 2018, the Bidding Consortium was successful in its bid to manage the operations of the Norman Manley International Airport (NMIA). Grupo Aeropuerto Del Pacifico (GAP), a member of the Bidding Consortium, was also the majority shareholder of the Sangster International Airport (SIA) consortium which was managing the operations of the SIA.

The FTC determined that the transaction raised competitive concerns in the market for airport services. In particular, that NMIA and SIA operated in the same relevant market and therefore would have increased the market's vulnerability to coordinated effects. The FTC approved the transaction subject to measures recommended to mitigate, if not avert, any anticompetitive effects primarily through a monitoring mechanism.

Betting and Gaming Merger

The FTC reviewed three mergers during 2019. The first transaction occurred in the Betting Gaming and Lotteries Industry when Supreme Ventures Limited (SVL) acquired the majority shareholdings in Post to Post Betting Limited (PTP). SVL offered betting services on local and simulcast horseracing, sports events, lotteries and slot machine gaming. PTP operated similar services such as betting on virtual games, sports events, local and simulcast horse and dog racing as well as slot machine gaming services.

SVL held the greatest market share in the local horseracing services accounting for 77 per cent of bets placed. PTP held the greatest market share of betting on sports events with 53 per cent of bets placed followed by SVL which accounted for 31 per cent.

The FTC reviewed the transaction and concluded that the merger raised the prospects for unilateral effects

in the market for betting on local horseracing. In particular, the Staff was concerned that the transaction increased the incentives for discriminatory conduct on the part of SVL in favour of PTP and against competing players. The Staff concluded, however, that the regulatory oversight of the Betting, Gaming and Lotteries Commission (BGLC) is sufficient to mitigate, if not avert any discriminatory practice. Accordingly, the FTC approved the transaction.

Petroleum Marketing Companies Merger

The second transaction reviewed by the FTC during 2019 was the acquisition of Epping Oil Company Limited and Epping Retail Limited by Total Jamaica Limited. Both parties are petroleum marketing companies with Total supplying 28 per cent of retail gasoline locations and Epping controlling 7 per cent.

The FTC determined that the transaction raised competitive concerns in the market for retail gasoline. Based on an empirical analysis of pricing patterns before the merger, however, the FTC concluded that Epping was not the most significant constraint on Total's retail gasoline dealer locations. Accordingly, the FTC approved the transaction.

Packaged Ice Merger

The final transaction reviewed during 2019 occurred when Pure National Limited entered the market through its acquisition of Pure National Ice Company Limited (PNIC), and Island Ice and Beverage Company Limited (IIBCL).

Eezy Ice Company Limited had the largest capacity of all manufacturers of packaged ice accounting for 36 per cent of the market's capacity. This was followed by May Pen Ice Company with a manufacturing capacity of 27 per cent. PNIC had the third-largest manufacturing capacity (20 per cent) while IIBCL had the fourth-largest capacity (11 per cent).

The FTC determined that the transaction raised competitive concerns in the market for packaged ice in Jamaica and concluded that although the transaction increased the market's vulnerability to coordinated effects, competitive entry was likely to mitigate, if not avert any anticompetitive effects which are likely to arise. Accordingly, the FTC approved the transaction.

The FTC continues to be vigilant in its oversight of the market to ensure that merger transactions that have the potential to adversely affect competition are assessed and that remedial measures, where necessary, are taken to maintain competition and improve consumer welfare.

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On the records

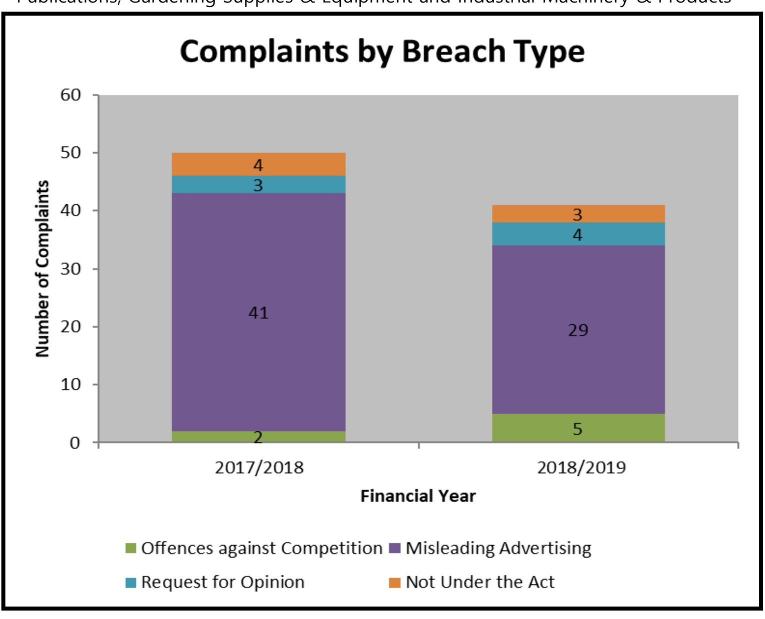
As part of its mandate, the FTC carries out investigations concerning the conduct of business in Jamaica. Over the period April 1, 2017 to September 30, 2019, the FTC opened 125 new cases. These cases concerned goods and services sold in over 23 industries with the most investigations relating to the telecommunications and the automobile industries which accounted for approximately 50 per cent of the cases opened during the period. Cases involving the telecommunications sector included allegations of offences against competition and misleading advertising regarding matters such as terms of service, prices or promotions. Cases arising from the automobile industry were based on allegations including misleading advertising regarding the model year of vehicles, warranty obligations, and roadworthiness.

In the Financial Year 2018/2019, the FTC opened 41 cases down from the 50 cases during the previous year. For the first six months of the 2019/2020 Financial Year, 34 new cases were opened. As it relates to changes in the distribution of cases across the top two industries, there was a decline in both telecommunications and automobile related-cases between 2017/2018 and 2018/2019. While cases in the automobile industry further decreased in the April-September 2019 period, cases in the telecommunications industry increased. The number of telecommunications cases opened for the first 6 months of the 2019/2020 financial year exceeded the total cases opened in that industry in 2017/2018. This is attributed to an increase in the number of complaints regarding the use of the term "unlimited" in plans offered by both telecommunication providers. Subscribers complained that the providers advertised certain plans as unlimited, however, they subsequently discovered that the plans had some restrictions. To address the issue, the FTC released a press advisory in September 2019, advising consumers to be vigilant when subscribing to plans promoted as unlimited and to obtain full information from the providers on the details of the plans before purchase.

A breakdown of the cases by breach type indicates that for the Financial Year 2017/2018, there were 41 cases of misleading advertising; three requests for opinion; and two offences against competition. Four cases were considered as being outside the purview of the FCA. For the 2018/2019 Financial Year, the number of cases regarding misleading advertising decreased to 29 while both requests for opinion and offences against competition increased to four and five cases, respectively. Three cases were considered as being outside the purview of the FCA.

CASES OPENED BY THE FTC			
APRIL 1, 2017 TO SEPTEMBER 30, 2019			
PRODUCTS AND SERVICES	Year 2017/ 2018	Year 2018/ 2019	April-September 2019
Advertising	1	1	-
Automobile	11	10	2
Business Practices	1	-	1
Clothing/Accessories & Textiles	1	-	1
Construction/ Repair Supplies	-	1	-
Education	3	2	-
Energy	2	1	1
Financial Services	4	3	4
Food/Supplements & Beverages	1	2	2
Gaming & Contest	-	-	1
Household Products	3	3	-
Insurance	1	-	-
Leisure & Recreation	1	-	1
Medical Supplies & Services	2	1	-
Office Supplies	-	-	1
Petroleum Products	-	1	-
Professional & Specialist Services	3	2	1
Real Estate	-	1	-
Telecommunications	13	10	16
Other [1]	3	3	3
TOTAL	50	41	34

[1]**Other** - Baking, Payment Services, Legal Services, Agricultural Products & Agro-Processing, Hardware & Electrical Tools, Media, Packaging, Publications, Gardening Supplies & Equipment and Industrial Machinery & Products



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- believes a digitally-literate citizen is the first line of defence against malicious, harmful and inappropriate content.

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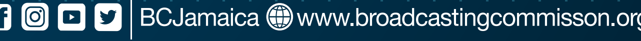

Competition and Consumer Protection: Better Together?

By Russell W. Damtoft, *Associate Director* - Office of International Affairs
United States Federal Trade Commission[1]

Competition and consumer protection have much in common. A healthy market economy depends on vigorous competition among providers of goods and services and the ability of consumers to make informed choices, which in turn stimulates firms to innovate, reduce prices and offer a wider array of products. Competition law and policy protects supply from being distorted by cartels, monopolization, and anticompetitive mergers. However, demand also affects markets, and it can be distorted as well. When firms seek customers through deception, consumers' decisions may depend more on that than on the relative virtues of the product — especially if consumers can't easily judge for themselves, such as when health and safety claims are involved. Consumers are harmed not only by the deception itself, but if pervasive deception undermines firms' incentive to compete by making better products, consumers could be harmed also by getting lower quality products.

The linkages between competition and consumer protection policy have been long understood, but views differ about whether to join them up in a single enforcement agency. Both disciplines share the goal of encouraging free and open competition to ensure that free markets work for consumers, but the day to day work of enforcing competition and consumer protection laws is quite different. The competition enforcer concerns herself with things like defining markets, assessing barriers to entry, understanding theories of harm, and examining efficiencies. Her consumer protection counterpart considers how consumers perceive a claim, whether claims are adequately substantiated, and how best to redress fraud. While there are some similarities between cartel and consumer fraud enforcement, for the most part competition and consumer protection work is quite different.

Even where agreement exists as to whether to join up competition and consumer protection, there is little agreement on how to do that. There is no single right answer. Consider some of the different ways the disciplines may relate to each other:

- At one end of the spectrum, some agencies make no dis-

tinction between competition and consumer protection. Case handlers typically work in a particular sector, and competition and consumer protection are simply different tools that they may use to solve the problem at hand. Collusion or abuse of dominance calls for application of competition tools, while deception calls for consumer protection tools. This is the approach used by the Australian Competition and Consumer Commission, for example.

- Other agencies, such as the United States Federal Trade Commission and Canada's Competition Bureau, have separate staffs to handle competition and consumer protection cases. The US FTC, for example, has separate Bureaus of Competition and Consumer Protection and a Bureau of Economics that supports both. However, the Commission itself makes the final decision in both competition and consumer protection cases. This kind of linkage ensures that common enforcement values inform both types of cases while acknowledging the specialization of skills involved.
- In other jurisdictions, competition and consumer protection are handled in separate agencies in the same ministry. The work of the agencies is entirely separate, but the minister can influence agency leaders to work towards a common economic goal. This model is most evident in the European Union, where the Directorates General that handle competition and consumer issues are both part of the European Commission. Similarly, in Costa Rica, both agencies are joined under the Ministry of Economy, Industry, and Commerce. The potential weakness is that the ultimate leader may not have the time or expertise to ensure that everyone is marching in step.
- At the other end of the spectrum, some countries treat competition and consumer protection as entirely separate matters. In Brazil, Mexico, Argentina, France, and South Africa – and in the United States, the Department of Justice – competition matters are handled entirely separately from consumer protection, and the agencies consult with each other as they see fit.

An additional complication is that the term "consumer protection" does not mean the same thing everywhere. Misleading advertising is described as "consumer protection" in some countries, including the United States, while others refer to it as "unfair competition," "deceptive marketing practices," or the like. Whatever it is called, the logic between joining competition and consumer protection is most clear in the case of misleading advertising. Firms compete by advertising, and advertising regulation affects how and even whether firms can compete. If they cannot advertise innovative products, there's not much reason for them to spend money on innovation. Consumer protection may include other matters in some countries, such as food and drug safety, product safety, the resolution of individual consumer disputes, data privacy, or weights and measures enforcement. These matters are not as closely related to the functioning of markets, and many countries assign them to specialized regulators even when misleading advertising is handled by the competition agency.

While there may be no single way to mix competition and consumer protection enforcement, it's hard to argue against an institutional linkage between the two policies. The best argument for separate enforcement is that the differences in the daily work reduces the possible synergies. Yet if they follow separate paths, enforcers may lose sight of the common goal of fostering a market economy that protects consumers through competition and innovation. There is a risk, for example, that consumer protection enforcement that does not consider competition principles will veer towards overregulation. Moreover, the growing importance of the digital economy suggests that competition enforcers have much to learn from their consumer protection colleagues about how misuse of data can harm consumers, while consumer protection enforcers can learn from their competition colleagues about how to think about data as a competitive asset.

While the daily work is different, it seems unwise for competition and consumer protection to each operate in splendid isolation. A consumer protection enforcer should have a working understanding of the implications of market power, while a competition official should understand how a tech merger might affect data privacy. However it is structured, both should share a common goal of making markets work for the benefit of consumers. The global trend seems to be in the direction of bringing competition and consumer protection under the same roof. In recent years, the Netherlands, Ireland, Estonia, Zambia, Kenya, and Denmark have joined their competition and consumer protection functions, joining their Western Hemisphere colleagues in Jamaica, the United States, Canada, Colombia, Panama, Ecuador, and Peru.

[1] The views expressed herein are those of the author, and do not necessarily represent the views of the United States Federal Trade Commission or any individual Commissioner.

Foundations of an effective competition agency

Summary of Sections I & II of the 'Foundations of an effective competition agency' – Note by the UNCTAD secretariat, published in May 2011 for the Eleventh Session of the Intergovernmental Group of Experts on Competition Law and Policy (July 19-21, 2011)

An effective competition agency is one that achieves its objectives while using resources aptly. Government agencies, the judiciary, the business community, the media and the general public all have an impact on the environment within which the competition agency operates and ultimately its effectiveness.

The effectiveness of a competition agency can be examined by answering two key questions: (i) Did the agency's interventions achieve the objectives of competition law; and (ii) Did the agency's processes lead to an appropriate allocation of resources to promote the realization of the law's objectives? Evaluation also has a role to play in the effectiveness of a competition agency and is important for several reasons. Firstly, evaluation is necessary to determine whether an enforcement policy of the agency contributes to the objectives of competition law. Secondly, publication of the agency's own evaluation facilitates evaluation of the agency by others. Finally, evaluation may generate new hypotheses and ultimately contribute to the development of competition policy. Evaluation of an agency may be carried out in three ways: (i) Annually through the publication of its annual report; (ii) Peer review by other competition agencies; and (iii) Ex-post assessments of the decisions of the agency.

As it relates to the institutional design of an effective competition agency, there are several elements to consider. These include independence, accountability, transparency, enforcement powers, and staffing and financial resources.

Independence

An effective competition agency should be independent from political interference and business influences. This is to ensure that the agency's decisions and advocacy efforts are not politicized or implemented on the basis of narrow goals of particular interest groups. Independence should be balanced with responsiveness as independent agencies are expected to be subject to government oversight and decisions subject to judicial review. To facilitate the independence of an agency, the legislation should define the operational independence by specifying the functions and powers; the appointment, tenure and removal of staff; and financing of the agency.

There are several safeguards to achieve a balance between independence and accountability such as: (a) Providing the agency with a distinct statutory authority; (b) Specifying professional criteria for appointments; (c) Allowing the executive and legislative branches of the government to participate in the appointment process; (d) Appointing the head of the agency and board for a fixed period and prohibiting removal except for clearly defined due cause; (e) Ensuring that the agency is adequately funded; and (f) Prohibiting the executive arm of the government from overturning the agency's decision except through carefully designed channels.

Accountability

The agency's independence should be balanced with accountability as the general public, the business community and the media should be aware of the rationale for the decisions made by the agency. Stakeholders should be allowed to participate in the agency's decision making process through a consultation process and must also be able obtain redress if the agency has acted arbitrarily or incompetently.

There are several safeguards to achieve this balance such as: (a) Making publicly available the duties, rights and responsibilities, obligations and reasoned decisions of the agency; (b) Ensuring that the decisions of the agency are subject to review by non-political entities or the courts. A threshold should be implemented to prevent strategies that are solely aimed at delaying the implementation of decisions.; (c) Requiring that the agency publish annual reports and its performance reviewed by independent auditors; (d) Allowing interested parties to make submissions to the agency on matters under review; and (e) Establishing rules for the removal of board members if there is evidence of misconduct.

Transparency

When a competition agency operates in a transparent manner, the public will have confidence in the legitimacy and effectiveness of the agency. Therefore, agencies should ensure that rules, policies, regulatory decisions and principles for making future regulations are available to the public. Where a competition agency makes public the reasoning behind its decision including guiding principles and evidence, it reduces the likelihood that the agency's decision will be seen as biased or arbitrary.

While transparency is important, the agency should ensure that commercially sensitive information is protected. Therefore, information released to the public must be screened to maintain confidentiality where necessary.

Enforcement powers

An effective competition agency must have clear enforcement powers and the capability to exercise its authority and enforce its decisions. To investigate matters effectively, agencies should have the power to gather information in a timely manner and impose sanctions for non-compliance. Agencies should also have the power to prescribe a particular conduct to restore competition and to impose sanctions through the judiciary.

Staffing and financial resources

Issues such as skills shortages, low public sector wage and the risk of corruption pose a threat to the effectiveness of competition agencies, especially those in developing countries. Given that competition law and policy requires specialized training, some countries address this skill shortage by implementing targeted training as well as reaching out to universities. Low public sector pay has implications for the recruitment and retention of skilled personnel in competition enforcement. With respect to the risk of corruption, empirical evidence as to whether low public sector pay creates an environment for corruption is mixed.

Financial resources are rarely seen as sufficient to adequately support the operation of the competition agency. Merger filing fees may be seen as an avenue to increase the financial resources of the agency, however this can subject the agency to unpredictable variations since it is based on the number of mergers occurring in a given period. Other means of securing financial resources such as fines and subventions from the budget pose challenges to the agency. Where a competition agency receives a share of fines imposed on a party that is noncompliant with the rules of competition law, this can raise questions about conflicts of interest. Questions may also be raised about the independence of the agency from ministerial direction if the agency is reliant on subventions from a ministerial budget.

Back to the Future?

By Stephen Calkins[1], *Professor of Law* at Wayne State University

Jamaica is joining the increasing number of countries that combine competition enforcement and one or more other responsibilities, most typically (as with Jamaica) consumer protection. This is good news. I've worked at two agencies that combine these functions and firmly believe it is the way to go.

When I was asked to recognize this development by contributing a short article on the theme, "The Future Reimagined," I was delighted to accept the invitation. I have had high regard for the Fair Trading Commission ever since I participated in a judicial workshop it organized some years ago and I foresee nothing but good things to come from this combining of competition and consumer enforcement.

The irony, of course, is that Jamaicans know the advantages of having a single agency responsible for protecting consumers through competition and consumer enforcement because Jamaica had a single agency until 2005 when the Consumer Affairs Commission was established under the Consumer Protection Act. There is no upside to debating whether this was a good idea, but it clearly is a good idea to concentrate the two approaches in a single agency.

What is the optimal design of a combined agency such as Jamaica will soon have? This assigned topic is a challenge because I have not had time to develop a detailed understanding of how much has already been decided. Moreover, there is no one perfect design, since designs must vary to respect national laws, traditions, and culture. Rather than setting out an ideal I will instead modestly offer several thoughts and suggestions — some of which, I hope, will have relevance to decisions being made in Jamaica.

Energetic, bi-partisan competition enforcement is the ideal. See my reflections at https://www.antitrustinstitute.org/wp-content/uploads/2019/08/Calkins_201-Antitrust-Achievement-Award.pdf. The U.S. has a consumer agency with one head (the CFPB) and a competition agency led by multiple, bi-partisan commissioners (the U.S. FTC) and in 2017 we saw that the latter is superior because it allowed for continuity and stability. Watching the former do a 180 degree turn after an election gave observers whiplash. When agencies change policies too sharply and frequently, they are less likely to maintain public respect and support. Also, in 2017 we were reminded of the importance of staggered terms and of officials being able to remain in office until successors are in place. More recently, we saw that an odd number of commissioners (if that is their title) is better than and even number. Competition and consumer enforcement are matters about which reasonable people can disagree.

International engagement should be part of the design of any modern agency. The Organization for Economic Cooperation and Development, International Competition Network, and other institutions regularly share information about best practices for competition enforcement. Similarly, the International Consumer Protection and Enforcement Network makes real contributions to consumer enforcement. Participation is not just about learning. It is also about building relationships that permit the sharing of information. And today, when competition and consumer issues increasingly relate to digital commerce, remedies may well be available only outside of a particular country, making international ties more important than ever.

International engagement does not mean that the same ap-

proaches are appropriate for everyone. They are not. Each country is unique and must have remedies and procedures — and priorities — appropriate to its situation. The last thing any agency needs is to be swallowed up by massive undertaking that consumes all its resources. Reputations — with political leaders and the public alike —need to be established and then nurtured, and that requires that agencies regularly are taking actions — and seen as taking actions — that benefit the public.

Just as it is important for an agency to look overseas, it is important for the agency to look both backwards and forward. Backwards, by recognizing and learning from mistakes, is key to progress. Just think what the new Jamaican agency should be able to learn from experience with its different designs! So also, an agency should work to anticipate future developments. Nothing stands still. Procedural changes have substantive consequences. See Calkins, *Reflections on* Matsushita *and 'Equilibrating Tendencies': Lessons for Competition Authorities, 82* ANTITRUST LAW JOURNAL 201 (2018). Initiatives such as this special issue are to be applauded.

Ideally, the newly-consolidated agency will employ the best of its tools. As the AAI speech cited above explains, today consumer issues may need competition remedies, consumer remedies, or both: Consumer problems can have more than one dimension. Think lack of privacy, which can be a consumer protection issue but also a problem resulting from competitive harms. Accurate pricing is needed both to prevent deception and also to enable vigorous competition. If you only have a hammer, everything looks like a nail, but if you have a robust toolkit things look different.

Finally, it is important that a dual-function agency signal to staff and the public alike that both emphases are valued and respected. When the merger of two Irish agencies necessitated an extended period of functioning in separate buildings, I moved my principal office into what had been the home for the consumer agency. Message: We are now one agency. At the U.S. FTC, there have been times when competition enforcement has seemed more glamorous, and times when consumer protection has. Leadership has to work constantly to show that both are valued and, indeed, are complementary approaches to protecting consumers. And just as techniques more closely associated with one can benefit the other (think economics), so also staff can benefit from working in one sector and then the other (think trial practice, or data analytics, etc.). Setbacks in one part can be offset by successes in the other, and thus the combined agency can stay positive, optimistic, and dedicated to protecting consumers.

[1] Mr. Calkins is a former Member of the Competition and Consumer Protection Commission of Ireland and its predecessor agency; and former General Counsel of the U.S. FTC.

History of the Consumer Affairs Commission (CAC)

(formerly the Prices Commission)

How it all Began...

Legislation amending the Trade Act, which was passed in July 1970, resulted in the establishment of the Prices Commission.

The main emphasis of the Prices Commission, as part of its consumer protection mandate, was to regulate the prices at which goods and services were sold, by setting and monitoring prices in retail outlets.

The Commission also had authority to investigate reports of breaches such as hoarding and "marrying" of goods.

Changes...

1981-1989 saw a reduction in the number of goods, which had been under price control, as the Government began to pursue a path whereby prices were determined by market forces.

In 1985 Jamaica became a signatory to the UN Guidelines on Consumer Protection recognising the eight basic rights of the consumer. In 2015, these rights were amended to provide new references and updated policies to tackle emerging consumer protection issues in financial services, privacy, energy, travel and tourism.

Trade Liberalization...

1990 to Present - By Cabinet decision in 1992 the Prices Commission was changed to the Consumer Affairs Commission.

During this period, Jamaica moved from strictly Price Control to a liberalised market driven economy. Therefore CAC expanded its Consumer Education Programme with the goal of empowering consumers through the provision of information about their rights and responsibilities.

Consumer Protection Act (CPA) 2005

In 2005, the Consumer Protection Act (CPA) came into being. It is the legislation which enables the CAC to operate, and is applicable to all persons involved in trade and business through the purchasing or vending of goods and/or services.

Best practices

from an examination of competition models in other jurisdictions

By Venessa Hall, *Legal Officer*

It is axiomatic that in a market economy, it is competition that drives economic growth and innovation and produces greater variety, increased quality, and lower prices thus ensuring that benefits are widely shared[1]. Competition policy and law, therefore, are crucial facets to the development of a stable market economy as they assist by increasing productivity and the international competitiveness of the business sector and promote dynamic markets and economic growth.

The growing importance of competition law is reflected in the extent and ubiquity of its adoption. Approximately one hundred and thirty countries have now implemented laws that seek to safeguard and foster market competition[2] and Jamaica is one such country.

Notably, while competition laws have become commonplace, they are by no means uniform, some tending to be more restrictive while others are more expansive. For instance, some jurisdictions require advance approval of mergers, acquisitions and joint ventures by a public regulatory agency to ensure that such transactions do not create monopolies or have serious anticompetitive effects[3]. Additionally, some jurisdictions have implemented a more in-depth competition policy and actively seek to establish a culture of competition. In Jamaica's case, the Fair Competition Act (FCA), which establishes the Fair Trading Commission (FTC), is at the more restrictive end of the continuum. Even so, it prescribes as part of the role and function of the FTC protecting the market against anticompetitive conducts such as misleading advertising, price-fixing, abuse of dominance, exclusive dealing, market restriction, among others.

Institutional models for administering competition also vary across jurisdictions. There are agencies that focus solely on competition matters[4] while others have mandates which include competition and consumer issues[5]. Further, there are jurisdictions where the competition agency has substantial independence as a stand-alone entity[6], and are largely insulated from political interference. There are also variations on the approaches to the determination of a breach of competition law and enforcement of sanctions, as some competition agencies have the authority to undertake this function, while in other jurisdictions, this authority is allocated to other public bodies.

It is posited that among the multiplicity of variations enumerated concerning the scope, the institutional arrangements and the enforcement approach to competition policy, it is possible to identify a core of best practices that are useful especially as lessons to nascent and evolving competition policy regimes. The importance of identifying and denoting such best practices is underscored by the observation that of the approximately one hundred and thirty countries that have adopted competition policy, a third have only done so in the last twenty-five years. Notably, Jamaica falls into that category and should therefore benefit from such an exercise.

Best practices have been described as a practice that has been shown to produce superior performance and the adoption of best practices is viewed as a mechanism for improving the performance of a process, business unit, product, service, or an entire organization[7]. The literature indicates that there are a number of factors that contribute and are crucial to establishing, maintaining and running an effective competition agency. Indeed, evidence of the prevalence and convergence of these factors

in the design and operation of the more successful competition agencies, arguably, indicates that they represent best practices. Some of the more common features are discussed below.

It has been contended that a cornerstone of a good institutional design is to be free from political interference. In this respect, the legislation which creates the agency should promulgate the functions of the agency and other operational necessities. Understandably, an agency cannot function effectively without political support. This is so as the budget of the agency requires approval, the competition laws require amendments and adjustments and the responsiveness of the executive branch to the agency's advocacy efforts are crucial[8].

Even so, there should be an embedded autonomy in the power and duties of the agency where for example, the agency is empowered by law to choose its cases and recommend or determine and enforce remedies without any interference. In 2013, for example, Mexico undertook a significant institutional change regarding its competition authority where two separate agencies where created – the Federal Telecommunications Institute and the Federal Economic Commission. The latter was given special institutional characteristics to effectively protect the competition process. These included full independence in the decision-making process, budgetary autonomy, the power to enact implementing regulations, among others.

Additionally, besides the formalistic safeguards geared at maintaining the independence of the competition agency, it has also been recommended that Commissioners should have fixed-term periods long enough to allow enforcement consistency and forbid their removal from the office except for good cause. It is also posited as best practice for the Commissioners to be appointed for a sufficient term to enable them to acquire the basic skills necessary to deal with the specialized area of competition law.

Furthermore, accountability is an important aspect of the institutional design and works in tangent with the independent agency. Accountability assists by ensuring that competition agency communicate regularly with other institutions and stakeholders. It also ensures that the competition agency is not controlled by powerful economic interests and facilitates the ability of the competition agency to evolve and keep abreast of emerging ideas regarding competition policy and law. Accountability may be achieved by giving the executive branch and/or the legislature oversight of the agency's budget. In addition, the establishment of the process to obtain judicial review of the competition agency decisions may bolster accountability. This ensures that the competition agency is acting within the bounds of its authority.

Although independence and autonomy are institutional goals that all competition agencies should strive to obtain there is a delicate balance. A fully autonomous agency may lose its focus and become isolated from policy decisions that shape the competitive process[9].

Transparency is a fundamental requirement for good governance, and it promotes development and efficiency. It is contended that transparency strengthens legitimacy and assists in reducing accusations that decisions are biased, arbitrary or discriminatory. Accordingly, it is imperative that policy, rules and individual enforcement actions be based on sound law, economics and market knowledge[10]. The agency should be able to clearly establish the foundations of its enforcement actions and how they contribute to the wider public interest and

importantly, consumer welfare.

The globalization of markets has facilitated an increase in international trade, and by extension resulted in the need for the merging of competition laws in countries. This requires a system that guarantees coherence and predictability for businesses. Merging parties, for example, would require the policies and methodologies utilized to assess mergers to be fair, consistently applied, and predictable. Additionally, from an internal point of view, a transparent process ensures a better understanding of the facts that are a part of the investigation, improves the quality of evidence and reasoning on which the competition agency bases its actions. Transparency is therefore vital for the successful enforcement of competition laws[11].

There is also the important consideration of prioritizing resources. Admittedly, there are various issues that may affect the market economy and the role and function of the competition agency calls for the agency to act at the right time regarding the right markets, in relation to the right problems by providing the correct remedies[12]. However, the system should make it possible to concentrate resources on the potentially most harmful conducts and precedent-setting cases[13]. There is also the added dimension of fostering a culture of competition among society. This may be attained by effective communication that advocates the benefits of competition law and policy for consumers.

The goal of competition law and policy is to safeguard the market against anti-competitive practices such as collusion and market-sharing and against the abuse of market power. The central task of the competition agency is to protect competition. However, this can only be achieved if there are mechanisms and practices that are properly structured, organized and implemented to facilitate the competition agency to function effectively. While there is still wide diversity in competition policy and regimes there is admittedly a maturing and converging body of practices from which new competition agencies can lean. At the same time the caveat, one size does not fit all, continues to apply. In the circumstances, each jurisdiction must devise methods that are best suited for its particular needs even while drawing on the lessons presented by best practices.

Endnotes

[1] Umut Aydin and Tim Buthe, *Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits, 79 Law and Contemporary Problems.* Retrieved from http://scholarship.law.duke.edu/lcp/vol79/iss4/1

[2] Ibid.

[3] Ibid.

[4] Countries such as France, Korea, and Brazil have single purpose agencies.

[5] The United States' Federal Trade Commission, European Union's European Commission, and Australia's Australian Competition and Consumer Commission are all agencies with multipurpose agencies.

[6] Countries such as Brazil, Australia, Japan, France and Great Britain have competition agencies that are self-contained bodies.

[7] Jackie Druery, Nancy McCormack and Sharon Murphy, *Are Best Practices Really Best? A Review of the Best Practices Literature in Library and Information Studies,* 2013. Retrieved from https://journals.library.ualberta.ca/eblip/index.php/EBLIP/article/view/20021/15939

[8] Umut Aydin and Tim Buthe, *Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits, 79 Law and Contemporary Problems.* Retrieved from http://scholarship.law.duke.edu/lcp/vol79/iss4/1

[9] William E. Kovaic and Mario Mariniello, *Competition Agency Design in Globalised Markets,* 2016. Retrieved from http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Kovacic-and-Mariniello-FINAL.pdf

[10] Phillip Lowe, The design of competition policy institutions for the 21st century – the experience of the European Commission and DG Competition. Retrieved from https://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf

[11] OECD, *Competition policy: promoting efficiency and sound markets,* July 2012.

[12] Phillip Lowe, The design of competition policy institutions for the 21st century – the experience of the European Commission and DG Competition. Retrieved from https://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf

[13] Ibid.

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Mergers and Acquisitions: the way forward in the new legislative landscape

By Michelle Phillips, *Legal Officer*

The goal of competition agencies worldwide as regards merger and acquisition review and analysis is to quickly identify and remedy or prevent only those mergers and acquisitions that are likely to harm or those that have harmed competition significantly. The basic goal is always to protect the competitive process and the agency should only intervene to restore or maintain competition affected by the merger and not to enhance premerger competition or other policy goals.

A true merger involves two separate undertakings merging into a new entity, or the amalgamation of two or more undertakings to form a new undertaking. However, where one undertaking acquires all or the majority of shares in another undertaking, it would be described as a merger in relation to competition law and policy if it results in the one undertaking being able to control the strategic business decisions of the other.[1] In some circumstances the acquisition of a minority shareholding may qualify as a merger.[2] A merger can be an opportunity for undertakings/businesses to expand into new product and geographic markets and may lead to benefits such as innovation. On the other hand mergers can also lead to disadvantages to consumers in the form of, among other things, higher prices, lower quality and fewer choices. It is therefore of the utmost importance that competition agencies have proper merger notification and review processes that should be carried out in specific timelines to protect the interests of the parties and so as not to unduly interfere with the competitive process.

In Jamaica the Fair Trading Commission (FTC) is the competition agency that enforces the provisions of the Fair Competition Act (FCA) which governs inter alia anticompetitive practices and agreements. The current legislation, the FCA, does not contain specific provisions in relation to mergers and acquisitions. What currently obtains in our FCA is a general section, section 17, in relation to agreements which contain provisions which have the purpose, effect or likely effect of substantially lessening competition in a market. This section prohibits or renders the provisions of such agreements unenforceable, unless the agreement has been approved by the Commission by the grant of an authorization (Part V) or is one which has an efficiency justification such as improving production, distribution or technical progress as espoused under section 17(4).

The Privy Council ("**PC**") in the case *Fair Trading Commission v. Digicel Jamaica Limited & Anor* found that **section**

17 of the FCA was wide enough to encompass agreements such as mergers and that it establishes a regime over a class of transactions which include mergers.[3] It was stated section 17 applied to any agreement falling within subsection (1) being "*any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market*." It was held that "*an agreement by which two competitors merge is an agreement falling within subsection (1), because the reduction in the number of significant competitors in a market is self-evidently likely to have the effect of lessening competition*." This case has been instructive and is also binding (and the highest) authority for the depth, breath and scope of the FTC's jurisdiction in regards to merger analysis and review and the FTC's power to investigate and intervene in same.

It is important to note that unlike other jurisdictions such as the United States of America (USA) and Barbados, Jamaica does not have pre-merger notification where the merging undertakings (or an acquiring undertaking) must notify the Competition Agency and obtain their approval prior to consummating a merger. Currently the FTC usually becomes aware of mergers after they have been completed either through the media or via other means. Generally the parties to the merger and/or acquisition do not come forward, prior to the merger, with the merger and/or acquisition documents or bring same to the FTC's attention to ensure that none of the provisions in any of the documents are anticompetitive or specifically contain provisions that have the purpose, effect or likely effect of substantially lessen competition. A determination of whether an agreement or its provisions "substantially lessen competition" involves an analysis of what is termed the *counterfactual,* which is how the relevant market in which the merging parties operate would perform if the transaction was not or had not been completed and seeing if same would have been substantially more competitive but for the merger.

Although the parties to a merger or acquisition are not obligated to obtain pre-merger clearance from the FTC, the FTC has the power through the Court, to intervene in, impose conditions (such as divestiture) and/or changes, or to reverse a merger after same has been completed. This poses challenges to both the FTC and to the merging parties and can be costly to all in terms of time, money and resources.

In the USA there is a requirement for Pre-Merger filing or Formal Notification to the United States Federal Trade Commission (US FTC), and the merging parties must obtain approval from the US FTC in order for the parties to be able to consummate the merger and/or acquisition. Similarly, in Barbados, section 20 of their Fair Competition Act prescribes that their Fair Trading Commission (the Commission) must approve any merger where an entity on its own controls or where the merging parties will control 40% or more of any market (or such other amount as the Minister prescribes) and the parties must apply to the Commission for permission to effect the merger. An undertaking that breaches this requirement is guilty of an offence and is liable to a fine.

As previously mentioned, in Jamaica there is no obligation on parties to notify the FTC prior to completing merger and acquisition transactions. Accordingly there is no requirement for merging undertakings and/ or an undertaking that is acquiring control of another undertaking to obtain the approval of the FTC to ensure that the contemplated transaction does not impede or specifically substantially lessen competition in the relevant market in which the undertakings operate. If the parties had such obligation prior to consummating the transaction and the FTC found that the said transaction was anticompetitive it could work with such undertakings to remedy any provision that was found to substantially lessen competition before the transaction was "out the door" or finalized. Pre-Merger Notification and Review is opined to be the best way forward for Jamaica. However, in the interim, it is recommended that the parties to a merger and/or acquisition submit relevant documents detailing their agreement to the FTC for clearance prior to completing the transaction. This will ensure a smooth, seamless process and will avoid any interruptions or disruptions that may be caused if conditions, remedies or changes are imposed post merger. This pre-merger notification will benefit the merging undertakings as it inter alia provides legal certainty and saves money and costs.

Endnotes

1 Competition Law 9th Edition by Richard Whish and David Bailey p.829.
2 Ibid
3 *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28

Market definition: Exploring the contours of substitutability under the Fair Competition Act with relevance for merger cases

By Marc S. Jones, *Senior Legal Counsel*
CARICOM Competition Commission

A. The statutory context

Everything in competition law depends on defining the market. This is true for merger cases in as much as it is true for cases involving anti-competitive agreements or abuse of dominance.

The rationale for market definition in the context of merger cases is relevant at this time in light of the renewed drive to amend the Fair Competition Act so that it includes a formal merger review and control regime. It may therefore be expected that the *"future reimagined"* for the Fair Trading Commission in this new decade will be one in which it undertakes merger analysis with greater frequency than it has over the last decade.

From the perspective of antitrust structuralism, the proposed regime should have as one of its policy objectives the identification and resolution of mergers which are likely to create enhanced incentives for the merging parties to exercise market power. On this view, which has some regional currency, merger analysis should be concerned with potential adverse changes to market structure on the theory that structure influences firm conduct. Of course, market structure may not be properly understood unless the market is first defined.

Therefore the first port of call in any investigatory voyage under the Fair Competition Act should be section 2(3) which provides that:

> *"Every reference in this Act to the term "market" is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them."*

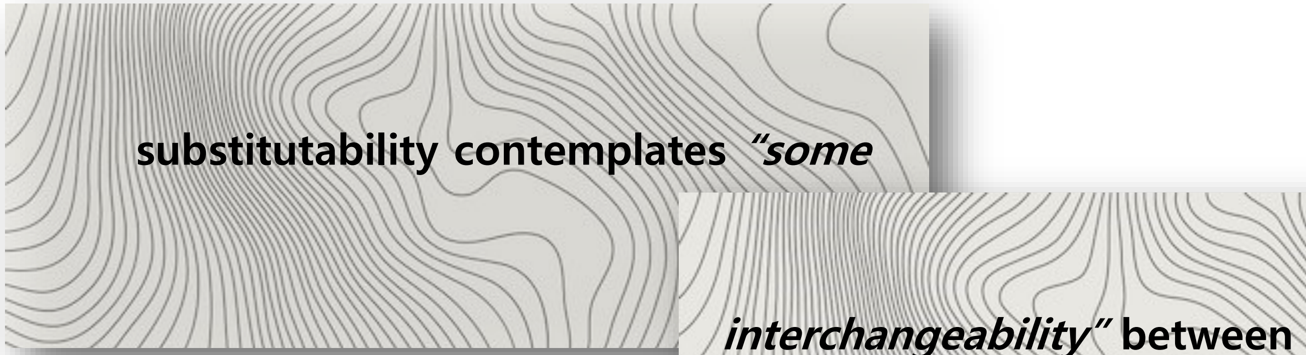
The language of this provision is not new or even unique to Jamaica. Its lineage can be traced to statutory ancestors in Australia and New Zealand. Consequently, in distilling a workable understanding of market definition under the statute, reference will be made to case law from those countries.

B. The composition of a market

Although the definition of "market" under section 2(3) repeats the word *"market"*, it is reasonably clear on its language that the concept encompasses *"goods"* or *"services"*. Those latter terms are in turn defined under section 2(1).

It was once the prevailing interpretation that the exclusion of *"real property, money, securities or choses in action"* found in the definition of *"goods"* meant that such subject matter could not constitute a market for the purposes of the statute.[1] However that view no longer prevails and the settled interpretation now is that the Fair Competition Act does not exclude any particular sectoral market.[2]

It is also clear enough that the statutory concept of a market encompasses not only one type of good or service. It is a flexible concept capable of expanding to include "other goods or services" separate from



the first mentioned good or service (or in appropriate cases contracting to exclude those "other goods or services").

This flexibility in turn hinges upon the character of *"substitutable"* which goods or services must possess in relation to each other in order to comprise a market.

C. The scope of a market

However this begs a fundamental question, what is meant by *"substitutable"* under the statute? It is not defined in the statute, but this is unsurprising in the field of economic regulation where courts are sometimes expected to refine broad statutory language into workable legal standards for individual application.

Fortunately the Australian High Court, that country's final appellate court, has indicated that substitutability contemplates *"some interchangeability"* between products. This is centered on both their functional characteristics as well as consumer preferences as evidenced by the cross-price elasticities of those products.[3]

On this view, the inclusion of the criterion of substitutability in the definition of *"market"* under the Fair Competition Act implies that the scope of a market in any given case under the statute will either expand or constrict depending, mainly though not exclusively, on the variables of product functionality and consumer preference.

D. The threshold of substitutability

The question remains, however, apart from product functionality which is a somewhat objective concept, what is the degree of consumer preference, a relatively more subjective concept, needed to demonstrate that two or more products are substitutes? Can substitutability be established on a showing that on some occasions, some people consume one product rather than another?

On this question of degree, the Australian High Court's decision in **Boral Besser Masonry Ltd v Australian Competition and Consumer Commission** is insightful.[4] The case concerned allegations that the appellant, Boral Besser Masonry Ltd, had misused its market power in breach of Australia's competition legislation.

In the High Court, Justice McHugh explained that:

> *"Thus, the market is the area of actual or potential, and not purely theoretical, interaction between producers and consumers where given the right incentive - a change in price or terms of sale - substitution will occur. That is to say, either producers will produce another similar product or consumers will purchase an alternative but similar product. Section 4E should be taken to require close substitutability because in one way most products are substitutes for one another, meaning that market power would always be understated. Professor Chamberlain stated that 'the only perfect monopoly conceivable would be one embracing the supply of everything, since all things are more or less imperfect substitutes for each other.' Close substitutability and competition are evident when more than a few consumers switch from one product to another on some occasions."*[5]

On this view, the threshold is met by demonstrating not just that products are substitutes, but that they are *"close substitutes"*. In assessing *"close substitutability"*, that is, whether more than a few consumers will switch between products, the High Court's decision reveals that a range of factors should be considered apposite to the analysis. Those factors include product functionality, the views of industry participants as well as cross elasticities of demand and supply; all of which must be examined over a sufficient period of time, that is, 'in the long run' as explained in the case law.

One may therefore conclude that market definition belongs not in the realm of *"bright line rules"* but rather in the realm of value judgments. Indeed, as the High Court observed in another case:

> *"The Act does not otherwise seek to define what is meant by the word 'market'. That is not surprising since the word is not susceptible of precise comprehensive definition when used as an abstract noun in an economic context. The most that can be said is that 'market' should, in the context of the Act, be understood in the sense of an area of potential close competition in particular goods and/or services and their substitutes (cf. Re G. & M. Stephens Cartage Contractors Pty. Ltd.)*
>
> *The identification of relevant markets and the definition of market structures and boundaries for the purposes of determining whether [the Respondent's refusal to supply the Appellant] contravened section 46(1) involves value judgments about which there is some room for legitimate differences of opinion.*
>
> *The economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap other markets and contain more narrowly defined markets which may, in their turn, overlap, the one with one or more others.*
>
> *The outer limits (including geographic confines) of a particular market are likely to be blurred: their definition will commonly involve assessment of the relative weight to be given to competing considerations in relation to questions such as the extent of product substitutability and the significance of competition between traders at different stages of distribution"* [6](modified)

In light of this it is of little surprise that the Fair Competition Act speaks to substitutability as *"a matter of fact and commercial common sense"*.

E. Conclusion

In sum, market definition under the Fair Competition Act hinges on the criterion of substitutability among goods and services. The threshold for establishing that goods and services are substitutable is the standard of *"close substitutability"*, which requires more than a slight or temporary interchangeability between goods and services.

In assessing whether two or more goods are close substitutes in any given case, the competition authority, and ultimately the court, will have to consider a range of factors including product functionalities, the views of industry participants and historical cross elasticities of demand and supply; all of which must be examined "in the long run". Those considerations are implicit in the phrase *"as a matter of fact and commercial common sense"* found in section 2(3).

Endnotes

[1] **Jamaica Stock Exchange v Fair Trading Commission** S.C.C.A No. 92/97, Judgment Delivered on January 29, 2001 at page 21.

[2] **Fair Trading Commission v Digicel Jamaica Ltd & Anor** [2017] UKPC 28 at para 12.

[3] **Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd** [1989] HCA 6.

[4] **Boral Besser Masonry Ltd v Australian Competition and Consumer Commission** [2003] HCA 5

[5] [2003] HCA 5 at para 252.

[6] **Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd** [1989] HCA 6.

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Informative Advertising, Consumer Choice and Consumer Welfare

By Kevin Harriott, *Competition Bureau Chief*

Informative advertising can be a useful tool for increasing consumer welfare in free-market economies. Consumer welfare depends on consumers' access to preferred goods and services. In turn, product accessibility depends on the information available to consumers when products are being selected. Information reaches consumers when consumers search or when businesses advertise. In certain markets, advertising can be more efficient than consumer search in informing consumers. The importance of advertising is likely to increase in the immediate future due to the growth in e-commerce, the increased use of the Internet and the popularity of social media platforms.

Consumer welfare improves as consumers consume more of the products which appeal the most to their tastes, interests and basic needs. These products include food, shelter, education, professional services, and recreational activities. The greater access consumers have to their preferred products, the greater the observed improvement in consumer welfare.

The accessibility of a product to consumers is contingent on more than one factor. The most obvious factor in determining the level of consumer access is the price of the product. To this end, competitively organized markets create adequate incentives for business enterprises to offer products with greater quality, greater quantity, in greater varieties and at lower prices, relative to markets that are not competitive. A less obvious factor, but not a necessarily less important one, is the level of consumer information. Many consumers fail to access their preferred products for no reason other than they are unaware of some crucial product information such as availability and characteristics.

The level of consumer awareness about a given product is determined by two processes: advertising and consumer search. Advertising describes the active attempt by businesses to distribute information to potential consumers. Consumer search describes situations in which individuals take deliberate steps to gain crucial information about a product. The many ways in which consumer search takes place include asking others who may have the information being sought by way of searching for product reviews.

In many markets, and for many consumers, advertising is more efficient than consumer search in building consumer awareness about a product. The importance of advertising is most visible in markets where only the supplier of a particular brand has the information that a consumer requires to make that important purchasing decision. Advertising is an important source of information, however, even in markets where it is feasible for consumers to seek out the relevant information independently of the supplier. In particular, the importance of advertising is also demonstrable in markets that are characterized by rapid rates of product introduction and in markets in which there is a high rate of technological innovation. In these markets, information accumulated from past searches becomes obsolete relatively quickly and therefore it would be more efficient for the supplier to disseminate updated information to consumers than it would be for each consumer to be engaged in continuous search efforts to maintain current with the latest relevant product information.

It is not difficult to imagine a future in which advertising is an indispensable tool in improving consumer welfare. The importance of advertising is likely to skyrocket in the foreseeable future because of three current trends: (i) the increasing accessibility of the Internet; (ii) the increasing appetite for social media applications; and (iii) the increasing importance of e-commerce.

The increasing use of the Internet, especially by way of interaction on social media platforms, will allow consumers to reveal their preferences in a manner that was unimaginable before the Internet Age. Search engine giants will be able to collect information about online users' preferences and make this information available to businesses. In turn, businesses armed with such information on consumers could introduce many new products or rapidly create product varieties catering to the observed tastes of even the most discriminating online user. In this future, therefore, there is likely to be a proliferation of products in various markets and it would be extremely difficult for consumers to rely on search efforts to keep informed about the suitability or even the existence of products most suited to their tastes.

Online advertising would, therefore, be an important tool for decision making in this imagined future. By the use of artificial intelligence technologies, advertisers would have a reliable means of capturing the preferences based on consumers' participation in e-commerce activities and various social media interactions. Once consumer preferences can be tracked, business enterprises would have the ability to disseminate product information directly to consumers who would likely have an interest in the product, based on revealed preferences.

Through targeted advertising, consumers would be adequately informed about only products suited to their tastes. As consumers use the Internet, whether interacting on their favourite social media platform or reading their favourite blog, advertisers would deliver targeted information to each consumer reflecting that consumer's particular tastes and interests. This targeted approach to information dissemination would significantly improve each consumer's decision-making process. This, in turn, would result in better consumption patterns and ultimately an improvement in consumer welfare.

The effectiveness of advertising to improve consumer welfare depends on advertisers being truthful. Competition law contains provisions strictly prohibiting deceptive advertising strategies, among other conduct. In the future, enforcement of all other anticompetitive conduct may take a backseat to deceptive advertising conduct as (truthful) advertising becomes an indispensable source of consumer information and therefore an integral part of the consumer decision-making process.

Broadcasting rights into the future

By Verlis Morris, *Competition Analyst*

The broadcasting sector delivers interactive information content via telecommunication services. In Jamaica, the sector is regulated by the Broadcasting Commission of Jamaica (BCJ).

Broadcasting can be an effective service for informing the general public and as such, the sector creates spill-over benefits for the implementation of key government policies such as public health management, disaster preparedness management and social services. Given the importance of the broadcasting sector, it would be in society's best interest that such an industry operates efficiently. Broadcasting rights have an important role to play in achieving this goal.

Broadcasting rights authorise its holder to distribute a given content. This authorisation is given by the content developer for a negotiated fee. Subscriber television (cable TV) operators and free-to-air television stations ("FTAs") are the main broadcasters in Jamaica. Cable TV operators distribute content, mainly of entertainment value, originating mainly from overseas. FTAs, on the other hand, tend to disseminate local content such as government broadcast, local news and programmes centred on Jamaican culture. FTAs also distribute content developed overseas resulting in some level of competition between the two groups.

In the recent past, some cable TV operators in Jamaica routinely distributed content without the requisite broadcasting rights. This practice raised concerns for the BCJ because the practice was inconsistent with the BCJ's regulations. Accordingly, in 2005, the BCJ intervened and successfully directed broadcasters to conform to the stipulated regulations. Broadcasters who secured the requisite broadcasting rights continued to distribute the content but broadcasters who could not secure the rights to a given content discontinued its distribution.

BCJ's intervention resulted in viewers of some cable TV operators either no longer having access to certain content or having to pay additional fees to continue viewing the content. The greatest concern to viewers was the disrupted access to content developed by the EPL (Football), the NBA League (Basketball) and HBO (movies).

Arising from the disruption in the viewing of what Jamaicans consider to be premium content, many held the view that the BCJ's enforcement of broadcasting rights regulation made the public worse off. This is a misguided view because although the public

was made worse off in the short-run, the BCJ's enforcement activities serve to make the public only better off in the long run.

To this end, the competition authority (Fair Trading Commission) maintains the view that the illegal distribution of content is anticompetitive since it harms viewers and the legitimate broadcasters. In particular, illegal broadcasters have an unfair competitive advantage over legitimate competing broadcasters. When a broadcaster pays significant amounts to secure the exclusive broadcasting rights to a high valued sporting event, that broadcaster anticipates recovering the sums paid through advertising revenue to be earned from businesses seeking to reach its viewers. The illegal broadcasting of the content by a competing broadcaster harms the rights holder by diverting viewers and advertising revenues from the holder. If this illegal conduct was left unchecked in Jamaica, broadcasters would have fewer incentives to pay for the broadcasting rights to high valued content and so their viewers would have access to less content.

Broadcast rights also play an important role in the development of the content. Content, like any good or service, is costly to produce. The revenue earned by content developers from broadcasting rights is the primary means by which they are compensated for their efforts; broadcasting rights allow content providers to recoup costly investments in developing content and therefore provides adequate incentives for the continued development of content likely to be highly valued by viewers.

Observed changes in Jamaica's broadcasting sector since 2015 demonstrate the role of broadcasting rights in achieving efficiencies. The quality of the content has improved and there is a noticeable increase in the variety of content being distributed. Further, the enforcement of broadcast rights regulations facilitates competition in the broadcasting markets and extends the reach of certain content that was previously available only to subscribers of cable TV operators.

Today, one can observe significant innovations in the telecommunications sector which allows for content to be distributed through more channels and therefore increasing the number of viewers. For example, social media is now an identifiable means of content distribution. Accordingly, the long-run benefits of better content should not be sacrificed because of short-run transitory harm perceived from enforcing broadcasting rights. Broadcasting rights continue to play an integral role in generating efficiencies in the broadcasting industry and will likely continue to do so 'right' into the future.

Banking on technology: the future of banking

By Desroy Reid, *Competition Analyst*

In Silanga, a small rural district, on the banks of the Nairobi Dam, Kenya, a little girl enters the Sunday Stage Shop to buy candy. Her delight at getting the sweet treat is palpable; she completes the transaction by dialling in a number in her phone, says thanks to the shop keeper for the treat and skips out to resume her play in the street.

Closer to home in Haiti, a housewife walks into the Haitian Public Market to purchase her monthly supply of "Lalo" (jute leaves), she sends a text message just before she leaves the vendor and her purchase is completed.

A decade ago, these scenes would be possible only as clips from a sci-fi movie. Today they are the realities of the world we live in and just one of the cutting-edge features of banking – mobile money.

Past and Present

Banking, one of the world's oldest businesses, is constantly evolving. The driver for this change is technology. The improvement in technology is disrupting how banks operate resulting in a reduction in the number of brick and mortar locations. Customer sophistication is also improved resulting in increases in their expectations of services offered by banks. Online banking is now an essential feature of banks. The days of banking Monday to Friday between 9 am and 3 pm are long gone. Internet banking means that banks are now opened 24/7. Customers are switching from banks that fail to match up with their demands for convenience and speed. Banks either evolve or face obsolescence.

Jamaica's Experience

This reality is not lost on the banking industry in Jamaica. Traditional banks are wary of impending competition from challengers to traditional banks in areas such as savings and checking accounts, credit and debit cards, and loans. The Government of Jamaica (GoJ) has also engaged stakeholders under its National Financial Inclusion Strategy (NFIS) that is focused on helping individuals and businesses have increased access to useful and affordable financial products and services. One such goal of the NFIS is to increase the use of Electronic Retail Payment Services (ERPS) and one such product is mobile money. The examples cited earlier of the Kenyan girl and the Haitian housewife depicted the use of mobile money. Jamaica is still in an embryonic phase of implementing mobile money but the speed of adaptation has been slower than anticipated. The push to have the country catch up with the rest of the world where ERPS is concerned is noteworthy. Recently, MasterCard set up shop locally and is set to launch its payment platform which has been touted as a game-changer. Local players have also launched mobile money platforms with varying degrees of success.

In March 2017, the results of a GoJ commissioned NFIS survey revealed that the use of electronic banking tools among Jamaicans was low. These tools included the use of debit and credit cards, mobile and Internet-based platforms. The following table presents a summary of some of the key results of the survey.

2016 Jamaica's National Inclusion Strategy Survey Results	
Percentage of Jamaicans who owned a debit card	65
Percentage that used the debit card in the past year	25
Percentage of Jamaicans using the internet to pay bills or make purchases in the past year	10
Percentage of adults using mobile banking	3
Percentage of adults using mobile wallets in the last year	1

The National Financial Inclusion Council pointed out that these trends do not differ markedly across the Caribbean, although mobile money products have achieved relative success in several countries, including Kenya, Paraguay, and Haiti.

A major part of the slow take-up in digital banking among Jamaicans has been credited to the issue of low Internet penetration.

The Future of Banking

Mobile money is here and now and is operational. Three other advancements in technology that are changing the face of banking are:

(1) Application Programme Interface (API). APIs enable customers to consent to share their proprietary data through a computer programme without fear of compromise.

APIs could be used to enable a bank's mobile app to access its customers' account information to be used to conduct business on the customers' behalf. Fintech enterprises have also used API technology to enable their businesses to work, and their success is encouraging competitors to develop their own APIs.

(2) Blockchain technology: banks are exploring blockchain technology to streamline their banking processes and to cut their costs of storing and securing customer information. Blockchain is a useful technology to keep track of transactions between users in a public ledger.

Commercial banking applications include the tracking of ownership of documents and financial documents, combating fraud and storing files for customers. Advancements are such that blockchain platforms now exist that allow for the creation of smart contracts that become active based on predetermined conditions and enables automated payments to be released on the consent of parties to the transaction. Unlike the present set up of the banking system where the database is centralized and controlled by a bank or a government agency, blockchain is controlled by potentially millions of persons, each of which act as a watchdog over the system and none of which can act on their own to affect the system without the consent of others based on a pre-established criteria. The decentralizing of the database increases the security of banks as there is no single entry point that attackers can target.

(3) Artificial Intelligence (AI): AI is another exciting prospect that is looking to further transform the banking landscape. It is already having a significant impact on banking and there is no reason to believe that its role will diminish in the future.

Locally, banks have made attempts at integrating AI through chatbots, voice assistants that mimic employees and other banking transactions such as check deposits and cash lodgements. AI is also being used to tackle fraud by "teaching" machines how to determine what types of transactions are fraudulent. AI allows this to be done to more exacting standards than was possible before. Machines are even being taught how to give financial advice (robo-advisors), through the automation of the best practices of seasoned investors. This phenomenon of robo-advisors has been on the rise and is common among investors particularly the younger population as well as those who believe that investing plus emotions equals serious losses.

Conclusion

Increasingly, the world is becoming more connected. The need for having an inclusive financial service sector is also increasing. Studies, however, have shown that an estimated two billion people are still unbanked. That is, they do not own a basic bank account. This reality is also evident here in Jamaica. The evolution of banking and its concomitant advancements in technology facilitates the breadth of financial inclusion.

The future of banking is here and more changes are coming. The scope to improve banking across the globe will increase as technology progresses. It is in our interest to embrace it and to prepare ourselves to make the best of it.

Find the price-fixers ...

if you can

One day a whistleblower sent the letter below to the Fair Trading Commission. He had called a week earlier and gave the Complaints Officer the following information:

"I am going to send you a letter with the addresses of two firms that are engaged in price -fixing, and that of the lawyer involved in writing the contract. The letter has three paragraphs, and each paragraph has numbers that, if you sum them, they will tell you where each firm is located. Pay attention to the numbers within the words. The words you think are misspelled, are not."

Good day Mr. Executive Director,

I have one in-ten-tion and one in-ten-tion only four writing this letter. I know of two firms who are working twogether two fix the price of a popular product because the competition between them was ruining their profit margins. Befour I say anything else, I only have one condition two give you the infourmation: No-one must know that I wrote this letter.

Three lawyers were invited two a meeting one day last year two bid for the right two draft a contract four the firms. They wanted us two coin a contract such that one member had two pay the other member a significant sum of money if they broke the price-fixing arrangement. Even though I did not win the bid, I knew that I was the best person two draft the contract and therefour I think that my civic responsibility means that I must report it to the Fair Trading Commission.

I know you are going two do your duty and investig-eight. If you need additional infourmation, do not hesit-eight two contact me. I believe that these criminal elements have given consumers six four nine four far two long.

_______ Parkway Avenue (1st firm)

_______ Shady Boulevard, New Kingston (2nd firm)

_______ King's Way (Key witness - winning lawyer's office)

Answer: 44 Parkway Avenue | 25 Shady Boulevard New Kingston | 49 King's Way

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Telephone : (876) 968-7790; 968-7799
Fax: (876) 920-2799
Email: info@janaac.gov.jm
www.janaac.gov.jm
Request: servicerequest@janaac.gov.jm
Address: 6 Rekadom Avenue Kingston 10