



2022 International Competition Network (ICN) Annual Conference¹

Advocacy Working Group Breakout Session #1: Advocacy to Sector Regulators & Public Bodies Frenemies – when a regulator’s objectives conflict with those of a competition agency

Consumer welfare through competitive markets is ultimately at the centre of Competition Law and of Sector Regulation. Consumers are also at the centre of Data protection and of Consumer protection. However, the “consumer” that each of these policies have in mind is probably not the same, and these policies have different means to achieve their ultimate objectives.

Moderator: Mr Rafael Allendesalazar, Managing Partner, MLAB Abogados, S.L.P.; NGA, Spanish National Markets and Competition Commission

Speakers:

- Mr David Miller, Executive Director, Jamaica Fair Trading Commission
- Mr Osamu Igarashi, Deputy Director, Coordination Division, Japan Fair Trade Commission
- Mr Alexandre Barreto, Superintendent General, Brazil Conselho Administrativo de Defesa Econômica
- Mr Huy Do, Partner, Co-Leader, Competition, Marketing & Foreign Investment, Fasken; NGA, Competition Bureau Canada
- Ms Irene Picciano, Counsel, Portolano Cavallo – NGA, European Commission Directorate-General for Competition

Speaking Notes of Mr. David Miller, Executive Director, Fair Trading Commission

Please allow me to thank the ICN for the opportunity to be here among this esteemed group of competition law practitioners.

Jamaica has several sector-specific regulators responsible for sectors such as banking and finance, insurance, utilities, broadcast content, and spectrum, to name a few. The Jamaica Fair Trading Commission (FTC) is a separate agency from several sector-specific regulators and is the only agency responsible for enforcing Jamaica’s competition law. Although Jamaica has a consumer protection agency, the FTC also has consumer protection provisions in its legislation. Therefore the FTC investigates consumer matters and interacts with the consumer protection agency.

¹ The 2022 ICN Conference was held on May 4 to 6, 2022, in Berlin, Germany.

Our history is replete with instances of interaction and collaboration with several regulators on the interplay between competition issues and regulators' objectives and responsibilities. Yet, regulators' objectives and the FTC's objectives are often not aligned, are in conflict, or the regulator believes that its focus has 'primacy' over competition law and policy.

My presentation will discuss experiences of:

- Interaction and Collaboration
- Policy development
- Interventions in regulators' stakeholder consultations, and
- Building personal and institutional relationships with the following regulators:

None of the regulators has a mandate that includes promoting competition or has responsibility for examining competition issues. Competition advocacy, therefore, plays a critical part in ensuring that competition objectives are duly considered, and that harmonious relationships are maintained.

To support its competition advocacy programme, the FTC also uses Memorandum of Understanding (MOU) with several regulators as well as frequent interaction with the business community, primarily through trade associations. MOUs structure the form of cooperation and engagement with clear lines of demarcation for information sharing, investigations, market studies, and policy development. MOUs result in a deeper understanding of the respective focal areas (e.g., competition issues or the regulators' duties), and therefore the use of MOUs tend to reduce conflict.

For example, our MOU with the spectrum regulator brought collaboration on a study to assess competition in the mobile telecoms market, informing the regulator's Spectrum Cap Policy. The FTC designed a new method of assessing spectrum requests through a spectrum screening process and was involved in the regulators' stakeholder consultations through direct discussion with market participants.

Similarly, the MOU with the gaming regulator has allowed for merger and abuse of dominance investigations as well as the regulator's policy prescriptions to flow smoothly and for the FTC to obtain market data much more readily than had it not been for the MOU.

There are instances, with the telecoms regulator and the gaming regulator, where the telecoms act dictates that the Jamaica FTC must be consulted on specific competition matters. Consideration is being given to having similar provisions included in the petroleum industry regulator's legislation and the pensions and insurance regulator. The latter is specific to information sharing for competition investigations and market studies.

The FTC and the utilities regulator, which is also the telecoms regulator, have established a working relationship extending over the last 20-odd years. Together, we have developed an information-sharing mechanism, and there is frequent collaboration on market studies and investigations. There is an established process for addressing differences in views, and therefore, differences do not lead to conflicting positions.

Decisions on which agency takes a case depend on the nature of the matter and the sector. For the most part, there have been no conflicting issues, and where there have been ‘disagreements,’ an amicable resolution has been arrived at between the FTC and the regulator, allowing the agencies to achieve their respective objectives. However, there has been a need for clarity on issues related to the banking sector regulator and the pensions and insurance sector regulator.

Concerning the banking sector, the regulator’s primary focus is to ensure the financial stability of commercial banks and credit unions, maintain the financial stability of banks (even if it is a failing bank), and ensure prudential requirements are treated as a priority over competition issues. For example, decisions relating to the impact on competition of a large bank acquiring a failing bank rests with the banking sector regulator.

The banking sector regulator is also responsible for the general review of the practices of credit bureaus. However, the FTC may intervene in competition issues related to the conduct of credit bureaus, and the FTC will shortly be undertaking a market study on the market in which credit bureaus operate.

Although there are no exceptions or limitations on the applicability of the competition law in financial regulation and banking, historically, competition issues are at times not given due consideration. The FTC has therefore had to build a relationship with the banking sector regulator that sees us collaborating as in a recent market study on competition within the space where commercial banks, credit unions, and MFIs operate.

Based on the FTC’s consumer protection mandate, where consumer protection issues are seen in competition investigations and market studies, such issues are dealt with hand-in-hand with the competition issues. There are many such examples where the FTC has been involved with different regulators, particularly where the regulator does not have a direct responsibility to handle consumer protection issues, and the FTC takes the lead.

Concerning whether Jamaica’s competition agency and regulators pursue separate or coordinated advocacy policies, we pursue different policies as each agency’s policy focuses on its legislation, functions, responsibilities, and objectives. There are occasions where there is a nexus between functions and objectives on specific issues. Therefore, collaboration on advocacy activities results in

a better understanding or appreciation of each agency's role not only by the agency themselves but also by other stakeholders such as market participants, for example, on policy development or policy changes.

Thank you to the ICN and to the Conference hosts, the Bundeskartellamt, for putting on this Conference.