



Governance Week 2022¹

Engaging in Fair Trade

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

June 28, 2022

Thank you for the opportunity to share in Governance Week and to participate in this panel discussion themed “Engaging in Fair Trade”.

Reading from Jamaica’s Corporate Governance Framework, “Corporate Governance embodies processes and systems by which corporate entities are directed, controlled, managed, and held to account. Corporate Governance influences how objectives are set and achieved, how risk is monitored and assessed, and how performance is optimized. It encompasses authority, accountability, stewardship, leadership, and direction of an organization. Corporate Governance, therefore, involves the totality of the systems and frameworks that ensure that a culture of accountability permeates the organization so that individuals know what their responsibilities are and are equipped with the appropriate tools and skills to exercise them.”

Proper functioning Governance arrangements should facilitate the transparent, efficient, and effective use of resources.

Private enterprises have a clear profit motive and active shareholder participation in adjudicating and monitoring Governance and leadership. This is different from government agencies. However, private enterprises and Government Agencies often operate in the same space and must co-exist.

Just as how the roles and responsibilities of the Board Chairperson and Board Members of private enterprises include technical areas such as audit, finance and accounting, risk assessments and prevention, and other business management skills set, it is necessary that Boards of private enterprises also have skills such as:

1. Knowledge of the competition legislation and competition policy – what is competition law, why is there a competition law, and who benefits.

¹ Governance Week 2022 was hosted by the Caribbean Corporate Governance Institute from June 27 to July 1, 2022.

2. Awareness of the competition authority's investigation processes.
3. Knowledge of the requirements to prove or demonstrate breaches of the Act and the features of each breach.
4. Awareness of challenges faced by the competition authority, such as availability of data and administering the law.

The Jamaica Fair Trading Commission (FTC) is about protecting the competitive process – ensuring that consumers enjoy competitive prices and choices of products and services. Our work is not about protecting a particular market participant but ensuring a level playing field for all market participants.

Accordingly, similar to how knowledge of competition law ought to reside in the private enterprise's Board as a Governance area, it is also a Governance area of the Jamaica FTC to recognize and acknowledge:

1. The legal framework within which the private enterprise operates,
2. the business that the enterprise is engaged in,
3. the market structure of the sector or markets within which the enterprise operates,
4. constraints or challenges the enterprise faces, as well as opportunities and strengths.

Within this broad framework, the Jamaica FTC interfaces with private enterprises to achieve outcomes suitable to both sides. It is my personal view that most private enterprises are intent on operating within the laws of their country. Therefore rules of law, moral integrity, transparency, participation, and responsibility and accountability would be among the Governance pillars which private enterprises embrace.

I mentioned earlier that the Board level should have a little more than a basic knowledge of the market conditions that the FTC examines when deciding whether a firm's conduct may be in breach of the Act. These market conditions include:

1. what constitutes barriers to entry to markets?
2. what is meant by a substantial lessening of competition?
3. what is bid-rigging?
4. what is collusion – whether it be agreements to fix prices, divide markets or similar conduct?
5. why must the FTC conduct merger assessments. For example, if private enterprises decide to merge with a competitor or acquire a competitor, what are the tests, from a competition authority's perspective, that must be passed.

I will describe an example of our Jamaican experience. In assessing mergers and acquisitions, firms often are not sufficiently aware of the competition law requirements when formulating merger or

acquisition agreements. On occasions, the Jamaica FTC, having completed its assessment, has had to engage the principals of the merging firms, and recommend that changes be made to the merger agreement, to prevent a breach of the law. This results in delays which can be costly to the firms and could result in reputational damage.

Our position is that our investigative and assessment processes should be as clean and smooth as possible through dialogue and information sharing with all parties. If the firm proceeds without checking the competition law, it may expose itself to Court action, reputational damage, or a rework of its operations. Therefore, the Board and senior management must be aware of the law.

I cannot underscore enough the need to embrace Corporate Governance principles and best practices at all management levels. The principles apply to private enterprises and government agencies of all sizes. Organizations should make the effort to participate in workshops and seminars such as Governance Week, to gain, update and refresh their knowledge on good governance.

Thank you.