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FIGHTING HARD CORE CARTELS

Prepared by Mr. David Miller, General Manager of the Jamaican Fair Trading Commission for the Third Meeting of the Latin American Competition Forum, Madrid, Spain – July 19 to 20, 2005

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Jamaica's Fair Competition Act (FCA) addresses cartel activity in the following sections:

- Section 10 – Powers of entry and search, etc.
- Section 17 – Agreements having effect of substantially lessening competition
- Section 18 – Agreements containing exclusionary provisions
- Section 34 – Price Fixing
- Section 35 – Conspiracy

Although the FCA and the Fair Trading Commission (FTC) have been in existence since 1993, the Staff has never conducted an investigation into cartel activity. Some of the reasons relate to:

1. Legal Framework
2. Peculiarities of a Small Economy
3. Staffing of the Commission
4. Investigative Tools
5. Level of Awareness of the Harm Caused by Cartel Activity

LEGAL FRAMEWORK

The FCA

For an alleged cartel activity to be illegal, it must fall under the FCA. It is absolutely necessary that product and geographic markets are defined and it must be demonstrated that the cartel has market power.

The level of fines which are established under Section 47 of the FCA is not a deterrent to cartel activity. The maximum fine which can be imposed on an entity is J\$5,000,000 or approximately US\$83,000; and on an individual, J\$1,000,000 or approximately US\$15,000. It must be noted also that the FTC does not have the power to impose fines; it is the Court which is vested with this power. The highest fine that a Jamaican Court has ever issued for any breach of the FCA is J\$750,000 or approximately US\$12,000. The benefit of having a cartel may easily exceed the maximum fine under the FCA, hence individuals and businesses that are aware of cartel activity do not have any 'incentive' to come forward. It must be noted that for the Year 2004, the average annual Turnover of the thirty-four (34) companies which are listed on Jamaica's Stock Exchange is US\$111,643,313; and the average annual Profit before taxes is US\$15,275,002.

One very effective approach to penalizing persons who engage in cartel activity is to base fines on the total turnover or gross revenue of the cartel members, or on the volume of commerce affected by the cartel. We would not be inclined to support the view that they should be based on profit because profit can be manipulated. In light of the current difficulty in fining enterprises enough to deter cartel activity, it would also be useful to

focus on fining and/or imprisoning persons for their participation. This would create an incentive for individuals to defect from the cartel and to cooperate with the investigation. It could be argued that enterprises may seek to reimburse individuals for the fine imposed on them in their personal capacity. For that reason the act of reimbursement should also be made illegal. Reimbursement may be difficult to prove as it may take many forms, but if it is made illegal, enterprises may not be able to ‘guarantee’ such reimbursement and individuals would not be sure that enterprises will follow through on their promises.

The FTC does not have a leniency programme in place but given the fact that the existing level of fines does not encourage whistle-blowing, such a programme would seem to be almost useless.

Section 10 of the FCA gives the FTC powers of entry and search. While the provisions contained in this Section appear sufficient, the Section does not give the FTC the power to seal off premises; it does not define “premises”; and it fails to address the question of search of persons.

The Staff is of the view therefore, that the FCA in its current form is one of the limitations in investigating anti-cartel activity, and that it could be strengthened by:

1. Establishing penalties at a level where they will act as a deterrent. The suggestion is that they be linked to the value of offenders’ annual turnover, for example. Fines ought to exceed the amount gained by the unlawful activity. In other words, the fines must be so high that perpetrators ‘feel it’ in their pockets. This would import the need for administrative fines; or the need to remove the restrictions set out in Section 47.
2. Authorizing the sealing off of premises, documents, computers, equipment, etc., during the conduct of a cartel investigation;
3. Extending the power of search under Section 10 to individuals and to personal property, for example motor vehicles. Currently the Section refers to “premises”, but perhaps a stipulation should be made regarding residences;
4. Extending the powers of interviewing/examining persons/witnesses to the Staff who conducts the relevant investigations. At present, this power is restricted to Commissioners.

Other Statutes

Proving the existence of a cartel agreement is very difficult. Any information, which would constitute circumstantial evidence of the existence an agreement, is useful. For example, evidence from telephone logs, e-mail and other correspondence showing frequent contact, especially when the communication is closely followed by simultaneous, identical action, would be useful. Other indicators such as timing of price movements or similar percentage changes in prices, when considered in isolation, may

not be enough to prove the existence of a cartel, but all indicators when considered together may be sufficient to make a case.

Direct testimonial or physical evidence of the agreement is often times needed to support, or tie together, the various pieces of circumstantial evidence in order to make a case 'concrete'. This is where wire tapping has proven to be a very useful investigative tool in certain jurisdictions. e.g. the United States of America. Note that wire tapping is not allowed under Jamaican Law.

There are no criminal sanctions against cartel activity, in Jamaica. Criminalisation could be used as a supplement to administrative fines to increase deterrence even more and provide significantly greater incentives for leniency applications and cooperation. Since cartels are not viewed as sufficiently serious violations for the criminal justice system, and crimes of violence are very high on the priority list of the Government, it may be considered an inappropriate use of limited resources if criminal sanctions were to be put in place. In any case, there appears to be a trend away from dealing with cartel activity as a criminal offence. We note for example, that Chile has recently decriminalized the offence and substantially increased the maximum fine. It seems therefore that a substantial increase in the level of fines may be the best solution.

Individual sanctions such as temporary or permanent bans on someone proven to be engaged in cartel activity, from serving as a Director of an enterprise; orders to engage in community service; or restrictions on travel, may also be workable within the Jamaican context.

Although Statutory powers exist under the FCA, it is in need of strengthening. Government departments and officials however, do not possess the kind of appreciation for the damage caused by cartels, which will encourage them to support the proposals for strengthening investigation methods and sanctions, such as sealing off premises and wire tapping, and significantly increasing penalties - all necessary tools in the fight against cartels. This means that the FTC must seek to engage in more serious advocacy.

PECULIARITIES OF A SMALL ECONOMY

In Jamaica "everybody knows everybody"; "and everybody is related to everybody". Many persons are related by blood, or are associated with each other from childhood or by way of extended families; and many persons know each other through service and sports clubs. For example, it is not unusual to see two or more competitors having lunch together or interacting on the social scene, on a regular basis hence the discovery of such a meeting need not be an indicator of cartel activity. For this reason, wire tapping would be useful in assisting in identifying the existence of a cartel.

A person who comes forward to expose cartel activity may be "branded" as a "squealer" and it may be difficult for that person to find employment in the future because such an act would be communicated within the informal network which exists in the business sector. This makes it more difficult for one person to expose the actions of others.

Other peculiarities, which may make it more difficult to identify cartel activity, are:

1. Parallelism in business, where each enterprise when deciding its prices and other market strategies, takes into consideration the likely reactions and counteractions of its competitors to its own moves. To that extent, similarity in prices, movement in prices and other competitive variables could be the result of parallelism or tacit collusion rather than overt collusion. Tacit collusion exists where in the absence of any formal attempts to implement a collusive outcome, firms understand that if each firm competes less vigorously they might all be able to enjoy higher prices and higher profits. This type of collusion is not proscribed under the FCA;
2. There are not many players within each industry. Players may agree (without using a formal written agreement) to share the market in order that all persons remain in business;
3. The fact that “follow-the-leader” is a very natural practice within our country and competitors employ the same or similar pricing strategies. All players may move prices at the same time but it is very likely that the costs of inputs to everyone could have increased simultaneously. e.g. petroleum sector in which all the marketing companies are purchasing from a common source;
4. New competitors are created when employees decide to start their own business which is similar to that of their ex-employer. The new player ‘copies’ the policies and strategies and operates in an identical manner;
5. The tendency of Governments in developing countries to protect selected industries thereby stifling competition;
6. The Government’s interest in promoting foreign and domestic investment. Investors often regard competition law enforcement as harmful to investment and Government officials often times yield to the requests of potential investors.

Although there appears to be no economic reasons which justify the conduct of cartel activity, from the perspective of the proper functioning of the market, various businesses may claim that they form an “export cartel” and collude because they compete on the international marketplace and therefore need to join together in order to operate as efficiently and as cost-effectively, as possible.

The Staff has to be cautious in conducting its investigations because indicators of the existence of cartels are not clearly visible. Indicators in other jurisdictions may not necessarily be indicators within the Jamaican context. Further, while recognizing examples from other jurisdictions, it may be difficult to explain its applicability to our own country as Jamaicans view their business environment as being somewhat unique. e.g. a price increase by two enterprises in one jurisdiction may be an indicator of a cartel, but a price increase of a similar nature in Jamaica may not be an indicator because one

enterprise may recognize that its competitor is able to benefit from charging a higher price and therefore follow that competitor and increase its own price.

STAFFING OF THE COMMISSION

The level of expertise, which is required in identifying and investigating cartel activity, does not currently reside in the FTC. There exists no data, expertise, practical experience or resources to conduct a full-scale cartel investigation. Access to expertise in areas such as Information Technology, Engineering, Forensic investigating, Interviewing skills, Search techniques, Research methods, Expert surveillance, is almost non-existent. In a country of almost three (3) million people, the Technical Staff of the FTC consists of three (3) attorneys and three (3) Economists; and there is inadequate funding of the Commission to allow it to access the expertise or to train the Staff sufficiently. The number of Staff members and the limited nature of its expertise make it difficult to carry out Searches effectively. Ideally, Search Teams should comprise persons with expertise in almost all the areas listed above.

Since the inception of the FTC the focus has been more on consumer complaints with cases of Misleading Advertising consuming the majority of our efforts. About a year ago the decision was made to shift our focus away from consumer complaints and place a greater emphasis on competition matters and the incidences of anti-competitive practices within the market. This shift could be seen as prophetic, as the Minister with responsibility for Commerce Science & Technology issued a directive effective June 1, 2005, enjoining the Commission to divest itself of consumer protection matters and concentrate more on investigations into anti-competitive activities.

Whereas we feel that in a few sectors there could be cartel activity taking place we are cautious about channeling the limited resources into work that might yield nothing. At the same time we are not unaware of the possibility that individuals and businesses know of the Commission's lack of experience, expertise, knowledge, and resources, in investigating cartel activity, and therefore they do not feel obliged to come forward and report such activity; enjoying some measure of "comfort" in continuing to engage in cartel activity.

INVESTIGATIVE TOOLS

There exists no compulsory investigative tools. The FTC has never conducted a Dawn Raid and does not have the practical experience in conducting one.

We do not envisage having a difficulty in engaging the services of the Police Force and the Judiciary to assist in acquiring and executing warrants; but we would have a difficulty in acquiring the requisite human resources with the technical capacity.

There have been no instances in which specific legislative or enforcement initiatives have been frustrated by legislators, prosecutors, judges or others on the grounds that cartels are not harmful.

Sections 42 and 43 of the FCA provide:

that any person who in any manner impedes, prevents or obstructs any investigation, or who refuses to produce any document, or destroys or causes to be destroyed any document, or to supply any information when required to do so, is guilty of an offence and is liable on conviction in a Resident Magistrate's Court to a fine not exceeding J\$500,000 and/or to imprisonment for one year or to both such fine and imprisonment.

The limitation of these Sections is that the FTC would have to apply for a summons and await a hearing by the Court, by which time the relevant information could be effectively secreted or destroyed. Thus Sections 42 and 43 provide very little incentive to cooperate with an investigation.

It is recognized that where strong sanctions do not exist, an Agency has to consider other mechanisms to provide incentives for individuals to defect. Korea for example, has instituted a monetary reward system. It is unlikely that such a system could be implemented in Jamaica as there is no Budget for such an item of expenditure. It is to be noted that pursuant to Section 47 (1) of the FCA, any pecuniary penalty which is imposed by the Court is paid to the Crown.

Despite the limitations, some of the tools which could be applied in Jamaica are:

1. The use of Searches. Despite not having powers of sealing off, if used correctly, Searches can be an effective tool in terms of gaining immediate access to critical information. Warrants are issued only after satisfying the issuing authority that there is sufficient evidence or reasonable grounds to prove anti-competitive behaviour. On the only occasion on which the FTC conducted a Search, accusations of "fishing" were raised - the party being investigated claimed a lack of evidence strong enough to support a Search. There is definitely room for improvement in Search techniques. One method is to be able to observe the planning and execution of a Search being conducted by an Agency experienced in the conduct of Searches;
2. Focus on visible conduct that may facilitate or manifest cartels. This includes monitoring of trade associations' information exchange programmes to see whether they are anti-competitive in and of themselves;
3. Focus on agreements regarding for example:- uniform hours of business, refraining from advertising or attempts to eliminate competition;
4. Focus on horizontal agreements not to deal with customers or suppliers unless they agree that they will not compete with the parties to the agreement or do business with the parties' competitors or potential competitors.

LEVEL OF AWARENESS OF THE HARM CAUSED BY CARTEL ACTIVITY

The lack of awareness of the harm caused by cartels is directly and indirectly responsible for many of the difficulties faced by Competition Agencies. Insufficient knowledge and experience on the part of Law makers makes it somewhat easier for businesses to maintain anti-competitive activities. Law makers, Government officials, business people and the public in general, are not aware of the harm that is caused by cartels as they lack a good understanding of the premises or benefits of competition law enforcement; and are not aware of the activities which may constitute cartel activity. Often times Government officials involved in procurement, whether innocently or not, become guilty of engaging in activities which could be considered as assisting in the creation and maintenance of cartels.

Our Competition Law applies in most circumstances to anti-competitive rules and activities by Government entities when the rules and activities reflect Government action in its regulatory capacity. Many Government officials are not aware of, and do not believe that they should adhere to the provisions of the FCA, hence they constitute one of our target groups for education. It is also necessary to increase the Judges' awareness of the nature of cartels; the harm that they cause and the need for deterrence, in order that they may feel justified in imposing the maximum fine allowed.

Even though public education has always been very high on its list of priority tasks the FTC recognizes the need for increased work in this area. Seminars, workshops and meetings with Government officials, members of the Judiciary, educational institutions, business groups and professional associations, are included in our annual agenda of activities. For the past five (5) years the FTC has hosted an annual public seminar (the Shirley Playfair Lecture); and this year for the first time it will be broadcast on national television. The panelists will make presentations on various aspects of competition, including cartel activity. Other forms of Public Education include speeches, radio and television interviews, newspaper articles and an annual Newsletter.

Ongoing programmes to communicate clearly and consistently about cartel activity will begin to be a more significant part of our Public Education campaign. We have done some work on educating a limited number of Government procurement officials and we are now planning a short seminar aimed at educating Government officials on cartel activities. Such officials are in a position to detect signs of cartel activity such as bid-rigging and they ought to be able to influence how bidding procedures are organized so as to make the formation of cartels more difficult.

We intend that our future Public Education programme contain:

1. Information about cartel cases, such as background, nature, mode of operation.
2. Public statements, constructed in such a way as to highlight the harm caused by cartel.
3. Quantitative estimates (in dollars) of the level of damage, or potential damage, caused by cartels and the effect which it has on the economy. To date, we have been unable to do this. Until recently, we were not ourselves aware of the economic harm in any tangible way.

4. An indication of the fall in prices resulting from the detection and prosecution of cartel activity.
5. The use of brochures and the website. e.g. brochures produced by the US DOJ, on the danger of cartels and a checklist of suspicious behaviour.
6. Information provided by the 1998 OECD Recommendation; the OECD Competition Committee reports; and the International Competition Network's Cartels Working Group.

Since we have no experience in gathering the relevant evidence, presenting arguments and in distributing information about cartels' harm caused in our country, we await the publication of the experiences of other countries and look forward to participation in international workshops/seminars to assist in improving our technical capacity.