

FAIR TRADING COMMISSION



THE MOST IMPORTANT INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION in JAMAICA

**Paper Prepared
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Institutional Challenges in Promoting Competition

THE MOST IMPORTANT INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION IN JAMAICA

But for the acuity of the organizers of this forum, in delimiting the challenges in promoting competition, by insertion of the word “institutional”, there would be no end to this paper. And even with the limits imposed, one still needs to exercise rigid discipline of thought in order to comply with the “less than 10 pages” stipulation.

Jamaica established a competition regime in 1993, as a response to the international trend of the time, which saw more and more governments seeking to embrace the concept of a market driven export-led economy. The stated objective of the Jamaican Government was to create an institutional framework within which the country could achieve economic gains through reliance on market forces. Accordingly, certain structural adjustments were required. These included:

- (a) tariff reform which eliminated quantitative restrictions; the removal of requirements for excessive import licensing; the significant reduction of tariff levels;
- (b) removal of price controls and the deregulation of certain industries e.g. motor vehicle, tourism, banking, air and ground transportation;
- (c) privatization/divestment of certain para-statal agencies e.g. media houses, Government printing services, Sugar Redundancy Housing Programme;
- (d) subjecting state enterprises to greater commercial pressure.

Competition legislation was considered to be central to the implementation of those measures as indeed it is. It would be through **The Fair Competition Act** that *inter alia*:

- (i) the need for the Government to re-enter into the regulatory process in the future would be reduced;
- (ii) private firms would not replace the Government as the new regulators;
- (iii) the benefits of deregulation are shared by all members of the society;
- (iv) the arrangements of private firms do not distort the market.

LEGISLATIVE FRAMEWORK

It does not admit of discussion that once anti-competitive laws are established it is very difficult to get rid of them. Naturally, established stakeholders would resist change. Given the high degree of Government regulation that predates the promulgation of the **Fair Competition Act (FCA)** in 1993 there would continue to exist, unless successfully challenged by the FTC, a large body of laws, supportive of various anti-competitive conducts by various state agencies, in particular.

One major challenge facing the Commission therefore would be to have provisions offensive to competition amended or repealed. Between resistance and the slow pace at which such processes go, the prospects for success are consistently grim. After several years of effort to have meaningful discussions regarding a number of Pre-liberalization Commodity Boards, for example, the Commission was forced to discontinue its investigations. Neither human nor financial resources were available to justify continuing. The Commission lacked

the resources to conduct proper research into the relevant sectors; and persuasion was not effective.

Until 2000 when the **Telecommunications Act** was passed, no piece of legislation in Jamaica had given consideration to the role of the Fair Trading Commission. Intensive advocacy is required in order to sensitize lawmakers to the value of having the Commission's input in the process of lawmaking; and without specific provision being made, possibly under statute, the Commission's intervention will more often than not, be seen as interference.

Within the present legal framework, there is no official means by which the Commission's voice can be heard. From time to time, various arms of Government will invite comment. Essentially, the Commission has to await such invitations. In a few instances when it has become aware of new laws being contemplated or new arrangements being entered into by the Government, it has sought to be included in the discussions; but officials are not always forthcoming with essential information.

All this having been said, I must concede that there is evidence of small steps being made toward proper recognition of the role of the Commission but change cannot come fast enough. The legal framework needs to be improved to support the promotion of competition in Jamaica.

THE FCA

In clear support of the Government's objectives, the FCA not only addresses fundamental anti-competitive conduct like abuse of dominance; cartel activity and the protection of consumer rights, it stipulates in Section 54 that *"Subject to any provision to the contrary ... this act binds the Crown."* As time would come

to reveal however, the structure of the Act itself would present the Fair Trading Commission (FTC) with perhaps the greatest challenge that a Commission could face, as it tries to promote competition.

Having established the Commission as a quasi-judicial body, the FCA makes no mention of a staff or of the Commission having any powers of delegation. This *lacuna* led the Court of Appeal to hold in a 2001 judgement, that the Commission, being vested with powers of investigation as well as powers of adjudication, any decision which it makes in execution of both those powers in any one case would be in breach of the principles of natural justice: **The Jamaica Stock Exchange v The Fair Trading Commission.**

As a consequence the Commission has not been able to hold Hearings for the last three years. Surely investigations have been conducted; but heavy reliance has had to be placed on moral suasion and the level of co-operation which a firm is minded to exhibit. To its credit, the staff of the Commission has in the interim, been able to procure a number of consent agreements. The FCA is being amended to resolve this and other issues.

Highlighted too by the aforementioned **Stock Exchange case** was the issue of jurisdictional boundaries of the Fair Competition Act in relation to other bits of legislation and the specific groupings which they govern.

The Court held that the Jamaica Stock Exchange is governed by the **Securities Act of 1993** and therefore the jurisdiction of the FCA is ousted. Similarly, when the General Legal Council challenged the jurisdiction of the Fair Trading Commission the Supreme Court held that the Council is governed by the **Legal Profession Act** and not the **Fair Competition Act**. It is my view that clear words in the Competition legislation would have prevented such confusion. Appropriate amendments are being considered.

The precedent has therefore been firmly established, for various so-called self-regulated groupings to challenge the jurisdiction of the FCA and the FTC. Section 3 of the FCA exempts from its application, among other groups and activities, *“activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public”*. Anything less than a strict interpretation of this provision will result in the various professional associations escaping the reach of competition. The exempt activities must serve the specific purposes mentioned in the provision; and there must be no equivocation in that respect. This brings me to another of our important challenges – the relationship between the Courts and the FTC.

THE COURTS

Until the judiciary is fully seized of the importance of competition in the Jamaican market place, the FTC will be challenged by questionable interpretation of the law; by attitudes which are inimical to competition promotion; and by significant limitations in comprehending complex economic analysis.

In the **Jamaica Stock Exchange Case** the Court’s interpretation of the word “services” was limited by the definition of the word “goods”, so that the services provided by The Stock Exchange were considered to be exempt, on the basis that the definition of “goods” exempts, *inter alia*, money and securities. The Court applied such an interpretation even though services is clearly defined as services *“...of any description whether industrial, trade, professional or otherwise.”* A real appreciation of what competition seeks to achieve would no doubt have produced a different; and with respect, an accurate interpretation of the provision.

In one misleading advertising case before the Court, the judge at first instance held that to the extent that the Respondent had intended to provide the facilities advertised, it could not be guilty of misleading advertising. Happily that judgement was overturned on appeal. Misleading advertising accounts for 90% of the cases investigated by the staff of the Commission. It was especially critical that the Court appreciate why intention cannot be considered in matters of this kind.

Much effort is being put into obtaining assistance to facilitate the training of judges. The importance of such projects cannot be overstated.

BUDGETARY

The FTC is a statutory body, wholly funded from the Government's Consolidated Fund, through the Ministry of Commerce, Science & Technology, to which it reports. While this arrangement is not peculiar to Jamaica; and indeed, most competition agencies rely on their Governments for funding, the point must be made that Government's resources are scarce and competition promotion is not likely to be considered an area of high priority for allocation of those resources. Understandably all aspects of the Commission's operations are affected, the most important of which are:

(i) Staffing:

It is no secret that but for the diehard nationalist or the committed student of competition very few persons remain at the FTC for much beyond three years, which is the contract period for the professional staff. By a long stretch, the meager salaries is the reason identified. For a whole year the Commission was unable to attract a Senior Legal Counsel; and the position of Competition

Bureau Chief has been vacant for nearly two years. In the meantime, the Government has put a freeze on employment. This situation has serious implications not only for the level of output from the Commission but also for its institutional memory. Regulatory capture is also a real and present threat.

(ii) Staff Training:

There is no delicate way to say that training as a budgetary item, was removed from the Commission's budget request from as far back as the year 2000; and there is no indication that it will be accommodated any time soon. Competition promotion is still new to Jamaica. There is no local academic institution which produces graduates trained to handle the complexities of this discipline. Training is hands-on and while that is happening anti-competitive conduct in the market could be proceeding without detection and therefore unchecked. In a matter which the staff sought to settle two years ago, the firm which was being investigated came to the negotiating table with its battery of legal representatives from local and foreign law firms; and this is the level of competency with which the staff has to compete. Here, I must pay tribute to the U.S. Federal Trade Commission, which provided us with much needed assistance in the person of skilled negotiator; and we managed to arrive at a consent agreement.

As the recently liberalized telecommunications market continues to expand, the relevant issues are becoming increasingly complex. The FTC is required to work alongside the sector regulator – The Office of Utilities Regulation, to ensure that the long history of monopoly behaviour is not perpetuated in the new liberalized market. The impact of competition can be truly realized only if the

competition agency possesses the required skill and expertise to address the highly specialized and technical issues that arise in this sector.

The absence of an allocation for training means too that the Commissioners and staff cannot participate in international conferences, seminars or workshops unless said participation is fully funded by others' generosity. It is highly unnecessary to multiply words about the value of being able to share experiences with other competition agencies; and gain insight into the variety of ways in which competition may be promoted.

Thanks to a number of donor agencies, which have from time to time facilitated training of the FTC staff in one form or another. Recent donor assistance has resulted in our having in our library at this time, a video taped recording of training provided by said donor; and this addresses the issues of both training and institutional memory, all at once.

CONCLUSION

Challenges to effective competition promotion and enforcement are not peculiar to the Jamaican experience. What might typify Jamaica's challenges, given its status as a developing country is the abject scarcity of expertise at all levels of the intricate societal web within which we seek to promote competition. More than anything else, Governments need to understand that to a large extent, the success of competition agencies depends on their being provided

with appropriate levels of funding. They need to be convinced that the competition legislation needs to be supported by other laws so that the work of the competition agency can be enhanced. Above all, there must be real commitment to the ideas that underpinned the establishment of a competition regime.