

Unclassified

DAF/COMP/GF/WD(2006)18



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

06-Jan-2006

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Jamaica

-- Session II --

This contribution is submitted by Jamaica under Session II of the Global Forum on Competition to be held on 8 and 9 February 2006.

JT00196628

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. These notes fully embrace the widely held view that “hard core cartels are the most egregious violations of competition law”. It is also true to say that developing countries are least able to afford to pay the high prices which are generated by cartels operating in many industries; and sadly it is these same countries that find it most difficult to identify, investigate and prosecute cartel activity.

2. In Jamaica’s case, the main challenges may be categorised under the following headings:

- legal Framework;
- size of the economy;
- limitations human and financial.

2. Challenges

2.1 *Legal Framework*

- Of note is the fact that the enabling statute, The Fair Competition Act, 1993 (The Act/The FCA) does not contain the expression “hard core cartel” or the word “cartel”. Accordingly there is no statutory definition of these terms. Instead, the Act seeks to prohibit certain activities, which can be identified as cartel activities e.g. price fixing; carving out and controlling markets; bid rigging. It could be said that the definition of hard core cartel is implicit rather than explicit in the FCA, and perhaps an inexperienced agency needs to be guided in more explicit terms. Admittedly however, this in and of itself might very well be a positive feature: agreements not hitherto contemplated could be caught, as long as the substantial lessening of competition is established.
- The offences identified above are for the most part *per se* offences; the Commission must therefore take the *rule of reason* approach to determine whether the relevant activity amounts to an offence. Under one section of the Act, the activity must have or be likely to have the effect of substantially lessening competition; another section speaks of restraining or injuring competition unduly.
- Note however that price-fixing and bid rigging manage to appear as *per se* offences elsewhere in the Act, but the Commission would be hard-pressed to justify investigating a case under these provisions, instead of under the provisions which require the *rule of reason* approach.

The obvious conflict breeds confusion and renders the staff insecure in its efforts to apply the law.

- It is of course, no secret that “the threat of severe sanctions” can operate as an effective deterrent for persons who would be minded to engage in cartel activity. To that extent a strong case can be made for bringing such conduct within the reach of the criminal jurisdiction. The prospect of incarceration has proved exceptionally effective in some jurisdictions, notably, The United States of America (USA).

Cartel activities under the FCA are not criminal offences and there is therefore no such threat of incarceration.

High levels of fines may also deter persons, but it is questionable whether a maximum fine of Five Million Jamaican Dollars (J\$5M) i.e. U.S. \$83,000.00 can be considered sufficiently severe a sanction. The reported average annual turnover of thirty-four (34) locally listed companies for the year 2004 is US\$111,643.00; and the average annual before tax profit is US\$15,275,002.00.

- If fines are not sufficiently punitive then it becomes extremely difficult to conceive of a meaningful leniency programme. There is virtually no incentive for potential whistle blowers to approach the Commission.
- The Commission has no authority to impose fines. That is the sole prerogative of the Courts; and given the inordinate delays for which the Court System is reputed persons who would engage in cartel activity are less than scared of running afoul of the law. It is important to state here that to date the Courts have not been called upon to adjudicate upon a cartel case.
- An examination of the provisions which provide the actual tools for investigating cartels will reveal that although there is a power of entry and search, there are many weaknesses which can undermine the staff’s best efforts:
 - While the Act allows for a warrant to be obtained to enter and search, “premises” it does not define premises so there is doubt as to whether a motor car or a boat, for example, constitutes “premises”. Questions would arise too as to whether persons would be liable to being searched.
 - There is no provision authorising the sealing off of premises.
 - Documents may be removed only for the purpose of making copies and may be retained for seven days only. Admittedly, a further warrant may be obtained.
 - The relevant provision does not contemplate search of computers and other electronic systems; nor does it speak to seising of such equipment.
 - In its current form the Act does not give the staff the power to interview/examine persons, pursuant to an entry and search warrant.

3. In sum the legislative framework and the actual investigative tools are weak.

2.2 *Size of the Economy*

4. It is being posited that it might be significantly more difficult to detect and investigate cartel activity in an economy as small as Jamaica is, than it would be in a large economy; and the following points are being highlighted in support of that position.

- Relationships are very tightly interwoven at various levels and in an elaborate array of interlocking settings. One is therefore required to be extremely cautious in arriving at conclusions as to purport of persons who might be seen together. We need to be acutely aware of the line between correlation and co-ordination.
- To be branded an “Informer” is to be regarded as the basest among men and unworthy of the society of “honourable” men. An “Informer” might even find himself in danger of physical harm. Thus whistle blowing holds very little promise for cartel investigation.
- In their effort to pick winners/protect national champions for whatever purpose(s), public officials tend to rely not only on official Government policies but also on unofficial measures and a variety of “connections” to achieve their aims. Such official measures have the clear potential to facilitate collusion in such protected sectors; and the Competition Authority could find that its efforts to investigate are undermined.

As can be imagined the Commission must also meet all the other challenges associated with cartel detection and investigation, where there is no direct evidence. The size of the economy serves to exacerbate the problems encountered.

3. Resources

3.1 Financial

5. Whereas the Commission is fully funded from the national budget; does not have the authority to impose fines or to charge fees, its financial resources are chronically limited. The situation was put into real perspective by Mr Gilles Ménard, UNCTAD Consultant who recently conducted a review of competition policy and law in Jamaica. His Report made the observation that a survey of the budgets of competition authorities in developing countries indicates that their average budget varies from 0.06% to 0.08% of the Governments’ non-military expenditures. In Jamaica’s case the budget is approximately 0.03% of the Government’s non-military expenditure, 80% of which goes to paying salaries. *Res ipsa loquitur* – the thing speaks for itself. Serious cartel investigation requires proper funding.

3.2 Human

- To a large extent, the limitations that exist in this area arise out of the financial constraints under which the Commission operates. The staff is largely untrained in evidence gathering and the various techniques which would be facilitated by disciplines such as information technology, engineering and accountancy. In every sense the level of expertise and experience available in the Commission is below the required standards.
- There is deficiency in numbers as well. The professional staff comprises three (3) economists and three (3) lawyers. As at December 30, 2005 there are sixty one (61) cases assigned to the three (3) economists – seven (7) of which relate to misleading advertising; five (5) represent requests for opinions and two (2) are cartel investigations, arising out of complaints without any direct evidence.

4. Conclusion

6. In addition to the hurdles already highlighted it is conceivable that there is also lack of awareness of the harm caused by cartel activity. For this the Commission must take some responsibility. Law makers and other Government officials need to be properly sensitised as to their own responsibility to avoid

actions and policies which might/could facilitate cartel activity. Effective competition advocacy must become the *sine qua non* of the Commission's work. In this regard, the Commission anticipates meaningful assistance from UNCTAD, as an outcome of the already mentioned peer review exercise.

7. The Commission looks forward too, to receiving assistance through a consultant to be provided under a current IDB assistance Programme. This should help to boost not only the knowledge base but also the confidence of the staff. Indeed, if one feels less than competent, one will experience insecurity and that in itself is an inhibitor to action.