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BRIDLING MARKET DOMINANCE: A VIEW FROM JAMAICA

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Abstract. In exploring the specific theme of market dominance in small states, this chapter highlights some of the peculiarities of such states, focusing on Jamaica, and through that lens discusses the treatment of dominance as a policy issue and the resultant legal framework. Whereas at the most general level, competition law seeks to ensure that domestic markets are not impeded by anti-competitive practices and that competitive forces are allowed to determine how markets are organised, this chapter argues that each state must determine the more specific objectives which its law must serve. The chapter explains that the Jamaican policymakers were obviously operating on the accepted principle that competition law must fit the circumstances of the state in which it is being implemented; the view being that a small state must by necessity be more tolerant than larger states would be, of higher levels of concentration in the market, if their significant industries are to be competitive in the regional and global arenas. The chapter posits that rigorous enforcement of competition law will protect the competitive process, thereby neutralising shocks to the economy.

1. Introduction

There is no general agreement as to how a small state is to be defined. The World Bank[1] and the Commonwealth Secretariat[2] define a small state as one with a population of 1.5 million or fewer. Countries like Papua New Guinea, Cuba, Singapore and Jamaica, with populations exceeding 2 million, are included as members of the Alliance of Small Island States (AOSIS)[3] which operates as a lobby group within the United Nations. The size of GNP and the land area have also been proposed as

[1] See http://wbln0018.worldbank.org/html/smallstates.nsf/ .
[2] See http://www.thecommonwealth.org/.
[3] See http://www.sidsnet.org/aosis/.

measurements of size (Downes, 1988). In recognition of the difficulties associated with defining what is a small state or a small economy as an absolute concept, during negotiations in the Free Trade Area of the Americas the expression "smaller economies" rather than "small economies" was used as "a relative concept based on countries' resource bases and levels of development" (Association of Caribbean States, 2001). In WTO negotiations, the concept of vulnerability was associated with the definition of smallness, and accordingly the term "small vulnerable economies" is commonly used (see Werner, 2008).

No matter how they are defined, small states need to promote market efficiency as much as, if not more than, larger ones, given that the former tend to be highly exposed to external shocks (Briguglio et al., 2006), and therefore require a properly functioning market to withstand or bounce back from such shocks. In this regard properly designed competition law and policy are important instruments, even in the smallest of states. One of the main purposes of competition law and policy is to protect the consumer against abuse of dominant positions; however in attaining this aim, competition law and policy also foster rapid market adjustment.

This chapter focuses on dominance in small states, referring to the factors which facilitate such dominance, referred to by Briguglio and Buttigieg (2004) as "ease of market dominance", and the measures available for curbing it. Practical examples, where appropriate, will be drawn primarily from the Jamaican experience.

The chapter is structured as follows. Section 2 outlines the major features of the market in small states, while Section 3 deals with the Fair Competition Act of Jamaica and discusses how the law is structured to deal with the matter of market adjustment. Section 4 highlights viewpoints on the adequacy of competition law. Section 5 presents two case studies which compare outcomes under contrasting legislative frameworks. Section 6 concludes the chapter.

2. Features of the Market in Small States

Natural Monopolies

Briguglio and Buttigieg (2004) tell us that, inter alia, small states are likely to be characterised by natural monopolies in utilities such as electricity, fixed line telephony, gas and water. These observations are, to varying degrees, true of all Caribbean States. Notwithstanding the adoption of extensive privatisation and trade liberalisation measures in the late 1980s into the 1990s, these sectors have remained monopolies, to a very large extent. Natural gas remains a monopoly in Barbados and Trinidad & Tobago. The same is true of electricity for these states as well, while in Jamaica there is partial liberalisation, allowing for limited competition in generation. In this context, the electricity produced by the bauxite companies and a few other independent producers account for 30% of electricity generation, which has to be sold to the incumbent, Jamaica Public Service Company. Whereas it is acknowledged that this arrangement provides a reliable and relatively cheap source of electricity, there is doubt as to whether the final consumer manages to benefit from this form of privatisation and the partial liberalisation of the electricity sector.

Essentially, fixed line telephony remains a monopoly in all three states, but there is vibrant competition in mobile and international services. In Jamaica where the sector was liberalised on a phased basis, with full liberalisation occurring in March of 2003, a licence was actually issued in 2002 for a second fixed line provider (wireless) to enter the market, but to date the licensee has not been able to start operations. For one thing, it seems not to have had deep enough pockets to follow through; and secondly, the chosen technology was not only quite unsuitable for Jamaica's topography, but was very mature and was heading toward obsolescence.

Natural monopolies are characterised by factors such as large capital outlays and "relatively large overhead costs" which prevent duplication and therefore competition; they occur where the market is not large enough to sustain competition at an efficient scale; and they tend to demonstrate appreciable economies of scale and/or scope; they are an acceptable phenomenon of small markets, despite their legendary rampant rent-seeking conduct. In an effort to achieve balance, governments the world over and certainly in the Caribbean small states, have relied on regulation of natural monopolies.

In Jamaica, the organisation which regulates the utilities is the Office of Utilities Regulation (OUR) – water and electricity being fully regulated; while for competition matters in telecommunications, the OUR must consult with and defer to the Fair Trading Commission (FTC). Competition in the mobile telephony market has been legendary, due largely to forbearance by the Regulator to regulate that market. The Government's objective was to increase the level of telephone penetration in the country; and the result was that subscribers increased from 300,000 in January 2001 to 2,745,400 by September 2005.

The FTC has had to be vigilant in monitoring the advertising wars that have ensued between the incumbent and one particularly strong new entrant. Information contained in advertisements of ever evolving new services have come under heavy scrutiny, to ensure that the consumer is not misled; and competition is not distorted. Section 37 of the Fair Competition Act (FCA) prohibits misleading advertising; and the FTC has interpreted the section to mean that an advertisement can mislead by what it expresses as well as by what it fails to express; and by the inferences that can be drawn from the placement of objects in relation to one another.

Competition in this area has been beneficial to several communities and other groupings in society. Sports clubs and sporting activities have been probably the greatest beneficiaries, not only locally but regionally. Exclusive promotion agreements are carefully scrutinised by the FTC to maintain healthy competition. Starting out in 2000 with 100 percent market share in the mobile market the incumbent began to suffer loss of market share immediately upon the entry of the Irish provider – Digicel, the market share of which was 60.2 percent as at September 2005, compared to the incumbent's 36.2 percent. A third provider held 3.6 percent.

The telecommunications sector in Jamaica clearly demonstrates that liberalisation together with unimpeded competition and keen enforcement of competition law will contribute to entrepreneurship and economic growth and could discipline dominant firms, thereby enhancing consumer welfare.

Unfortunately the same cannot be said of the electricity sector. By Ministerial Order dated February 2001, all aspects of the operations of the incumbent Jamaica Public Service Company (JPSCo) were exempt from the jurisdiction of the Fair Competition Act. This means that even though power generation was opened up to competition, the FTC cannot enforce the rules of competition against the dominant producer, which must be to the detriment of the market.

The power of the Minister to grant the relevant exemption is established under Section 3(h) of the FCA, which states that "Nothing in this Act shall apply to – such other business or activity declared by the Minister by order subject to affirmative resolution." It must be noted too, that under its current licence the JPSCo is the sole purchaser of all new capacity generated by independent power producers. The Company also has an exclusive right for transmission, distribution/retail business.

Ease of Dominance

While the factors that support the existence of natural monopolies in small states are principally the usual market realities related to scale economies, there tend to be additional factors underpinning market dominance in sectors other than the utilities. These are mostly associated with barriers to market entry.

In small states, barriers to entry that support dominance tend to be very common. These often allow dominant firms in a small state to remain dominant even after any superior competitive performance which they might have exhibited in their early history has disappeared. Briguglio and Buttigieg (2004) characterise "… the poor chances of success of setting [up] new business, in goods and services already supplied by existing firms" as a natural barrier to entry. This could happen, for example, where capital is scarce and obtaining credit might be influenced by social and family ties rather than by sound business plans, thus limiting the possibilities for competition. Not least among these natural barriers to entry can be cultural allegiances to products which have taken on iconic "personalities" over time.

This situation is evident in the brewery sector in Jamaica. Domestic beer consumption is high and the Jamaican consumer has been exposed to many brands of beer. Nonetheless the brewery Red Stripe Limited remains dominant after 80 years of its existence, encountering weak challenge for the first time some four years ago. In Jamaica, beer means Red Stripe.

Another natural barrier to entry in Jamaica, and in other small island states in the Caribbean, is high transportation costs, given the fact that for an island, cross-border trade is largely by sea or air. This often translates into bulk buying through dominant firms, which in turn control the distribution channels and firms are maintained in their relative positions along the distribution chain.

To the extent that interlocking relationships in small states allow business persons to have the ear of the policymakers, resulting policy decisions may give rise to Government-created barriers to entry. Such artificial barriers might manifest as state aid, concessions, preferential awards of contracts or tax breaks, which can amount to the picking of winners/ promotion of national champions; and therefore distortion of competition.

Other government-created barriers to entry which might not be peculiar to small states, include legislation such as those which address intellectual property rights and dumping. The power which resides in agents of the Government in the granting of licences and permits may also be exerted in a manner which creates a significant barrier to entry and facilitates dominance.

3. Dominance Under the Jamaica Fair Competition Act

It is important to indicate that market dominance (though often associated with monopoly power) is not an offence under the Jamaica Fair Competition Act as indeed it is not in other countries where competition legislation is in force. It is the abuse of that position that is punishable. A firm occupies a dominant position if:

> "... by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors".
> (Fair Competition Act, Section 19)

The 1945 case of United States v Aluminium Company of America (Alcoa), referenced in many textbooks, including Gellhom et al. (2004:110). provides us with an understanding as to why a dominant firm would need to be constrained. The learned Judge in the case suggested that monopoly power is feared because a firm holding such power can restrict output; raise prices and transfer income from customers to producers, thereby excluding rivals from the market "... by means other than superior performance in the form of better products, prices and service."

Fundamentally, competition law seeks to encourage, promote and maintain competition; and competition is affected by the behaviour/ conduct of firms and the structure of markets. Thus competition law controls firms' behaviour by prohibiting, among other things, anti-competitive agreements and the abuse of dominance; while the application of merger control provisions prevents mergers that could result in anti-competitive levels of concentration in the market.

Structure Approach to Market Adjustment

In the period leading up to the enactment of the FCA, there was considerable debate on features of the Act that could have a negative impact on investment in the newly liberalised economy. One such feature was merger control. Critical private sector groupings took the position that given Jamaica's level of economic development and the relatively small size of many of its firms—factors which have implications for the country's competitiveness, not just at the regional level but globally—firms should be allowed to merge without being subjected to the rigours of competition oversight.

Of course, this is not a view alien to the considerations which inform competition law and policy. Gellhom et al. (2004: 404) list a number of reasons why a society might wish to leave firms "relatively free to buy or sell entire companies or specific assets:

(i) mergers can bring superior managerial or technical skill to bear on underused assets;
(ii) [they] can yield economies of scale and scope that reduce cost, improve quality, and boost output;
(iii) the possibility of a hostile takeover can discourage incumbent managers from behaving in ways that fail to maximise profits;
(iv) a merger can enable a business owner to sell his firm to someone who is already familiar with the industry and might be in a better position to pay the highest price."

Gellholm et al. (2004: 404) go further by stating that "The prospect of a lucrative sale induces entrepreneurs to form new firms and thereby spurs competition by facilitating entry and exit" and capping their arguments with the statement that "... many mergers pose few risks to competition ... where for example, the merging firms are relatively small or entry into their markets is easy." In some respects, with its relatively small firms, the Jamaican economy could be seen as fitting neatly into this scenario.

It must be acknowledged that over the last five years, Jamaica has seen a number of mergers, predominantly in the banking, insurance and media sectors; and the FTC has been particularly concerned about those mergers that have occurred between banks and insurance companies. The "gut" reaction of the FTC is that consumers will be pigeonholed into using the services of specific providers, where, given choice they might have gone elsewhere. To the extent that horizontal mergers increase the level of concentration in a market, and could effectively reduce competition, they ought to come under the scrutiny of competition law.

The enforcement agency must have the opportunity to analyse a merger transaction and determine whether such a transaction produces or is likely to produce efficiencies; and whether some of the gains accruing will be passed on to the consumer. Surely rigid negative assumptions about mergers are wholly undesirable.

A small state must determine, among other things, its own thresholds; its own competitive test; and list of factors to be weighted in determining competitive impact. Ultimately it must strike the balance that it considers desirable for its own market.

Accordingly, the FTC has argued, in a paper presented to its portfolio minister in May 2006, that national policy regarding mergers is now ripe for review.

Conduct Remedies

In the absence of structural remedies the competition authority of a small state must be doubly vigilant in its application of the conduct remedies provided under the law, for disciplining dominant firms. Sections 19 – 21 of the FCA specifically address the conduct of dominant firms, prohibiting, among other things:

- restricting the entry of persons into any market;
- eliminating any person from any market;
- imposing unfair purchase or selling prices or other uncompetitive practices;
- limiting production of goods or services to the prejudice of consumers;
- making the conclusion of agreements subject to supplementary obligations, which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

An enterprise will not be treated as abusing its dominant position if it is shown that (a) its conduct was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (b) consumers are allowed a fair share of the resulting benefit. Further, an enterprise would not be treated as abusing its dominant position if the only reason for the relevant conduct is to enforce an intellectual property right.

Where the FTC finds that an enterprise has abused, or is abusing a dominant position and that such abuse has had, is having, or is likely to have the effect of lessening competition substantially in a market, the Commission shall direct the enterprise to "take such steps as are necessary and reasonable to overcome the effects of the abuse in the market concerned."

The FTC is also enjoined, under Section 21(2) "... to consider whether the practice is a result of superior competitive performance" in determining whether a practice has had, is having or is likely to have the effect of lessening competition substantially.

It is therefore clear from the wording of the sections of the Act which specifically address dominance, that in enforcing the law the Competition Authority is expected to take great care to ensure that it promotes competition, not stifle it; that innovation and economic progress are enhanced; that creativity through the exercise of intellectual property rights is not smothered; and that consumers ultimately benefit. Most significantly the Act supports the principle that even as it seeks to constrain the behaviour of dominant firms, competition enforcement must encourage rather than punish "superior competitive performance."

4. Viewpoints on the Adequacy of Competition Law

It is sometimes argued that in small states certain champion industries must be sheltered from too much competition, that a minimum size is required in order to compete effectively in global markets, that a combination of firms could improve efficiency and attain scale economies, and that therefore competition policy must determine how to defend these axial industries.[4] This argument is more suited for a discussion about trade remedies than for competition policy. Even in the context of trade remedies, sheltering from competition is not the best option. As Veroneau (2007: 2) argues:

> "Each society must find a way to address the needs of those who may be dislocated by change and cushion the transition. But backsliding and erecting walls and barriers to trade is not the answer. Trade barriers protect a few at the expense of the many and countries that fail to resist protectionism actions risk slower growth, inefficient and non-competitive sectors, greater unemployment and increased inflation in the longer term."

5. Case Studies

This section will present two cases, one which demonstrates how the FTC applied competition law to curb the dominance of a local icon and enhance and promote competition and the second demonstrates how government intervention into one market distorted the competitive process and led to chaos and disruption in the economy.

The Red Stripe Case

As previously mentioned, Red Stripe Limited was and is the dominant brewery in Jamaica, which according to the FTC, holds over 90 percent market share in 2001 - 2002.[5] In 2002 it came to the attention of the FTC that the company had entered into several sales and promotional arrangements with various distribution outlets. The ensuing investigation revealed that the relevant arrangements prohibited the promotion of competing products at selected outlets; demanded sales

[4] For example Dr Trevor Farrell, Economist, speaking at a Regional Conference held in Barbados in November 2006; and hosted by the Organisation of Commonwealth Caribbean Bar Associations and the Caribbean Court of Justice, expressed the view that Caribbean people, in embracing competition law and policy, need to be mindful of "axial industries of the Caribbean" such as tourism and energy, which are replacing earlier axial industries such as banana and sugar.

[5] The company disagreed that it holds such a large market share, contending that the relevant market includes all alcoholic beverages and not just beer as the FTC determined.

data on competing brands; prohibited sales and promotion of competing products at sponsored events; recommended that competing products be sold at premium prices at sponsored events; and provided for post-terminate preferential treatment.

Despite its non-admission of any breach, the company agreed to enter into a Consent Agreement with the FTC, in which it agreed, in respect of sponsorship at events, that, among other things:

- no agreements would exceed three years or provide for an option to renew and/or for any rights of first refusal;
- notice period for termination of any agreement without cause would be linked to the value of the sponsorship provided.

With respect to promotional arrangements at outlets the company agreed, that, among other things:

- the number of outlets would be reduced to a number agreed by the FTC;
- duration would not exceed twelve consecutive months;
- there would be no option to renew, nor would there be any right of first refusal;
- no agreement would seek to restrict or limit competing products from being displayed for sales purposes and dimensions of such displays.

As a direct result of the action taken against Red Stripe, the firm that entered the market at the time has not only been able to survive but has managed to increase its annual revenue by some 200 percent, which could mean a significantly increased market share. It has also carved out a viable niche for itself in the hotel sector. Further, in the last year, another rival has entered the market, without having to face the barriers faced by the first entrant and consumers have benefited from the variety now available to them.

Caribbean Cement Company

Anti-dumping and Subsidies Laws were considered to be integral to the process of economic liberalisation of Jamaica in the early 1990s. The appropriate statutory instruments were put in place, and the Anti-dumping and Subsidies Commission (ADSC) was established.

To the extent that anti-dumping laws seek to protect domestic industries from competition, those measures are often seen to be in direct conflict with the principles of competition; and never was this conflict made more stark than in 2001 when the sole producer of cement in Jamaica, Caribbean Cement Company Limited (CCCL), filed a complaint with the ADSC, alleging that since 1999 cement was being dumped into the country, resulting in injury to its production; loss of sales and market share; and therefore loss of profitability. At the end of an investigation, the Anti-dumping Commission agreed; and dumping duties of 89.79 percent were imposed on the relevant importer. This process repeated itself in 2002 and again in 2004, when upon the recommendation of the ADSC, the Government increased the applied tariff on cement from 15 percent to 40 percent. The CCCL promised not to increase prices for a specified period, and only with the government's approval.

Upon becoming aware of the matter in 2001, the FTC prepared and delivered an opinion to its Portfolio Minister, setting out its concerns and cautioning the authorities to carefully analyse from the perspective of the overall impact on competition and consumer welfare, the likely results of the measures taken. The FTC encouraged the Minister to "carefully weigh the choice of providing protection for a particular company at the cost of the consumer and wider economic objectives." It was pointed was out that CCCL's undertaking not to raise prices without the Government's approval might not be a sufficiently strong safeguard to mimic a competitive market.

Despite the caution of the FTC and the efforts of the parliamentary opposition, to persuade the government not to intervene in the manner requested, the fifty year old CCCL was afforded protection through the imposition of dumping duties, increased tariff, and a safeguard measure of 25.83 percent.

Indeed, one poignant intervention in Parliament was "you cannot be under supplying and expect to get protection." (The Daily Gleaner, March 21, 2007). At the relevant time, market demand for cement amounted to 900,000 metric tonnes per year and CCCL was producing 700,000 metric tonnes. In 2005 CCCL's production level had improved to 844,840 metric tonnes, but the Trade Board advised that the company would have been "unable to keep pace with the robust demand in the construction sector..." By this time firms which had hitherto been importing cement had fallen out of the market. The 2007 World Cup Cricket was imminent and large construction projects were underway, including a new multi-purpose stadium at which warm-up matches were to be played. New schools were being built and highways were being constructed.

A crisis had emerged in the construction industry. Public sector as well as private sector construction ground to a halt; and in the middle of all that, reports surfaced that CCCL had released sub-standard cement onto the market. These reports were substantiated by cracking and crumbling structures, resulting in the Company paying out J$305 million by way of compensation, as at December 2006.

In the wake of this crisis, the Government, as a first step to addressing the problem, rolled back the tariff to the original 15 percent for three months. This did very little to improve the situation: three months was much too short a period to allow persons interested in resuming importation to place orders and have the product shipped to Jamaica from such far away places as Thailand. Eventually the government was forced to remove the tariff altogether, for an indefinite period.

The sector is now climbing back to competitiveness, with importation increasing; but there is no guarantee that the current tariff structure will not change. As at March 2007 a 42.5 kg bag of CCCL cement was being sold for J$464.84 while a 42.5 kg bag of imported cement was being sold by one importer for J$369.00 and a 50 kg bag sold by another importer for J$430.00. This translates into J$10.94 per kilo for CCCL cement; J$8.64 for one importer's and J$8.60 for cement from the second. Indeed, as at December 2005 there were ten companies importing cement into the country and consumers are benefiting from competitive prices.

The cement experience clearly demonstrates some of the dangers of picking winners and promoting national champions—which is easily pursued under anti-dumping laws. It gives muscle to the argument that effective competition is the most effective means by which a country, regardless of how small, will decide who will produce what; to whom those goods and services will be allocated; and at what price. Trade remedies ought to be resorted to as measures of very last resort; and should be used sparingly. One can only hope that the cement experience has taught some lessons which extend far beyond the specific industry and which can inform policy approaches by other small states.

6. Conclusion

A dominant firm will tend to maintain its position in a market but there needs to be a credible appreciation of the adequacy of competition law to constrain the behaviour of such a firm. Rather than relying on mechanisms which seek to protect the few at the expense of the rest of society, small states should not shirk from employing competition law and policy, to promote rivalry among firms. This in turn will maximise consumer welfare. Its enforcement must be strict, consistent, and transparent. Competition policy is a particularly useful tool in small states, where dominance is not always a result of superior competitive performance. In monitoring the behaviour of firms in the market competition law promotes efficiency, which in turn produces good-quality goods and services at competitive prices. In being provided with choice, consumers are able to switch and the producers of goods and services are forced to make the necessary adjustments. Competition policy and law is a necessary support in a market economy. It offers the most objective means through which markets will be able to adjust to shocks, thereby enhancing their economic resilience.

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