PUBLIC CHOICE THEORY AND LEGISLATIVE AMENDMENT-THE CASE OF THE FAIR COMPETITION ACT, 1993

By Dr. Delroy S. Beckford*

Legislative amendment has often been treated as a product of selfless public interest activity for the common good designed to enhance effective governance. In some jurisdictions, notably the United States, this view is less acceptable given the existence of interest group lobbying where legislative reform is reducible to a market in which legislation is bought and sold. This less than sanguine view of legislative reform is said to apply with equal force to competition legislation in the United States whereby public choice theory is used as a benchmark of analysis in preference to public interest theory.

Public choice theory of antitrust enforcement subordinates the public interest theory of antitrust regulation, holding instead that legislators are motivated by self interest. The public interest theory views antitrust policy as a legitimate response to market failure whereby consumer interests prevail. Competition legislation is then supposed to represent the legislator's benign interest as a seeker of protecting the public interest as in maintaining a competitive economy as a public good.

According to Judge Richard Posner of the United States Seventh Circuit Court of Appeals economic efficiency as a social norm establishes a prima facie case for having an antitrust policy because this is a fundamental public good.

More information or better people will result in better competitive outcomes. More information provides consumers with arsenal to approach the ideal of perfect competition which in turn militates against market failure exemplified by an abuse of monopoly power. Better people as in bureaucrats, administrators, judges, legislators and market participants could result from the development of a competition culture fostered by advocacy programmes whereby the internal logic and justification of a competitive economy are routinely proselytized.

This view of the state of affairs is often questioned as not being a true representation of competition legislation and its application as opposed to the desired course of competition legislation. An assault on the public interest view is taken by public choice theory. Much of what follows is familiar ground of the relevance of public choice as a framework for examining legislative outcomes.

Public choice argues that legislators are self interested individuals whose main concern is not of the public interest but of their own re-election. The legislative process is seen as a market of competing interest groups where political favours are bought and sold. This may be called the interest group branch of public choice theory which tells us that legislative outcomes from the

* Senior Legal Counsel, Fair Trading Commission. The views expressed herein are entirely mine and are not necessarily attributable to the FTC.

political process are the results of deals between self-interested actors who use public power to further private ends.

Consequently, the general public interest is often sacrificed due to the power of organized special interests. Special interest groups engage in rent-seeking behavior by attempting to obtain economic benefits for themselves through government intervention in the market on their behalf. Successful rent-seeking on the part of special interests results in government policies that cost the public more than they are worth, such as government programmes that become too large, legislation that insufficiently internalizes costs of private actors, or legislation that is skewed against the public interest.

Competition legislation is no less susceptible to this analysis because of the contending interests often associated with such legislation, that is, producers versus consumers and the appropriate apportionment of transaction costs for effective governance within markets.

Is public choice an acceptable account of the provisions of the Fair Competition Act and attempts at amendment that have so far not borne fruit?

Two of the main provisions of the FCA regarded as the backbone of competition legislation relate to anticompetitive agreements and abuse of dominance. Examining these provisions is suggestive of tentative positions that could be sketched on the relevance of public interest and public choice theory in explaining legislative outcomes.

A convenient starting point is section 17(1) of the FCA which provides as follows:

17. (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that—

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) affect tenders to be submitted in response to a request for bids;

(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with

the subject of such contracts, being provisions which have or are likely to have the effect referred to in subsection (1)

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied—

(a) contributes to—

(i) the improvement of production or distribution of goods and services; or

(ii) the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

The provision does not expressly provide for pre-merger review but permits some review of agreements even if consummated.

Arguably, the absence of pre-merger review could suggest interest group capture to subordinate regulatory intervention in contractual freedom. An answer to this position could be that the absence of pre-merger review does not prevent review even if review is conducted post the merger as in, for example, where the agreement is established to result in a substantial lessening of competition in a market. Section 17 of the FCA permits this approach to be taken. Public interest theory would also seem to find support in a related provision that could operate as a pre-merger review proxy, that is, section 29 of the FCA that permits agency authorization of otherwise anticompetitive conduct provided the authorization satisfies the public interest test.

This provision, however, does not fit neatly into this perspective. There are no articulated criteria for determining the public interest under this provision and there is no certainty that public interest is meant to capture notions of economic efficiency exclusively given that the provision permits authorization even if the conduct for which authorization is sought is anti-competitive. That is, agency approval of the conduct is not barred even if the conduct is found to be anti-competitive.

That the provision relating to abuse of dominance does not establish that an abuse of dominance *simpliciter* is prohibitory conduct could also signal the importance of public choice trumping public interest particularly when other jurisdictions regard such conduct as a basic prohibition.

The standard employed for examining allegedly anti-competitive conduct, that is, whether a rule of reason or per se approach is adopted, can also point to whether it is public interest or public choice that better explains the provisions of the FCA to which such standards are applicable.

Section 17 of the FCA employs a rule of reason standard even for agreements that fix prices although such agreements if in the nature of a cartel is prohibited in most jurisdictions without the requirement for demonstrating anti-competitive effects. Adopting a rule of reason as opposed to a per se standard subjects the agency's determination of anti-competitive conduct to greater uncertainty when it is to be reviewed by a court whereby competing economic analyses of the effect of conduct in a market need not result in the agency's view being accepted.

For this reason it is accepted as an article of faith that it is easier to prove a per se offense than one requiring a rule of reason standard. The challenges of proof inherent in a rule of reason standard could suggest that, to the extent that it is excluded in the FCA for basic prohibitions in other jurisdictions, public choice may account for this development if organized special interests lobby for this flexibility in the provisions of the FCA to examine anti-competitive conduct assumed to provide no pro-competitive benefits.

This is not to discount public interest theory as accounting for flexibility in the law that would avoid delays in the process of amendment to accommodate changes in economic thinking that may point to pro-competitive benefits from practices originally presumed or proven to be anti-competitive without redeeming features. Additionally, absolute prohibition can create rigidity and brittleness while flexibility can add durability to the law.

Judicial intervention can reduce this flexibility but this is most likely to be the case in mature competition jurisdictions with a long history of enforcing competition law. What the US Supreme Court was able to do in rejecting the per se standard for retail price maintenance agreements based on revised economic thinking on pro-competitive benefits from such agreements is probably not conceivable in a judicial culture with a heavy reliance on precedent.

Closely related to legislative outcome is legislative amendment. Public choice tells us that the process of amendment will largely be captured by special interests. There is not much in the way of an empirical study to test this view as it relates to the FCA.

The factual account of the ongoing process for amendment to the FCA suggests that amendment was or could have been broached from as early as 2001 because of the decision of the Court of Appeal in Jamaica *Stock Exchange v. FTC*, whereby the court recommended a court or a tribunal to be the adjudicating body to effect the de-merger between adjudicative and investigative functions identified in the FCA.

Amendments other than structural change have been suggested but my focus is on structural change in view of its significance to rectify a constitutional issue, that is, the potential for breach of the principle of natural justice attendant on a merger of investigative and adjudicative functions. Secondly, structural change is a necessary condition for application and enforcement of some provisions requiring a finding by the competition agency absent amendment devolving that responsibility to a court or a tribunal.

Can public choice theory explain the delay in structural reform? Before addressing this question it is useful to set out the benefits of structural reform compared to another alternative that is feasible within the current legislative context of the FCA. A specialized tribunal is desirable if composed of the requisite expertise, is properly resourced, provides for binding decisions without recourse to the court for enforcement, and is established within a legislative scheme that specifies effective remedies for breaches.

In the current legislative framework direct access to the court may not be feasible for some breaches whereby a prior finding by the agency is a requirement before access to the court is permissible.

Amendment could either address those provisions requiring a prior agency finding before access to the court whereby that requirement would be removed to permit direct access or structural reform could be effected to allow a tribunal to decide on issues relating to breaches of the FCA.

However, a specialized tribunal moreso than a court is assumed to have the requisite experience and institutional knowledge to dissect and evaluate competing economic theories of the competitive effects of impugned conduct to inform optimal decisional outcomes in competition disputes.

In either case structural reform is a desirable outcome to the extent that it can facilitate robust enforcement of the competition legislation to approximate to the public good of economic efficiency. Public interest theory would suggest therefore that structural reform is the optimal outcome to satisfy the public interest social norm of economic efficiency.

Structural reform has so far languished from over extensive deliberation on the appropriate provisions to be included in the draft Bill. This has been due to several factors, not least of which is contestations on policy regarding issues such as the strength of provisions to permit agency acquisition of information, remedies to be available to a tribunal, for example, the ability to impose fines, and the extent to which direct access to the court as a first resort for enforcement should be available.

Delay in amendment is not in and of itself suggestive of a premium given for public choice if extensive deliberation is necessary to achieve the optimal public interest outcome. In the meantime, however, much is lost in the way of effective enforcement the more lengthy the delay, resulting in indirect industry capture consistent with public choice theory.

Concluding remarks

We may not arrive at a definitive position on the significance of public choice as opposed to public interest theory in explaining the delay in amendment with respect to the FCA as there is no empirical study on which to rely and the nature of anecdotal accounts may carry inconsistencies and differences of interpretation. Extensive delay in amendment, however, to the extent it fosters sub-optimal decisional outcomes, benefits groups that are less inclined to embrace increased competition in the market place thereby suggesting the significance of public choice over public interest as perhaps the more applicable framework for appreciating the impact, if not the purpose, of the delay in amendment.