Is the TTSEC abusing its monopoly power?

Chief executive officer of the Trinidad and Tobago Securities and Exchange Commission, Kester Guy

Anthony Wilson

anthony.wilson@guardian.co.tt

Executive director of the Fair Trading Commission, Bevan Narinesingh PHOTO BY ABRAHAM DIAZ

The commentary in last week's edition of this publication, under the headline 'Are TTSEC's proposed fee hikes justified?' ended by stating that the proposal by the Trinidad and Tobago Securities and Exchange Commission to more than triple many of its fees was "not justified and should be resisted."

In the course of the last week, several questions occurred:

• Is the TTSEC a monopoly?

• If the TTSEC is a monopoly, does it have monopoly powers?

• If the regulator of the securities industry in T&T has monopoly power, can it be deemed to be abusing that power by proposing to triple many of its fees?

• If the proposed fee increases by the Commission can be deemed to be an abuse of its monopoly power, is that potential abuse mitigated by the consultation period set out by the TTSEC— from December 17, 2024, when the proposed increases were posted to January 24, 2025, when the consultation period end?

• Should the TTSEC have scheduled a public hearing to properly explain and justify its proposal?

• And if the TTSEC is a monopoly, does have monopoly powers and its proposed fee hike can be deemed to be an abuse of those monopoly powers, is the regulator of the T&T securities industry subject to the oversight and investigatory powers of T&T's Fair Trading Commission?

• Is there a legal precedent for one regulator pursing another for alleged breaches? T&T's Fair Trading Act, at section 20 (a) defines monopoly power as being an enterprise that "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."

Section 21 (1) of the Fair Trading Act says an enterprise that has monopoly power, abuses that power "if it impedes the maintenance or development of effective competition in a particular market."

Section 21 2 (d) of the Act states that an enterprise abuses its monopoly power "if it directly or indirectly imposes unfair purchase or selling prices" or at section 21 2 (h) if it "engages in market restriction."

Section 21 (3) of the Act states that an enterprise shall not be treated as abusing monopoly power— (a) if it is shown that— (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (ii) consumers were allowed a fair share of the resulting benefits.

Section 17 (1) (a) of the Fair Trading Act outlines that any agreement that "fixes prices directly or indirectly, other than in circumstances where the agreement is reasonably necessary to protect the interests of the parties concerned and not detrimental to the interests of the public, is an anti-competitive agreement and is prohibited under this Act."

And while section 3 of the Act specifically excludes banks and non-bank financial institutions, which fall within the purview of the Securities Industry Act, 1995, there is no exclusion, explicit or implied, of regulators.

Finally, section 22 (1) of the Act states that where the Fair Trading Commission "has reason to believe that an enterprise has monopoly power in a market and has abused or is abusing that power, the Commission shall initiate an investigation into the matter after issue of the notice in the form prescribed in the schedule."

It is hoped that the executive director of the Fair Trading Commission, Bevan Narinesingh, and his attorneys, would ponder on the questions above.

Background

It was pointed last week in this space that last month the CEO of the Trinidad and Tobago Securities and Exchange Commission (TTSEC), Kester Guy, issued a circular letter to participants in the local securities market advising them that the Commission proposed to increase its fees.

The circular letter was issued to the market on December 17, 2024, and was addressed to reporting issuers, broker dealers, investment advisers, underwriters and self-regulatory organisations.

In many cases, the TTSEC proposes to triple the fees that are paid by market participants and the Commission also proposes to impose several new fees.

The commentary last week suggested two ways by which the TTSEC could avoid tripling many of the fees it proposes to impose on market participants:

1) The monies collected by the Commission from administrative fines for breaches of the Securities Act could be retained by the TTSEC for its own uses, instead of being deposited into the Consolidated Fund.

The budget documents Draft Estimates of Revenue for 2024 and 2025 disclose that the TTSEC remitted $7.56 million in penalties and fines to the Consolidated Fund in 2022 and $5.49 million in 2023. The revised estimate for the penalties and fines collected in 2024 is $6 million and the estimate for the collection in 2025 is also $6 million.

In a situation where the Ministry of Finance is reducing its subvention to the TTSEC—and the Commission proposes to triple many of its fees to market participants—would it not be possible for the body to retain its penalties and fines? Section 13 of the Exchequer and Audit Act provides the following: "All revenue shall be paid, at such times and in such manner as the Treasury may direct, into the Exchequer Account and the revenue shall form the Consolidated Fund, but— c) where the Treasury directs that any revenue, whether received by way of duty, fee, penalty or proceeds of sale, or by way of an extra or unusual receipt, shall be applied as an appropriation in aid of money provided by Parliament for any purpose, such revenue shall be deemed to be money provided by Parliament for that purpose, and shall, without being paid into the Exchequer Account, be applied, audited and dealt with accordingly…"

The definition section of the Exchequer and Audit Act states that 'Treasury' means the Minister (of Finance) "and includes such officer or officers in the Ministry of Finance as may be deputed by the Minister to exercise powers and to perform duties under this Act."

My non-legal interpretation of the above is that the Minister of Finance can direct that revenue received by the TTSEC by way of penalties or fines "shall be applied as an appropriation in aid of money provided by Parliament for any purpose," and that "such revenue shall be deemed to be money provided by Parliament for that purpose."

Does that section of the Exchequer and Audit Act allow the TTSEC to retain the penalties it collects? Also, it seems to me that section 27 of the Securities Act specifies that the TTSEC should receive an appropriation from the annual budget: "The funds and resources of the Commission shall consist of— (a) such sums as may be appropriated by Parliament; (b) all fees and other sums from time to time paid, or otherwise payable, to the Commission under this Act; and (c) all other sums or property that may in any manner become payable in any matter related to its functions and powers."

Since the penalties and fines levied by the TTSEC relate to its functions and powers, that seems to be another justification for the Commission to retain those funds.

2) The TTSEC's 2023 annual report outlines the fact that the regulatory body holds $84.51 million in cash and cash equivalents on its balance sheet as at September 40, 2023. Of that amount, $84.24 million is identified as being "cash with financial institutions."

Apart from the illogic of the regulator of the T&T securities industry not investing some of its cash resources in low-risk Government bonds, to earn additional income, is it unreasonable for participants in the securities market to expect that some of the cash on the Commission's balance sheet could be used to mitigate the tripling of fees?