



**ASSESSMENT OF THE ALLEGED MARGINALISATION OF LOCAL TOUR  
OPERATORS: REVIEW UNDER THE FAIR COMPETITION ACT AND  
INTERNATIONAL TRADE AGREEMENTS**

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**FAIR TRADING COMMISSION**

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## **Synopsis of tour operations in Jamaica**

1. Traditionally, local tour operators have supplied transportation services which involve transporting tourists to and from Jamaica's ports of entry as well as its various tourism entities such as hotels, attractions, crafts markets, etc. Those services are demanded by the tourism entities.
2. Traditionally also, key inputs for the supply of those services included: (i) a contract with a licensed tourism entity; (ii) licensed motor vehicle(s) and (iii) various regulatory permits such as a Tourist Board License.
3. From a value chain perspective, the local tour operators could be considered as intermediaries between foreign entities through which tourists may book their stay in Jamaica, and the tourism entities in the island.
4. More recently the local tour operators have diversified their offerings to include related activities such as hotel bookings, event planning, etc. In effect they have become Destination Management Companies (DMCs).

## **Entry of foreign DMCs**

5. Another recent development of importance is the implementation of the CARIFORUM-EU Economic Partnership Agreement ("the EPA"). This has resulted in the entry into Jamaica of foreign DMCs by either establishing a presence in the island or cooperating with select local DMCs.
6. The foreign DMCs could be considered to be vertically integrated entities in as much as they compete for tourist bookings in markets outside of Jamaica through a network of related travel agencies, airlines and hotels, and they also compete in Jamaica with the local DMCs.
7. Although the foreign DMCs are competing with the local DMCs in Jamaica, they are doing so using a different business model from the local DMCs. On the income side, the foreign DMCs, who enjoy the advantages of vertical integration, are able to secure contracts from tourism entities which hitherto may have been awarded to local DMCs.
8. On the expenses side, the foreign DMCs are able to contain costs by outsourcing value creation activities (for e.g. transportation or event planning) to the local DMCs at a price that is lower than what the local

DMCs may have otherwise obtained directly from the tourism entities. Notably, in this regard, some of the foreign DMCs do not own or operate licensed motor vehicles; preferring instead to outsource.

### **Alleged conduct**

9. Foreign DMCs are obtaining contracts from tourism entities in Jamaica at the expense of local DMCs; thereby marginalizing some local DMCs to the supply of outsourced services (for e.g. transportation or event planning) at reduced prices.

### **The issues**

10. The FTC has been requested to express its view on whether or not the alleged conduct could violate any provision of the Fair Competition Act (“the FCA”). This in turn requires the Staff of the FTC (“the Staff”) to consider the following issues:
  - (a) Whether or not the alleged conduct can be reviewed under the FCA; and
  - (b) Whether or not the alleged conduct can give rise to a violation of the FCA.
11. The first issue can be resolved upon the application of the law to the facts as given. The second issue, however, can only be resolved upon the application of the law to facts as established by way of economic analysis.
12. Consequently, so far as the second issue is concerned, this memo will only identify the broad legal framework within which the issue may be considered for further economic analysis. However a final determination of liability (if any) under the FCA must depend on the outcome of an economic analysis.
13. The FTC has also been requested to express its view on whether or not the competition provisions of the EPA are relevant to the alleged conduct.

## **Competition law Analysis**

*(a) Whether the alleged conduct is reviewable under the FCA*

14. This issue will be considered first in accordance with section 3 FCA, which deals with the “Application of the Act”. Notably, the section uses exclusionary language to prescribe the subject matter to which the statute does *not* apply. Consequently the necessary implication, supported by case law<sup>1</sup>, is that the FCA is of general application outside of section 3 subject matter. It is observed that the alleged conduct is not caught under section 3, and is thus not a subject matter excluded by the section. Consequently, on its face, the alleged conduct is a subject matter to which the FCA can apply.
  
15. Next this issue will be considered in accordance with Part III of the FCA, which deals with “Control of Uncompetitive Practice”. Part III contains the competition law provisions (sections 17 – 21) which would be relevant to the alleged conduct. Generally, those provisions apply to conduct which takes place in a “market”. Section 2(3) FCA indicates the statutory meaning of “market” as follows:

“Every reference in this Act to the term “market” is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.”
  
16. Based on the foregoing definition, a “market” within the meaning of the FCA must be: (a) in Jamaica; and (b) consist of either “goods” or “services”. Without setting out *in extenso* the definition of “service” which in turn implicates the definitions of “trade” and “business” under section 2(1), it is sufficient to conclude that the alleged conduct satisfies both conditions to be recognized under the statute as conduct which takes place within a “market”. Consequently, the alleged conduct can be reviewed under the competition provisions of the FCA.
  
17. Finally on this issue, in light of the fact that the alleged conduct satisfies the definition of “business” under section 2(1), it is also clear that the

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<sup>1</sup> **Fair Trading Commission v Digicel Jamaica Ltd & Anor** [2017] UKPC 28 at para 12; see also **The Fair Trading Commission v SBH Holdings Ltd & Anor** S.C.C.A. 92/2002, Judgment Delivered March 30, 2004, per Harrison J.A. at page 3.

FTC is clothed with the requisite jurisdiction under section 5(1)(a) FCA to consider and express a view on this matter.

18. The overall conclusion on this issue, therefore, is that the alleged conduct can be reviewed under the FCA.

*(b) Whether the alleged conduct could give rise to a FCA violation*

19. Under Part III of the FCA, sections 17 and 18 deal with multilateral conduct among firms (for e.g. cartels) while sections 19 – 21 deal with unilateral conduct by a dominant firm (otherwise called “abuse of dominance”). There being no allegation of multilateral conduct, the alleged conduct will be considered under the abuse of dominance provisions contained in sections 19 – 21.
20. The following issues will be briefly discussed in outlining the legal framework under section 19 – 21, which will frame the broad parameters of the economic analysis: (i) market definition; (ii) dominance; (iii) abuse of dominance; (iv) lessening of competition substantially; and (v) superior competitive performance.

(i) Market Definition:

21. The statutory definition of “market” under section 2(3) FCA, cited above, also indicates that a market may not only consist of goods and services but also other goods and services which are “substitutable for them.” This means that in any inquiry under the statute the relevant market should be determined based on an assessment of the degree of substitutability between the goods and services in question and other goods and services.
22. This, in turn, is of “essential significance” for determining whether or not a firm holds a dominant position within the meaning of section 19 FCA, and also for evaluating the competitive effects of that firm’s conduct under section 21 FCA.<sup>2</sup>

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<sup>2</sup> **Continental Can v Commission** Case C-6/72 at para 32; see also **United Brands Co v Commission** Case C-27/76 at para 22.

23. The assessment of the degree of substitutability between the services supplied by, and demanded from, DMCs in Jamaica and other services is a matter for economic analysis.

(ii) Dominance

24. Section 19 FCA defines the concept of “dominance” as follows:

“...an enterprise holds a dominant position in a market 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.”

25. Relevant case law has interpreted this concept of dominance to mean a firm that is distinguished by the freedom it enjoys to act in disregard of other market participants (for e.g. competitors and consumers) without suffering any detriment.<sup>3</sup>
26. Case law also indicates that in general a dominant position derives from a combination of several factors which, taken separately, may not necessarily be determinative.<sup>4</sup>
27. The following factors, when considered cumulatively in any given case, have been recognized in the case law as being sufficient to support a conclusion that a firm holds a dominant position: (a) market share in excess of 50%<sup>5</sup>; (b) exclusionary/exploitative conduct in the market<sup>6</sup>; (c) commercial advantages which could include vertical integration<sup>7</sup>, technological lead, superior sales force and high good will<sup>8</sup>; (d) the strength and number of competitors in the market<sup>9</sup>; and (e) barriers to entry for potential competitors which could include the need for exceptionally large capital investment and the risk of sunk costs<sup>10</sup>. Notably, this list is not exhaustive.
28. The assessment of whether or not any, some or all of those factors exist in relation to a foreign DMC so as to support a conclusion that it holds a

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<sup>3</sup> **Hoffmann-La Roche v Commission** Case 85/76 at paras 39 and 41.

<sup>4</sup> **United Brands Co v Commission** Case C-27/76 at para 66.

<sup>5</sup> **AKZO v Commission** Case C-62/86 at para 60.

<sup>6</sup> **United Brands Co v Commission** Case C-27/76 at para 68.

<sup>7</sup> **United Brands Co v Commission** Case C-27/76 at 70 – 81.

<sup>8</sup> **Hoffmann-La Roche v Commission** Case 85/76 at paras 48.

<sup>9</sup> **United Brands Co v Commission** Case C-27/76 at para 110.

<sup>10</sup> **United Brands Co v Commission** Case C-27/76 at para 122.

dominant position in the relevant market within the meaning of section 19 FCA is a matter for economic analysis.

(iii) Abuse of Dominance

29. Section 20 FCA generally provides that an "abuse" occurs where a dominant firm "...impedes the maintenance or development of effective competition in a market." Section 20(1) then enumerates examples of conduct by a dominant firm which are deemed to have that effect. Notably, this list of firm conduct is merely illustrative, and not exhaustive.<sup>11</sup>
30. Assuming *arguendo* that a foreign DMC holds a dominant position in the relevant market, it is worth observing that the alleged conduct concerns pricing in as much as the local DMCs believe that they have been relegated to taking the low prices offered by the foreign DMCs for outsourced services. It is therefore appropriate to consider section 20(1)(d), which concerns the imposition of unfair prices.
31. Although sub-paragraph (d) references "unfair purchase or selling prices", the concept of an "unfair price" is not defined under the statute. Relevant case law, however, indicates that this provision may be concerned with excessive pricing by a dominant firm.<sup>12</sup> The alleged conduct does not concern excessive pricing; instead the allegation is that the price offered is too low. Consequently, the alleged conduct may *not* raise any issue under section 20(1)(d).
32. Since the list under section 20(1) is not exhaustive, the Staff must go on to evaluate whether or not the alleged conduct could otherwise amount to an abuse within the meaning of section 20 FCA.
33. Based on relevant case law, the Staff takes the view that conduct by a dominant firm may generally amount to such an abuse if it strengthens the existing dominance of that firm to the detriment of consumers and the competitive structure of the relevant market.<sup>13</sup>
34. On this view, there is no need to prove an improper act or some factor of a subjective nature or to substantiate immorality, since an abuse must be understood as being an act the morality of which is immaterial but

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<sup>11</sup> **Continental Can v Commission** Case 6/72 at para 26.

<sup>12</sup> **United Brands Co v Commission** Case C-27/76 at para 250.

<sup>13</sup> **Continental Can v Commission** Case 6/72 at para 27.

which is objectively harmful to consumers and the competitive structure of the market.<sup>14</sup>

35. Consequently, assuming that there has been a prior finding of dominance, the economic analysis should consider the following in evaluating the alleged conduct consistently with the foregoing test of "abuse" under the statute: (1) whether or not any of the factors which underpinned the prior finding of dominance have been strengthened under the influence of the alleged conduct; and (2) whether or not consumers and rivals are harmed.

(iv) Lessening of competition substantially

36. According to section 21 FCA, the abuse of a dominant position must either have had, is having, or is likely to have the effect of lessening competition substantially in a market. This provides the legal basis on which the Commission could take action in relation to the alleged conduct, if it is found to be an abuse. Therefore, on the very language of the section, there must be a causal link between the alleged conduct and the lessening of competition substantially in the relevant market.
37. Although the FCA does not define the phrase "lessening of competition substantially" or otherwise indicate the legal standard connoted by the phrase, relevant case law indicates that the economic analysis should consider the following elements of market structure<sup>15</sup>:
- (a) The number and size distribution of independent sellers, especially the degree of market concentration;
  - (b) The height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
  - (c) The extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;

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<sup>14</sup> Commission submission on the meaning of "abuse" in **Hoffmann-La Roche v Commission** Case 85/76.

<sup>15</sup> **Re Queensland Co-operative Milling Association Ltd: Re Defiance Holdings Ltd** (1976) 25 FLR 169, 189.

- (d) The character of "vertical relationships" with customers and with suppliers and with the extent of vertical integration; and
- (e) The nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.
38. This list of elements is not exhaustive. Notably, this also indicates that the analysis should focus on the structural elements which generally frame the competitive process in the relevant market, as opposed to any specific relationship or individual case of rivalry between firms.<sup>16</sup>
39. Importantly, in determining whether or not the alleged conduct has caused a substantial lessening of competition, the economic analysis should evaluate the nature and extent of the structural elements of the relevant market that *would exist, but for* the abusive conduct.<sup>17</sup>
40. In this case, where the alleged conduct has occurred, or is occurring, the economic analysis should in practice consider the future state of those structural elements without the alleged conduct and compare it with the present state of those structural elements with the alleged conduct in order to determine what, if anything, has been lost.

(v) Superior Competitive Performance

41. Section 21(2) FCA obligates the FTC to consider whether abusive conduct which has had, is having or is likely to have an anti-competitive effect "is a result of superior competitive performance". Consequently, if the Staff finds that the alleged conduct is captured under sections 20 and 21(1), then it must also consider whether it is the result of superior competitive performance by a foreign DMC.
42. Notably, superior competitive performance may not be a defence to a claim of abuse of dominance.<sup>18</sup> It may not relieve a dominant firm from liability for an abuse. This is evident from the difference in language between section 20(2) and section 21(2). Furthermore, the superior

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<sup>16</sup> **Port Nelson Ltd v Commerce Commission** [1996] 3 NLZR 554, 564-565.

<sup>17</sup> **Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd** (1982) ATPR 40 – 315; (1982) 64 FLR 238

<sup>18</sup> Goldman. C, Bodrug. J, "Competition Law of Canada", 2003, Juris Publishing Inc, Chapter 9, section 9.06[1].

competitive performance provision does not require any balancing exercise between the pro-competitive (if any) and anti-competitive effects of abusive conduct.

43. The role of section 21(2) is reasonably clear from its language. Superior competitive performance is only a factor to be taken into account when determining the cause of the lessening of competition. While as a technical matter it may not excuse liability, the fact that the statute commands the FTC to consider it, does suggest that the FTC may decide, where appropriate, not to take action under section 21(1) where the conduct, though exclusionary in effect, originated from superior competitive performance.
44. Although the FCA does not define the phrase "superior competitive performance" or otherwise indicate the factors that should be taken into account, it is worth observing that a very similar provision exists under section 79(4) of the Competition Act of Canada.
45. While the Competition Tribunal in Canada has so far not expounded on the concept of "superior competitive performance" in its decisions, the following policy position of the Canadian Competition Bureau may provide some useful guidance on the role and impact of the provision in abuse of dominance investigations:

"If competitors leave the market or lose market share because a competitor is more efficient than its rivals or more effective in meeting consumer needs, the lessening of competition does not result from an abuse of market power, but rather it is a natural consequence of the competitive process. This factor is therefore included in the Act to ensure that efficiency, innovation and like considerations are given proper weight by the Tribunal in its assessment of the trade practices of a dominant firm or firms.

The indicia which may be included in considering whether the practice results from superior competitive performance may include economies of scale, scope or location, innovation and research, and distribution and marketing methods. As well, the origins of the firm's dominant market position could also play an important part in determining whether the practice results from superior competitive performance or the abuse of market power. In this respect, the Tribunal may consider whether the firm acquired its position in the market by way of natural growth stemming from superior skill,

foresight or industry, or by way of acquisition, financial power or below cost pricing."<sup>19</sup>

46. Arguably, therefore, section 21(2) could be seen as a statutory expression of the Equally Efficient Firm Test (EEF Test) in competition policy. The EEF Test is predicated on the premise that a competitive market consists of only the most efficient firms.<sup>20</sup> Therefore, from a competition policy perspective, the competition authority should not intervene even if the abusive conduct harms firms that are less efficient than the dominant firm.
47. In this case, even if the alleged conduct is found to be an abuse under sections 20 and 21(1), the Staff may nonetheless recommend that no action be taken if it also finds that the alleged conduct arises from the greater efficiency of the foreign DMCs over the local DMCs.

### **Economic Analysis**

#### Overview

48. Tourism is the most significant sector of the Jamaican economy. During 2016, Jamaica welcomed about 3.8 million visitors to the island. It is estimated that these visitors spent approximately USD 2,609 million. (Source: Jamaica Tourist Board). During 2016, tourism contributed 8.4 per cent of GDP. During October 2016, Hotels and Restaurants Services (which captures tourism activity) employed 9% of total labour force. (Source: Statistical Institute of Jamaica: Access March 2018).
49. The tourism sector comprises numerous products and services catering to visitors. These include hotel accommodations, dining and entertainment and various attractions such as beaches, amusement parks, and craft markets.
50. As such, ground transportation to and from tourist destination is a crucial sector within the tourism industry. To the extent that these

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<sup>19</sup> H. Westston, Deputy Director of Investigation and Research (Legal), "The Enforcement of Non-Criminal Trade Practices" (Address to the Canadian Bar Association, Ontario, February 5, 1987) at 36-37.

<sup>20</sup> Jenny. F, "Abuse of Dominance: Economic Analysis of Exclusionary Abuses" (PowerPoint Presentation to the Jamaica Fair Trading Commission, Montego Bay, Jamaica, September 2015) at 39-45.

various tourists are not located in the same area, ground transportation to and from their preferred tourist destination facilitates tourists' desire to discover all that Jamaica has to offer.

51. Ground transportation-based services are offered by persons typically called destination management companies (DMCs). Other names used to refer to these persons include tour companies, tour operators and contract carriage operators. DMCs require a license from the Jamaica Tourist Board to operate in Jamaica.
52. The largest DMCs in Jamaica include: Jamaica Tours Ltd.; Nexus Tours; Kiuki Tours and Transportation Ltd.; Tropical Tours Ltd.; Amstar DMC; Turisimo Ltd.; Holiday Services Ltd.; Caribic Vacations Ltd.; Tourwise Ltd.; Caribbean World Ltd.; Island Car Rental Ltd; and Island Roots.
53. DMCs normally promote their services on the website of the Jamaica Tourist Board (*jtbonline.org*). Others means of promotion includes social media, television and radio.
54. Up until recently, overseas travel and tour companies and local hotels have traditionally been the most important channels for customer traffic for local DMCs. Other sources include shopping centres, in-bond shops and gift shops.
55. Overseas travel and tour companies. Traditionally, local based DMCs shared a working relationship with overseas based travel partners. In particular, the overseas companies would offer visitors travelling to Jamaica the opportunity to book tours between various destinations in Jamaica. The local DMCs would advise the overseas companies of the term of their tour services and the information would be passed on to the visitors through the overseas based companies. These companies would then offer the Jamaica based companies to execute the tours, at a mutually agreed-upon terms. This relationship was mutually beneficial as it gave the overseas travel and tour companies the opportunity to offer a more convenient one-stop shop experience (air transportation, hotel accommodation, ground transportation, tour attractions, etc.) for its customers while the local based DMCs would have a steady flow of customers from big overseas travel and tour companies.
56. Local Hotels. Traditionally, local hotels represent another significant source of customers for local based DMCs. In particular, local DMCs

would have the opportunity to enter into service contract with hotels in which they provided transportation-based services for staff and guests. In turn, the local DMCs would agree to pay over to the hotel, an agreed upon percentage of revenues they received from the contracted services.

57. The terms and conditions under which local DMCs access customers through the aforementioned channels have changed recently.

#### The Challenged Conduct

58. The conduct which is central to this assessment is changes in the business relationship between the local DMCs and their primary sources of customers (i.e., overseas travel agents and local hotels).<sup>21</sup>
59. Overseas Travel Agents. Some of the larger overseas companies have recently been registering locally to offer tours. Accordingly, they have discontinued contracting with local based DMCs to offer tours and instead have integrated their businesses in domestic markets and are offering to hire these DMCs only to transport visitors to and from tourist attractions. The primary issue which arises in this new business relationship is that the overseas entities are negotiating to contract these local DMCs at rates which many local DMCs, but not all, indicate are below the cost of providing their service.
60. Hotels. Some hotels have introduced an intermediary in their relationship with local DMCs. In particular, recently hotels have established a single individual to interface with local DMCs. This individual, in turn, has altered the terms and conditions under which local DMCs access the hotels' staff and guests (visitors). While DMCs were dealing directly with the hotels, they were required to pay only a proportion of their revenues earned to offer their service to the hotel's guests and staff. The intermediary, however, introduced a two-part tariff compensation system where local DMCs were to pay a fixed sum to offer their service in addition to a proportion of the revenues generated.

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<sup>21</sup> The challenged conduct was determined through interviews with six local DMCs.

### Assessment of Competitive Effects

61. When assessing the competitive effects of any challenged conduct, it is customary to identify the boundaries of markets which could be affected. This is usually referred to as definition of the relevant market(s).

### The Relevant Markets

62. In this case, there are three markets which are relevant to assessing the likely effect of the challenged conduct: (i) The market for air/sea transportation to Jamaica; (ii) the market for tourist accommodation in Jamaica; and (iii) the market for ground transportation between tourist destinations within Jamaica
63. All three markets are relevant to assessing the competitive effects of the challenged conduct because consumers in the market for transportation to Jamaica and the guests in hotels typically form the customer base for local DMCs which offer ground transportation services between tourist destinations. In other words, visitors usually make their decision about taking a tour either (i) at the point when they are booking their flights/hotels with overseas travel agents or (ii) during their stay at the hotel. Further, overseas travel agents and local hotels have significant influence over which local DMC is ultimately selected by visitors.
64. The overseas travel agents and the local hotels act as “gate keepers,” controlling the access of local DMCs to their travelers/guests seeking ground transportation to tourism destinations in Jamaica.

### Market Power Assessment

65. Market power assessment measures whether and the extent to which suppliers can keep prices above the competitive level. In this matter, however, we observe what is referred to as buyer power.
66. Buyer power refers to the pressure buyers of a product or service can exert on the supplier to negotiate a lower price. Unless this buyer power is mitigated, buyer power may lead to prices below the competitive level.
67. In this instance, overseas travel agents and hotels influence the decision of a significant number of visitors seeking ground transportation and therefore have the ability to negotiate lower prices.

68. The overseas travel agents have long since had the *opportunity* to negotiate lower prices. We likely did not observed them exercising this buyer power until recently, however, because they had insufficient *incentive* to do so. Before the foreign based DMC's integrated their businesses in the domestic markets (tours and hotels), the prices negotiated with the local DMCs were simply passed on to the visitors; overseas travel agents did not benefit directly from lower rates and higher rates did not make them any worse off.
69. When these overseas travel agents entered into the domestic market, however, they acquired the relevant incentives to negotiate for rates ground transportation. Information received by the Fair Trading Commission suggests that they have negotiated significantly lower rates. Notwithstanding that some local DMCs refuse to do business at the lowered prices, the buyer power remains unchecked because there are local DMCs who accept the lower rates.
70. We therefore conclude that overseas travel agencies have been exerting significant buyer power in the market for ground transportation services between tourist destinations in Jamaica.

#### Assessment of Competition Harm

71. In assessing whether and the extent to which the challenged conduct is likely to have anticompetitive effects in a market, we typically evaluate whether there is harm to consumers and suppliers in the market. If there is likely to be harm to both consumers and suppliers in a given market, we will conclude that the challenged conduct is likely to have anticompetitive effects; otherwise we conclude that the challenged conduct is unlikely to have anticompetitive effects.

#### Harm to Suppliers

72. Harm to suppliers in a market is typically evidenced by increased costs, market foreclosure or diverted revenue.
73. Integration of Overseas DMCs. As indicated earlier, overseas travel agents have successfully negotiated with some local DMCs to transport visitors at a price as low as USD 9 per tourist. Before the integration of overseas travel agents into domestic markets, local DMCS were securing contracts to transport tourists for as much as USD 26 per tourist.

74. Local Hotels Using An Intermediary. As indicated earlier, some local hotels have opted to use an intermediary to handle the interface between visitors, staff and local DMCs. The intermediary has altered the terms under which the local DMCs access the visitors and staff. Before the intermediary, local DMCs were required to pay only a proportion of their revenues. This means that if they did not generate any sale in a given month, they were not required to pay the hotel. Under the intermediary, however, they are required to pay a fixed fee as well as a proportion of their revenue. This means that the local DMCs were required to pay over to the intermediary, an amount even if no revenue was generated.
75. Accordingly, we conclude that the challenge conduct is likely harming the local DMCs by reducing revenues.

#### Harm to Consumers

76. Harm to consumers in a market is typically evidenced by higher price, lower quality, fewer variety or slower rates of technological innovation.
77. Visitors to Jamaica are the final consumers in the market for ground transportation to tourist destinations in Jamaica. None of the information reviewed indicates that the challenged conduct could harm consumers.
78. Accordingly, we conclude that the challenge conduct is unlikely to harm consumers.

#### Conclusion on Competitive Effects

79. Based on our analysis, our overall conclusion is that the challenged conduct is unlikely to have the effect of substantially lessening competition in any of the relevant markets described in this report and therefore unlikely to breach the Fair Competition Act.

#### Recommendation

80. Although the overall conclusion is that the challenged conduct does not breach the Fair Competition Act, the analysis revealed that the market for ground transportation services to tourist destinations is subject to significant buyer power. This means that if there is no intervention, the local Destination Management Companies are all likely to exit the market

in the foreseeable future. We offer the following as a means to avert such an outcome.

81. One way for local DMCs to remain in the market is for them to source visitors directly from the international market for visitors to Jamaica. We are aware that some local DMCs promote themselves at international trade shows such as the World Travel Market. What is being recommended here is for a pooling of resources to support a central promotion of all local DMCs on a wider scale in the international market(s) for visitors to Jamaica.

### **Trade law analysis**

#### *(a) CARIFORUM-EU EPA*

82. Although Article 111 of the EPA is headed "Prevention of anticompetitive practices" it imposes no direct prohibition or obligation against such conduct, which could be actionable in domestic law. Instead, the language of Article 111, indicates that the obligation there imposed is an indirect one which only requires the contracting State Parties to maintain or introduce measures that address various forms of anticompetitive conduct. Jamaica, as a Signatory CARIFORUM State, complies with this Article with the enactment and continuing enforcement of the FCA.
83. Furthermore Article 111 should be read together with Article 125 - 128. In this regard, even if the alleged conduct is recognized as an anticompetitive breach, the remedy is under the EPA is information exchange and cooperation between the European Commission and the CARICOM Competition Commission. The FTC has no jurisdiction under the EPA.