

# Compete

Issue No. XXIII, December 2018

# FTC

*after*

# 25

*years*



## FAIR TRADING COMMISSION

*Promoting competitive markets*



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# Compete

## Foreword

This year marks the 25<sup>th</sup> Anniversary of the Fair Trading Commission. In celebration of this milestone, this is a special issue of our annual magazine, **Compete**. The theme, “**FTC after 25 years**” highlights the FTC’s past work, achievements and the way forward for competition law enforcement in Jamaica.

Established by the Fair Competition Act in 1993, the FTC has responsibility for the maintenance and encouragement of competition in the conduct of trade and business in Jamaica. Over the years, the FTC has carried out its functions through public education, advocacy and law enforcement.

Over the past 25 years, the FTC has encouraged, promoted and stimulated competition in many industries including telecommunications, financial services, pharmaceuticals and petroleum. When markets are competitive, consumers have access to high quality goods at affordable prices.

The articles included in this issue touch on several topics including competition in the transport sector, the importance of a transparent and comprehensive merger control system in Jamaica and market definition under the Fair Competition Act.

In addition to the articles, the magazine highlights some of our achievements since 1993, major work carried out in 2018 and the outlook for the development of competition law in 2019 and beyond. We have also included reflections from some of the Commissioners who have served us at different stages of our life; as well as congratulatory messages from the highest level of the country’s leadership.

We know you will enjoy this special edition of

**Compete** as much as we enjoyed putting it together.

Happy reading!

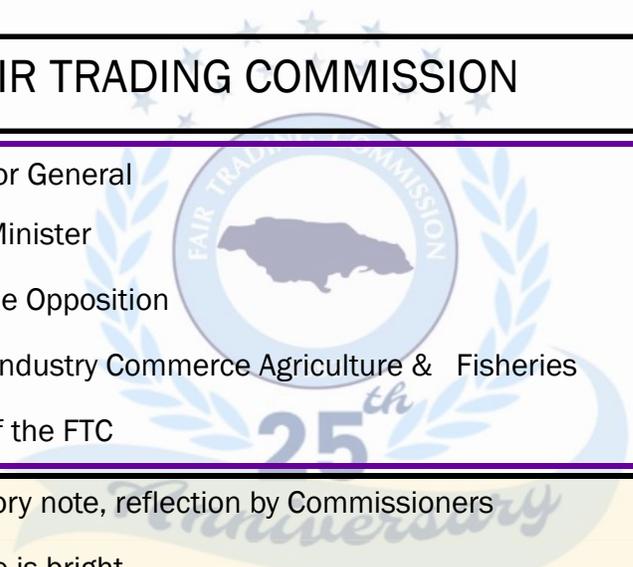
*Kristina Barrett-Harrison*

*Chairperson, Magazine Committee*

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# ABOUT THE FAIR TRADING COMMISSION

The Fair Trading Commission (FTC) is a statutory body established in 1993 to administer the Fair Competition Act (FCA), which was enacted in March 1993. The FCA provides for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica; and was established to ensure that the benefits of the competition process in Jamaica are not hindered by anti-competitive activities. Its objectives are to:

*Ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy.*

*Encourage competition in the conduct of trade and business in Jamaica.*

*Ensure that consumers are provided with better products and services, and a wide range of choices at competitive prices.*

Competition lies at the heart of any successful market economy and is crucial to the efficient allocation of resources and ultimately to the benefit of consumers. The FTC works to ensure that suppliers of goods and services are given the proper incentives to provide consumers with the widest possible choice of quality goods and services at competitive prices. The functions of the FTC as set out in section 5 of the FCA are:

- To carry out, on its own initiative or at the request of the Minister or any other person, investigations in relation to the conduct of business in Jamaica in connection with matters falling within the provisions of the FCA;
- To advise the Minister on matters relating to the operation of the FCA;
- To make available to businesses and consumers, general information with respect to their rights and obligations under the FCA;
- To undertake studies and publish reports and information regarding matters affecting the interests of consumers; and
- To co-operate with and assist any association in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the FCA.





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on the celebration of

**25**  
**STERLING**  
**YEARS**

of Promoting  
Competitive Markets.

We wish you continued success  
as you strive to promote and  
enforce fairness in the conduct  
of business in Jamaica.



*The JCAA...committed to the development of civil aviation in Jamaica.*

*Message from*

## **THE GOVERNOR-GENERAL**

His Excellency, The Most Honourable Sir Patrick Allen, ON, GCMG, CD, KSt.J



Twenty-five years ago when the world economy was beginning active engagement with the principles of responsible competition, the notion of competitiveness had to be analyzed and understood as a contributor to efficiency in production and to economic growth.

It was that environment in which our Fair Trading Commission saw the light of day. Since then it has grown in influence, serving the Jamaican consumers as its principal constituency while also encouraging improvements in market efficiency.

The Commission has consistently found the balance between the rights and responsibilities of providers of goods and services on the one hand and, on the other, the fair treatment of the consumers. Legislation, information, and choice availability, are among the principal instruments which the Commission has used effectively over the years in the successful pursuit of its mandate, and the benefits have been appreciated by the society at large.

We note the Commission's strategic collaboration with other related agencies, its investment in training its own staff, and the provision of Competition Law Courses and Consultancy Services. These initiatives have clearly helped to support a framework of integrity in business and to build consumer confidence.

I extend best wishes for the events marking the twenty-fifth anniversary of the Fair Trading Commission and wish the Agency continued success as its evolution continues in the years ahead. Jamaica is a better place because of your contribution to national development.

*Message from*

## **THE PRIME MINISTER**

The Most Honourable Andrew Michael Holness, ON, MP

The Fair Trading Commission (FTC) has operated as the vanguard of consumer protection for 25 years. This milestone has been achieved by strong leadership and fearlessly executing the mandate of the Commission to ensure the public is served. I therefore congratulate the FTC on the significant job it has done over its 25 years of existence.

Established in 1993, the FTC was given a mandate to administer the Fair Competition Act. The Commission was charged with investigating commercial activities to determine whether businesses were engaging in anti-competitive practices and ensure that consumers were aware of any unfair trade in the market place. In that regard, the FTC has been on the ground encouraging competition in trade and business to ensure businesses do not abuse their positions of dominance to engage anti-competition strategies. Even as businesses protect their profit margins, the Commission must be the vanguard against negative practices such as price fixing, bid rigging, boycotts, and anti-competitive agreements.

I must commend the FTC on its work in public education. I note that, as part of your public education strategy, critical stakeholders are targeted to ensure that they are trained in the areas of law that is important to the work of the Commission. The FTC has also collaborated with various Government entities, financial institutions and sectors to improve their operations and processes.

I note that, as part of your competition enforcement, the FTC has successfully challenged several high-profile companies and sectors in order to get redress for consumers. I also



encourage you to continue with competition advocacy as yours is one of the voices that consumers can rely on to get them much sought after justice and to keep businesses honest.

I am confident that the consumers of Jamaica are better for knowing that the FTC is protecting their interests. My administration will continue to support strategic efforts to transform the sector and efforts to ensure the rights of the consumers are protected.

I extend heartiest congratulations to you as you mark this significant milestone. I wish you many more years of successfully championing the rights of our consumers.

*Message from*

## THE LEADER OF THE OPPOSITION

Dr. Peter Phillips MP, President of the People's National Party

I am pleased to have been invited to add this message to those expressing solidarity and good wishes to the Fair Trading Commission (FTC) on the occasion of your 25<sup>th</sup> Anniversary.

When the Fair Trading Commission came into being in 1993, globalization was well on its way and there was a clear and present necessity to create an environment in which businesses in Jamaica could engage in legitimate activities without the impediment of unfair competition. The Commission offered a legal platform for fair trading in the exchange of goods and services, and to ensure that all elements of the Jamaican free market system provide equal and fair opportunity to all.

It is reasonable to conclude, based on all the evidence available that due to the existence and work of the FTC, Jamaican businesses can compete locally and internationally, adhering to standards of quality and safety, and bringing the attendant benefits of competition to our local marketplace. Perhaps the most challenging of your directives, is to ensure that the

Jamaican consumers are always exposed to the highest quality of goods and services at the best possible prices.

Nonetheless, despite all your successes, the FTC must maintain its vigilance to ensure that there is no contravention of the Act, and to persist in taking steps to inform the public on matters pertinent to the interests of consumers. There is always the risk of abuse by a dominant player and unfair competition is an ever-present possibility; however, we offer our encouragement to you to remain steadfast in the protection of the Jamaican consumers and ensure that all legitimate business enterprises have an equal opportunity to participate fairly in the Jamaican economy.

I would like to offer best wishes to the FTC as you embark on your planned series of activities and events to celebrate your 25<sup>th</sup> Anniversary, a very important milestone.



*Message from*

## THE MINISTER OF INDUSTRY COMMERCE AGRICULTURE & FISHERIES

Honourable Audley Shaw, CD, MP

I wish to congratulate the Fair Trading Commission (FTC), on 25 years of stellar service to the citizens of Jamaica and our economy.

Through its mandate of maintaining and encouraging competition in the provision of goods and services in Jamaica, the FTC has stridently seen to the promotion of economic efficiency and consumer welfare.

The role of the agency in ensuring a fair and competitive climate for consumers under the Fair Competition Act (FCA) has engendered a climate of inclusion and deeper satisfaction among local businesses as well as consumers.

In addition, as part of its function to undertake studies and publicize reports and information regarding matters affecting the interests of consumers, the FTC's work in the areas of Agriculture, Port Services and Special Economic Zones, among others, has also paved the way for strategic action in these areas.

I wish to commend the directors and staff of the FTC on the keen discharge of their roles toward the fulfillment of the agency's mandate.

Our economic advancement as a nation depends on a transparent and fair ecosystem in which consumers and businesses are able to interact on a competitive yet fair playing field. I salute the FTC on its drive to create and maintain this space and wish the agency every success in its future endeavors.

*Message from*

## **THE CHAIRMAN OF THE FAIR TRADING COMMISSION**

Dr. Derrick McKoy, CD, JP



A lot has changed in Jamaica since the introduction of the Fair Competition Act in 1993. To be sure, we now live in a much more highly regulated commercial environment than we did then. For example, commercial banks are now professionally supervised by the Bank of Jamaica, and no longer by the Minister of Finance, our public utilities now fall for regulation by the Office of Utilities Regulation, financial services are regulated by the Financial Services Commission, and we now have the benefit of a statutorily established Consumer Affairs Commission. There is, however, no greater change in our commercial relations than in the current competitive environment for the delivery of goods and services.

It may be fair to say that the Jamaican consumer no longer worries about uncompetitive practices such as the limiting of production or the restrictive sharing of markets. Restrictive trade practices such as bid-rigging, double ticketing, sale above the advertised price, and price fixing are no longer commonplace. The practice of tied selling, or the marrying of goods and services, whereby someone supplies goods or services as a condition of supplying other goods or services, at one time dominated the local marketplace. Today, one would be surprised if one saw an example of this in Jamaica. Much of this change must be attributed to the role played by the Fair Trading Commission.

It is no longer doubted that competition law and policy are important for national growth and

development, and it must be acknowledged that over the last 25 years the Fair Trading Commission has played its part in our national quest for improved living standards. We are now witnessing the spread of competition law globally. Increasingly countries in all parts of the world recognize the utility of competitive markets and the benefits to be derived from a legally enforced fair competition regime. Jamaica's Fair Trading Commission can take pride to have been at the forefront of this development in the Caribbean, having been established in 1993.

After 25 years it is appropriate for the Fair Trading Commission to take stock of what it has already achieved, and reflect on what further may be accomplished over the next few years. For example, it is now appropriate to reintroduce to the public square the debate on the desirability of a merger regime and to raise the question whether the current provisions on abuse of dominance is adequate to the task.

So, the Fair Trading Commission will now embark on a new chapter with consideration being given to further amendments to the legislation to address competition concerns in existing global and emerging industries. The Commissioners and Staff maintain their commitment to abide by the spirit and the letter of the Fair Competition Act and to engage consumers, businesses, regulators and other stakeholders in a grand partnership to achieve greater national development. In doing so, the Fair Trading Commission looks forward to your continued support.

*Musing, Congratulatory Note,  
Reflection*

**BY COMMISSIONERS**

**A Remarkable Institutional  
Architecture**

In any economy where the capitalist mode of production underlies the core principles on which economic arrangements are built, the need for a superstructure to ensure that economic activities are carried out in a fair, efficient and equitable manner is most welcomed. For, the primacy of individual rights and the freedom to act in one's self interest; which are core characteristics of the capitalist system, do not always lead to outcomes that coincide with the welfare needs of the general population. The capitalist state therefore, has to provide mechanisms to regulate excesses that might derive from individuals' freedom to act while at the same time, incentivize individuals to invest and create demand for goods and services that will redound to growth of the economy. The Fair Trading Commission, which was birthed in 1993 carries out this role in the context of the Jamaican economy.

In its short 25 year stint, the Commission carried out its role as the conscience of the capitalist market system, with distinction. Through dedicated leadership and a highly competent team, the FTC provided some of the most carefully researched analyses on the nature of the competition landscape in Jamaica. They keep a close watch on developments across industries to ensure that consumer welfare is not undermined. The people of Jamaica should be very proud of the work that this commission continues to do to protect the welfare of all citizens from the excesses of the unbridled capitalist mode of doing business.

I salute the leadership and hardworking team at the FTC and wish them continued success for another 25 years.

*Prof. Densil A. Williams  
Commissioner, 2012 - 2016*

My tenure as a Commissioner of the Jamaica Fair Trading Commission (the FTC) began in 2012 under the leadership of Chairman Christopher Samuda. Serving on the board of the FTC was a unique privilege and an extremely rewarding experience.

I was honored to serve alongside some incredibly talented and dedicated fellow Commissioners. The Commissioners shared a common belief that we could make Jamaica stronger by creating equal opportunities for businesses operating or seeking to participate in the Jamaican economy. We also recognized and embraced the vision that the FTC, the oldest such institution in the Caribbean, had a role to play in building out the competitive framework of the CARICOM Single Market and Economy. It was also a pleasure to work with the management and staff of the Commission. One of the main things that I have always admired with the FTC is the dedication and competence of its management and staff.

The FTC boasted a number of successes during this period. It concluded, *inter alia*: (i) a number of investigations of anti-competitive conduct in Jamaica; (ii) an assessment of the RJR/Gleaner merger; and (iii) matters before the Supreme Court and Court of Appeal in Jamaica. The Commission also successfully hosted the IDB/OECD Latin America and the Caribbean Competition Conference (LACCF) in 2015 at the Montego Bay Conference Centre.

One accomplishment of the FTC that stands out for me culminated after my tenure as Commissioner ended in 2016. This was the successful appeal before the Judicial Committee of the Privy Council in the matter of the *Fair Trading Commission v Digicel Jamaica Limited and another*. The Commissioners were adamant that the Commission should not hire British barristers to argue the case before the Privy Council. It was our considered opinion that the skilled legal team of the Commission should make these representations. They did, and they succeeded. With this ruling, it is now clear that the Commission has the jurisdiction to intervene in the telecommunications market in Jamaica and further that, in the absence of merger regulations, section 17 of the Fair Competition Act applies to mergers and acquisitions.

I hereby congratulate the Commission on its 25<sup>th</sup> Anniversary. I am confident that the Commission will continue to thrive as an institution and to contribute to the development of Jamaica as Jamaica seeks to fulfil its Vision 2030 mandate.

*Michelle Brown  
Commissioner, 2012 - 2016*

*Musing, Congratulatory Note,  
Reflection*

## BY COMMISSIONERS

The role of an agency such as the Fair Trading Commission in a free market economy should never be underestimated. By bringing the Fair Competition Act into force 25 years ago, our legislators in Parliament recognized that even in a liberalized economy there was need for a mechanism to ensure a level play-field and fair play for all.

Quoting in part from the Act: *"The functions of the Commission shall be (a) to carry out, on its own initiative or at the request of any person such investigations or inquires in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices; (b) to carry out such other investigations or inquires as may be requested by the Minister or as it may consider necessary or desirable in connection with matters falling within the provisions of this Act."*

My direct involvement with the FTC as a Commissioner spans just over two years but my awareness of its functions goes back many years. I was therefore pleased to accept the invitation to serve, knowing that in so doing I would be utilizing another avenue of making a meaningful contribution to the development of my country.

As we move closer to the year 2030, there is a growing consciousness that our country needs a commitment from all well-thinking citizens to play their part if we are to achieve the goal of our country, Jamaica, in becoming "the place of choice to live, work, raise families and do business."

I see the Fair Trading Commission playing a significant role in this by ensuring that there is fair competition in all sectors of business especially if we are to continue to develop and attract new businesses.

*Stuart Andrade*

*Commissioner, 2016 - Present*

Derrick McKoy and I joined the FTC at the same time in January 1996. We joined Chairman Shirley Playfair and Commissioners Aloun Ndombet-Assamba and Aulous Madden in completing the statutory number of Commissioners. I served until March 2010, becoming Chairman between March 2002 and September 2007.

The early days were challenging as we built a bicycle and rode at the same time. Competition enforcement was new to the Commissioners and Staff. There was much to learn. Competition policy is really economics, codified into law. Addressing economic issues through a legal framework is never easy. Sections of the law are per se (as stated) and sections rely on rule of reason (an action may be permitted if there is a larger social benefit). Competition enforcement is not purely legal or purely economics, it is almost a new discipline drawing from these pillars.

The FTC was created as a part of the infrastructure for a newly liberalized economy. It operates in a climate of great mistrust of markets by many. At the same time some feel that no attempt should be made to hinder market participants from pursuing their own self-interest. This argument is usually couched in some anti-bureaucratic sentiment or issues of competence. The conduct of the robber barons in the United States in the late nineteenth century demonstrated the need for a competition agency and led to the creation of the first competition agency, the US Federal Trade Commission (USFTC) in 1914.

The early years of the FTC were spent mainly on consumer redress issues, as there was a greater level of comfort in dealing with these issues. Eventually there was a pivot toward anti-trust activities. The Fair Competition Act was essentially a cut and paste job from different acts from around the world. It was only by applying it were we able to discover its initial internal contradictions.

Legal challenges showed up a major flaw in the FCA; granting to the Commissioners the authority to investigate and adjudicate. I am a strong advocate for a fix which keeps the FTC as a single entity with Chinese Walls between investigation, divested solely to Staff and Adjudication, to the Commissioners, as is the case with the USFTC. This structure is best suited for our environment: size, available skills etc. I continue to hope for a statutory staggering of the appointment of commissioners.

May the FTC continue to grow from strength to strength.

*Peter-John Gordon*

*Chairman, 2002 - 2007*

*Commissioner, 1996 - 2010*

# FTC AT 25: THE FUTURE IS BRIGHT

The journey since the doors of the Fair Trading Commission (FTC) opened 25 years ago has been challenging and rewarding in various ways and we have seen the Agency grow in stature and in technical capacity. Whereas our first 12 years was for the most part, spent on consumer protection and interfacing directly with consumers and business enterprises to obtain redress on behalf of the general public; the other 13 years has seen us take giant steps towards becoming a strong competition authority: steering government policy through advocacy, taking significant matters to Court thereby building valuable case law, and lobbying for amendments to the Fair Competition Act (FCA) that will make for more effective enforcement.

The organization is being built steadily on its core values of transparency, confidentiality, effectiveness and independence to ensure that we remain responsible and accountable for our actions and maintain a high level of credibility. Internal processes and procedures were created with these core values in mind and have been strengthened over time to keep in line with our economy's changing environment. Certification of our management systems by the International Organization for Standardization (ISO) should be achieved by 2019 where we will be ISO 9001:2015 certified.

Equally important to the growth of an organization is the growth of its Staff. With the assistance of several international developmental agencies, the Staff has over time, obtained specialized training in competition policy that has yielded to the benefit of the FTC and by extension, to our economy. Staff turnover has been very low over the past decade and the FTC team has been working closely to remain current with both the local and international business environment. I commend the Staff for remaining committed, dedicated and focussed in making a meaningful contribution to the growth of Jamaica.

In the last 13 years the FTC has made over 48 advocacy efforts geared toward introducing, preserving or enhancing competition in several markets in Jamaica. Influencing government policy at various stages of the relevant process is an important function for which the impact is oftentimes unquantifiable. It also signifies an acceptance by policy makers our expertise in competition matters. During this 13 year period, the FTC's advocacy efforts covered several key sectors including telecommunications, petroleum, financial, energy, construction, health, agriculture,

tourism, transportation, gaming and education. Notably, the FTC's interventions have been particularly successful in the telecommunications, petroleum, agriculture and construction sectors.

On the regional scene the FTC has through its life, been front and centre of developing consumer protection and competition policy within CARICOM. We have guided the formulation of legislation and/or policy of not only CARICOM itself, but also of the CARICOM Competition Commission and every member state that has established a consumer protection and/or a competition policy regime. In particular, our work in the OECS Member States is unprecedented, as this ongoing interface has produced several new initiatives and developments in the OECS.

The future of the FTC is bright. As we move into the next decade one can expect the FTC to have stronger enforcement tools that will arise from amendments to the Fair Competition Act (FCA). In recent times, there have been many mergers, acquisitions, joint ventures and consolidations of firms within several sectors of Jamaica's economy; and work is afoot to have expressed provisions that speak to a pre-merger notification regime included in the FCA. A formalised merger review process is considered as one of the 3 pillars of competition law and merger review is recognized by practitioners worldwide as a driver of economic growth. This is therefore another step towards further facilitating the development of markets, encouraging innovation as well as shaping business behaviour to the benefit of consumers.



**David Miller**  
**Executive Director**



*Congratulates*

the

# FAIR TRADING COMMISSION

on your

# 25<sup>th</sup> Anniversary



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# Congratulations!



**Congratulations on 25 years of excellent service!**  
We at JPS salute you for your sterling contribution  
to the growth and development of Jamaica.



# What matters most

1993 - 2018

PAGE TWENTY-EIGHT

THE GLEANER, THURSDAY, SEPTEMBER 9, 1993

## Fair Competition Act

takes effect today



**FAIR COMPETITION**

Creating a New Environment for Consumers & Businesses.

1993

The Fair Competition Act took effect on September 9, 1993. The doors of the FTC opened in November 1993.

1994

FTC's intervention ended discrimination and collusive practices regarding commission paid to advertising agents.

1995

Telecommunications of Jamaica (TOJ) rolled back its Internet access charges after the FTC had determined that the charges were unjustified and that TOJ's action represented an abuse of dominance.

1996

Agreement with TOJ removing the requirement that consumers use only TOJ's equipment in their homes.

1997

First issue of *Competition Matters*, an annual publication which highlights the work of the FTC. In 2013 the magazine was renamed, '*Compete*'.

1998

Agreement with Restaurants of Jamaica regarding misleading representation with respect to a special meal offering.

1999

Agreement with Cable & Wireless Jamaica Limited regarding misleading representation and abuse of dominance relating to its messaging service.

2000

Launch of the Annual Shirley Playfair Lecture, held in honour of the Mrs. Shirley Playfair, the first Chairperson of the FTC.

- 2001** Court of Appeal Judgement handed down in suit brought by the Jamaica Stock Exchange against the FTC. It later formed the basis for amendments to the Fair Competition Act.
- 2002** Following on research into the conduct of Banks, the FTC collaborated with the Jamaica Bankers Association to ensure that information such as the posting of exchange rates, advertising of interest rates, computation of interest charges for credit card purchases, are clearly disclosed to customers.
- 2003** Issued Guidelines to consumers for the purchase of used motor vehicles.
- 2004** Agreement reached with the individual airlines and the Board of Airline Representatives of Jamaica that all airline advertisements indicate the cost of an airline ticket, as well as the relevant taxes and levies.
- 2005** The principle that intention is not a consideration for the offence of misleading representation was established in Judgement in favour of the FTC in the matter brought against SBH Holdings Limited and Forrest Hills Joint Venture Limited.
- 2006** FTC's Court action led to consumers who had purchased a particular type of vehicle from Key Motors Ltd., obtaining replacement of the defective dashboards and full compensation for related loss and inconvenience caused.
- 2007** Made representation in Parliament on the Jamaica Dairy Development Board Bill advocating that farm gate prices of milk be determined by individual farmers instead of being set by the Board.
- 2008** Comprehensive revision of Case Selection Criteria. The Criteria guides the process of selecting and prioritizing matters to be investigated; and ensures transparency, certainty and uniformity in the case selection process.
- 2009** Completed a 4-year Inter-American Development Bank funded project geared at Strengthening the Technical Capacity of the FTC.
- 2010** Issued Report on fees and charges of Commercial Banks, following which there was an increase in promotional rates, rebates and removal of some fees.
- 2011** Filed suit in the Supreme Court against Digicel and Claro regarding their acquisition agreement.

## FTC appears on JIS Think Tank

**O**n August 24, 2018, FTC senior Staff participated in a Jamaica Information Service (JIS) Think Tank session. The Think Tank is a newsmaker event where participants discuss select special areas of interest, following which they field questions from JIS journalists. Excerpts from the discussions are disseminated through print and social media.

The FTC participants were Mr. David Miller, Executive Director, Dr. Delroy Beckford, Senior Legal Counsel and Dr. Kevin Harriott, Competition Bureau Chief. They discussed the work of the FTC over its 25 years, which included the transition from being a consumer-focused organization to becoming a full-fledged enforcer and advocate of competition policy; the FTC's plans for the next 5 years; as well as business enterprises' general responsibility under the Fair Competition Act (FCA).

The FTC team briefly described market studies that are slated to be completed by March 2019. These include studies on port services, airport services and the banking sector. Arising from this, the discussion evolved into the FTC's collaboration with several Government Ministries and Agencies during its history; this, as the FTC continues to play a significant role in guiding policy and legislation.

The discussion extended into policy recommendations such as the importance of having a merger review framework and the implications of the 2017 Privy Council decision, which clarified that the FCA applies to mergers and acquisitions. The session closed with Dr. Harriott explaining the economics of competition law and the benefits of a market economy; as well as the FTC's efforts in educating the public through conducting structured workshops and short courses targeted primarily at attorneys, regulators, firms and academia.



*more of What matters most...*

**2012**

FTC raised concern that the diesel fuel sold in Jamaica is unsuitable for use in some diesel-powered vehicles, due to the high sulphur content. Ultra Low Sulphur Diesel was introduced to the market the following year.

**2013**

FTC launched its new logo and new tagline.

**2014**

FTC conducted Competition Law and Policy Courses, which were accredited by the General Legal Council under the Continuing Legal Professional Development program.

## FTC engages graduate students

**A**s part of the celebrations of the FTC's 25 years of existence, the Staff offered to appear as guest lecturers at several departments at the University of the West Indies (UWI) and the University of Technology (UTech). Three lectures were delivered.

Dr. Kevin Harriott, Competition Bureau Chief, presented at UTech's College of Business and Management and at the Department of Economics (UWI). Both presentations were on the general economic principles underlying competition law. He engaged graduate students in areas ranging from consumer behaviour, preferences and demand to the behaviour of firms as they strive to maximize profits through competing for consumers' atten-



Ambassador Stewart Stephenson, former Executive Director at the FTC, shares in the discussion at the Faculty of Law, UWI.

tion; and the reliance of economic tools when assessing public policy. Issues such as the social benefits of price discrimination and protection as well as the benefits to be derived from competition generated much discussion. One student commented on seeing more clearly the practical applications of microeconomics, which is the branch of economics that underpins competition law.

The third presentation was held at the Faculty of Law, UWI. Under the topic 'Demystifying Misleading Advertising under the Fair Competition Act (FCA)', Mr. Marc Jones, Legal Officer engaged an audience of attorneys, academics and students in a discussion on the nuisances and finer points of the elements of section 37 of the FCA. A critical aspect of section 37, which deals misleading advertising, is the determination of when a representation may be deemed to have been made to the public. In exploring this aspect, Mr. Jones indicated that 'silence' could in some jurisdictions constitute a representation to the public; but note that in Jamaica, based on precedents, an explicit statement may be needed for there to be a determination of a representation.

This session was a collaboration between the FTC and Mona Law. The FTC plans to continue collaborating with educational institutions to strengthen the competition culture in Jamaica.

**2015**

FTC hosted the 13<sup>th</sup> Annual Meeting of the Latin American and Caribbean Competition Forum.

**2016**

FTC collaborated with the Organization of Eastern Caribbean States (OECS) to assess the consumer protection landscape in the member states.

**2017**

Judicial Committee of the Privy Council ruled in FTC's favour. It was clarified that section 17 of the FCA, which governs anti-competitive agreements, applies to mergers and acquisitions.

**2018**

Framework and provisions for pre-merger notification regime drafted.

# FTC moves closer to a pre-merger notification regime

Over the past year, the FTC together with its Consultant, Menns SPRL in consortium with LEAR Lab S.R.L., took giant steps toward completing the framework and draft provisions for Jamaica's Pre-merger Notification Regime. The goal is to effectively define appropriate provisions that will be incorporated into the Fair Competition Act, as well as procedural, institutional and substantive review rules and remedies to handle mergers.

Of eight deliverables expected of the Consultant, five have been completed. This includes the Consultant's draft provisions which have been approved by the FTC and the Ministry of Industry Commerce Agriculture & Fisheries (MICAF); and is awaiting consultation with the Attorney General's Department and the Office of the

Chief Parliamentary Council.

Work on the procedural arrangements and internal processes specific to handling applications from time of submission through to final decision is underway. The Consultant's work involves conducting training and sensitization sessions with various groups including selected Government Ministries and Agencies and sector regulators, members of Parliament and members of the private sector including law firms, business entities and academia.

This work, which falls within the Foundations for Competitiveness and Growth project (FCGP) and is financed by a World Bank loan, is one of the initiatives that is expected to strengthen the enabling environment for private sector competitiveness to help Jamaica unleash its potential for greater productivity and increased growth.

## Increasing the competitiveness of Jamaica's banking sector

The Ministry of Finance & the Public Service, together with the Bank of Jamaica (BOJ) and the Fair Trading Commission (FTC) has commissioned a study of the commercial banking sector in Jamaica. Menns SPRL from Belgium was awarded the Contract to undertake the study over a six month period; and work commenced on September 24, 2018.

The objective of the Study is to assess competition in the space or market in which commercial banks operate, to identify bottlenecks and impediments as well as propose policy recommendations for improved competition. It is intended that the Study will help policy makers to understand the reasons for the low level of financial intermediation in Jamaica and provide insights into possible ways for using this information to unlock economic growth.

The analysis will compare indicators internationally, that is, regional as well as peer countries, and within the do-



mestic market, with special attention to bank size, market potential and the prospects for sustainable growth of the banking sector. In particular, the analysis will: (i) analyse overall competition levels in the banking sector; (ii) analyse and identify the key components and drivers of interest rates and spreads in Jamaica; (iii) analyse competition issues affecting the usage of digital payment instruments; (iv) analyse the efficiency of commercial banks; (v) assess the factors affecting access to services by various segments of users; and (vi) propose policy recommendations to foster greater competition having regard to financial stability and systemic risk considerations.

# FTC engages expert to strengthen competition advocacy efforts

In August 2018, LEAR Lab based in Italy, specialists in competition economics, commenced work under a six month contract with the Government of Jamaica, to conduct an assessment of the effectiveness of FTC's advocacy interventions; to build capacity within the FTC on the relevant competition advocacy tools; and ultimately, to increase the effectiveness of competition advocacy in Jamaica by proposing well-sequenced and gradual recommendations that the FTC may implement in order to increase the likelihood that its opinions and other interventions are accepted and/or implemented.

This work will strengthen the FTC's work in its mandate of making recommendations to policy makers on matters that affect the competitive landscape of all markets in Jamaica. As a first step, the FTC submitted to LEAR Lab, historical information on advocacy efforts over the past 12 years. That is, a summary of the FTC's 48 advocacy efforts geared at introducing, preserving or enhancing competition in several markets or sectors in Jamaica, including sectors such as telecommunications, financial, energy, construction, health care, agriculture, tourism, transportation, gaming and education. It was found that the FTC's interventions have been particularly successful in the telecommunications, agriculture and construction sectors.

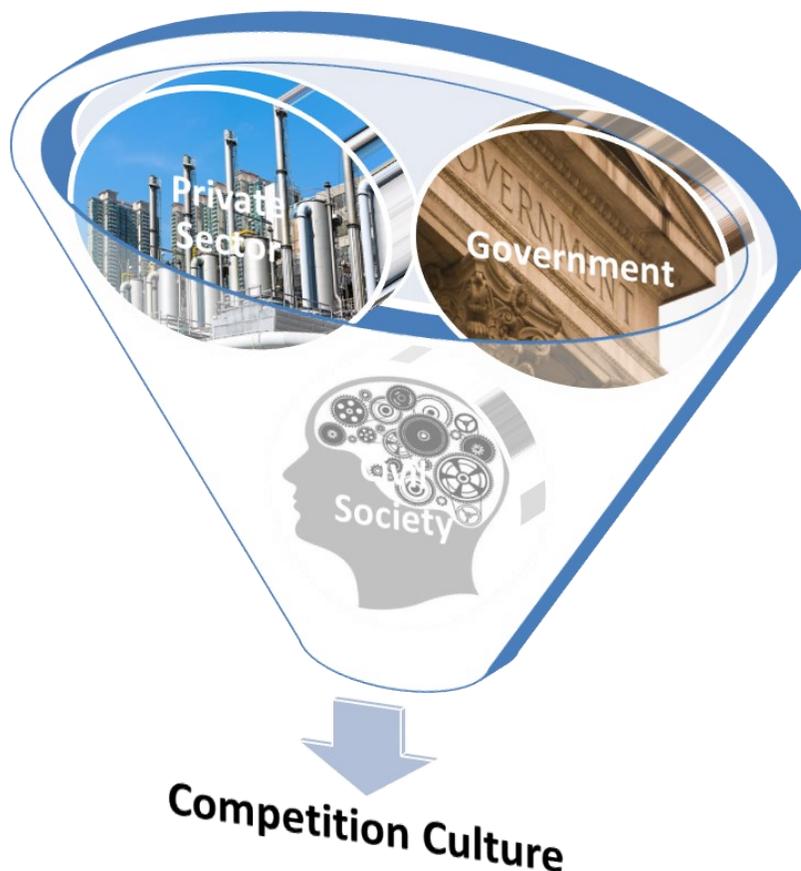
Consultation with private and public sector stakeholders is a feature of the work plan that will take two forms: an online survey and one-on-one meetings. These tools will be

used to explore the general perception, specific features of the FTC's roles and of its advocacy initiatives as well as the current level of awareness of the benefits of competition.

LEAR Lab will conduct an analysis of the FTC's competition advocacy activities; its advocacy mandate including its role in decisions and administrative procedures in regulated sectors; the conduct of market studies or sector enquiries and the tools and strategies employed by the FTC in issuing recommendations to public authorities. Its work to develop advocacy tools and strategies for the FTC will therefore be guided by in-

ternational best practices and will include consultation with several Ministries, Departments and Agencies as well as members of the private sector and academia.

This work is another initiative under the Foundations for Competitiveness and Growth (FCG) Project being undertaken by the Government of Jamaica in collaboration with the World Bank Group. The initiatives are expected to strengthen the enabling environment for private sector competitiveness to help Jamaica unleash its potential for productivity and growth.



# CARICOM Model Consumer Protection Bill Workshop



**B**etween July 15<sup>th</sup> and 18<sup>th</sup> representatives from the Fair Trading Commission, Dr. Delroy Beckford, Senior Legal Counsel, and Ms. Wendy Duncan, Legal Officer, attended a meeting held in Barbados by the Impact Justice Project, and funded by the Government of Canada. The meeting was held to facilitate discussions on the Draft Model Consumer Protection Regulations for the CARICOM Model Consumer Protection Bill 2016 and sought input from representatives from CARICOM members concerning: updates on the stages of implementation of the Bill in the various jurisdictions, comments and observations concerning the draft regulations, and suggestions regarding additional regulations necessary to support the Bill.

The meeting was chaired by Professor Velma Newton, Regional Director of the IMPACT Justice Project. Dr. Kusha Haracksingh, Chairman of the CARICOM Competition Commission, made general remarks on the Project and suggested the need for inclusion of regulations to address areas in relation to testimonials, health, e-commerce, gender equality, social media and standards—particularly, the recall of goods. The Drafting Unit of the

CARICOM Secretariat provided an overview of the Bill, pointing out the provisions included in the Bill but not currently addressed by legislation in most, if not all, of the CARICOM countries, such as the Recall of Goods, and Distance and Pyramid Selling.

With the exception of Suriname, all CARICOM countries were represented and participated in the meeting which covered two days, July 16<sup>th</sup> and 17<sup>th</sup>. Representatives from each CARICOM country reported on the stages of implementation of the CARICOM Model Consumer Protection Bill, 2016 and challenges faced. Jamaica's presentation included updates in relation to both the Consumer Protection and Fair Competition Acts, and references to other relevant pieces of legislation such as the Sale of Goods Act and the Standards Act. The meeting was also brought up to date with some of the legal developments in Jamaica with respect to the Fair Competition Act regarding case law, practical enforcement issues, and proposals for amendments to the Act.

The meeting ended after an open discussion on the regulations and the way forward. The Project is scheduled to end in March 2019.

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# On the record

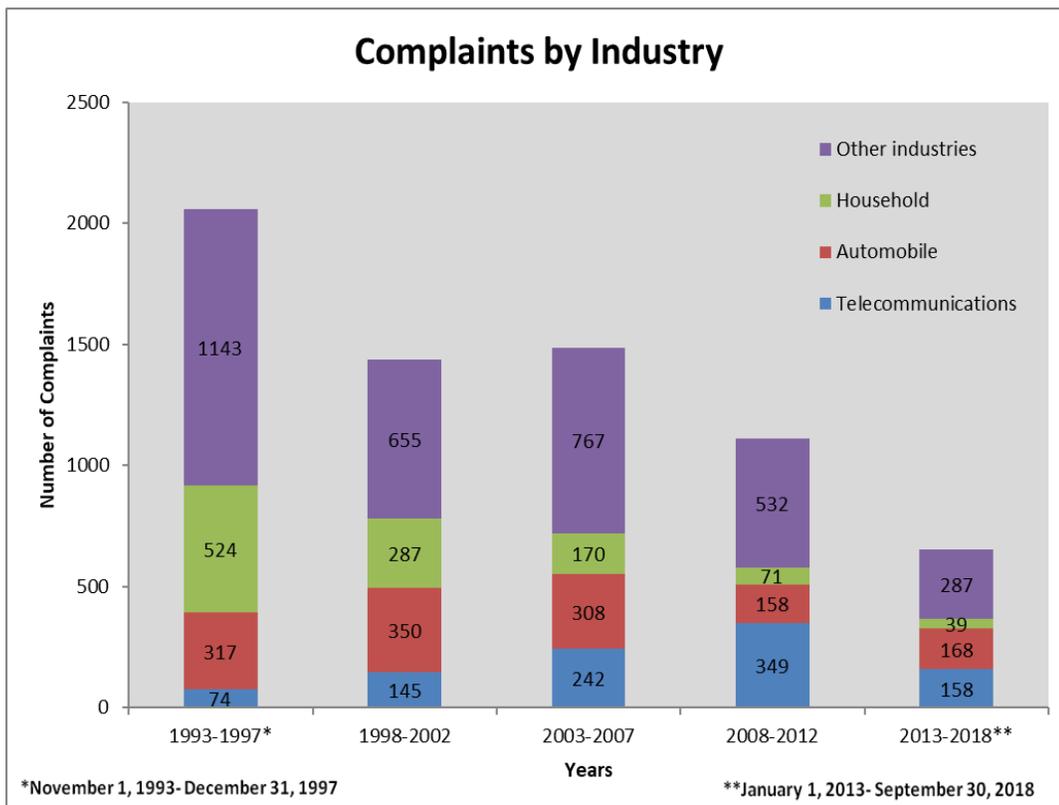
1993.11.01 – 2018.09.30

Since opening its doors in November 1993, the FTC has received a total of 6,744 complaints. These complaints span over 45 industries with the top three industries being automobile, telecommunications and household appliances/furniture. The three industries accounted for 50 per cent of all complaints received by the FTC during the period (See graph below for statistics on the number of complaints by industry). Complaints to the FTC regarding the automobile sector include the misleading advertising breach category regarding model year discrepancy, features or mileage of vehicle; failure of suppliers to fulfill warranty obligations; and supplying defective vehicles. As it relates to telecommunications, complaints to the FTC include allegations of abuse of dominance and misleading advertising regarding terms of service, price or promotion; and incorrect billing. For household appliances/furniture, complaints include sale above advertised price; failure of supplier to honour warranty obligations; and misleading advertising with respect to product quality or features.

In addressing the complaints and carrying out its mandate to encourage and maintain competition in Jamaica, one tool utilized by the FTC is law enforcement through the Fair Com-

petition Act (FCA). Enforcement is mainly through the Courts and also by way of Consent Agreements. Since 1993, the FTC has been a party to 12 court cases across the Supreme Court, Court of Appeal and Judicial Committee of the Privy Council. The court cases concerned matters in the telecommunications, automobile, live entertainment, real estate and financial sectors. An important judgement for the FTC and generally competition in Jamaica occurred in 2017 when the Privy Council ruled that the FTC has jurisdiction to examine the 2011 acquisition by Digicel Jamaica Limited of Oceanic Digital Jamaica Limited (Claro).

The FTC enters into Consent Agreements in situations where it believes that the FCA has been breached and the Respondents are amenable to settling the matter out of Court. During the past 25 years, the FTC has entered into Consent Agreements with 28 businesses. These agreements usually require that the Respondent commit to not repeating the offensive conduct, issue a public apology, provide redress to the Informant(s) as well as pay the Commission's costs. The FTC has entered into Consent Agreements with Respondents in the telecommunications, education, household furniture, live entertainment, automobile and hotel sectors.



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# Fair Competition Act STRENGTHS AND WEAKNESSES

The Fair Competition Act 1992 was tabled in Parliament early September. An important element of free market process, the tabling of the Bill has set off a series of debates on its merits and weaknesses.

Assistant Editor Carl Wint spoke to Opposition Spokesman on Finance Bruce Golding who has been very vocal in his views on the Bill.



Bruce Golding

Q. The Government has tabled the Fair Competition Act, 1992. What is it?

A. As I understand it, it is an attempt by the Government to use legislative mechanisms to prevent what it calls "uncompetitive practices" in the market and to provide protection for consumers by ensuring competitive prices and consumer choice. It therefore contains a variety of restrictions, prohibitions and penalties and proposes the setting up of bureaucratic machinery to administer its provisions.

Q. How popular is such a piece of legislation in other countries?

A. Perhaps the most well-known comparable arrangement is the Anti-Trust legislation in the United States but there are others. There is the Fair Trading Act in Britain and there are similar statutes in Canada, Australia and New Zealand. Such types of legislation are intrinsically "popular" since they purport to benefit and protect the masses whose incomes are invariably inelastic and they normally come about either as a result of strong consumer lobby or a government inclined toward populism. The trouble is that such laws tend to be more placatory than effectively protective or practical. What is worse, by interfering with the natural play of market forces, they run the risk of discouraging investment in production and therefore hurting the consumer in the long run.

### Main provisions

Q. What are the main provisions of the Act?

A. Under the general rubric of actions designed to "lessen competition", the Bill prohibits any act or agreement to fix prices, limit the production or supply of any item, or apply different credits or discounts

arrangements to different trading partners, divide up markets between competing suppliers, deter or prevent anyone from entering a market or require a trading partner to deal only in one's own goods. In addition, the Bill places special restrictions on enterprises which are defined as occupying a dominant market position by virtue of controlling (whether as supplier or purchaser) more than 25 per cent of the market. It also seeks to outlaw advertisements which are considered to be misleading as to quality, warranty, price or availability. Then, of course, it sets up a Fair Trading Commission empowered to receive complaints, investigate uncompetitive practices and issue directions in relation thereto. There are also provisions for fines or imprisonment for violations.

Q. On the Commission, could it not be administered by some existing agency of Government?

A. My understanding is that the Prices Commission, which has been retained despite the fact that price controls have been removed, is to be transformed into the Fair Trading Commission.

Q. The Commission consist of businessmen or are we going to see bureaucrats without business experience?

A. This question would have to be directed to the Government. The Bill does not make any stipulation regarding the type of person who may be appointed to the Commission. It is left entirely within the discretion of the Minister.

Q. The Bill is supposed to protect consumers. Can it do that?

A. Only to a limited extent. For example, the situation which occurred in the case of the... would be...

only to a limited number of distributors placed them in a position where they could, by collaboration, manipulate both the price and availability of those items. Such a situation would not be permissible under the new Act and, to that extent, the consumers could not be held to ransom. There are a few other respects in which the Bill can have a beneficial effect on the consumer but, generally speaking, the impact of the Bill is going to be disappointing for three reasons.

Firstly, it is mis-focused; it is seeking to use legislation to do what only competition, market forces and enlightened consumerism can do. Secondly, many of its provisions are unenforceable and the inability to enforce will discredit and undermine the entire operation of the Act. Thirdly, it is intrusive and will impose another element of humbug in the everyday conduct of business.

### Apparatus

Q. Is this apparatus going to cost the consumer more in the long run?

A. Generally speaking, no, but to the extent that it alters current practices which...

negative price or supply effect on consumers in relation to specific commodities and services.

Q. Have consumer groups made representations about any aspect of the Bill?

A. I have seen no evidence of any representations from the National Consumers League or any other Consumer group either to the Ministry of Production, Mining and Commerce during the formulation of the Bill or to the Select Committee of Parliament which is now loudly about the levy of consumer awareness and organizational capability which is very much at the heart of the problem.

Q. Does the Bill distinguish between the treatment of monopolies and businesses which arrive at a dominant position mainly because they are more efficient?

A. There is no distinction between the treatment of monopolies and dominant enterprises. In fact, the Bill makes no reference to monopolies. The definition of dominance is a matter with which the Select Committee is having considerable difficulty and it is still to be resolved. Many of the provisions of the Bill would be more appropriate for statutory monopolies, that is, monopolies which are, by law, protected from competition, than for ordinary businesses.

Q. Are the provisions in fact going to hobble entrepreneurial activity, if so, how?

A. In most cases it will make absolutely no difference. In some cases it will be just another irritant. But there are instances in which it could definitely interfere with normal intelligent business decisions and practices. For example, section 41 would prohibit a supplier from restricting the supply of his goods to a particular dealer who may be investing significant sums in promoting the product, servicing the customers and so on. He would be obliged to also supply other dealers who may be making no such investment and who simply ride on the back of the dealer who chose to be creative and aggressive. That dealer simply drops his hand, the consumer suffers and demand falls, the supplier loses their jobs.

Q. At a time when the suggestion is that Jamaican businesses need to grow bigger in order to compete in the international markets, how is this Bill going to help?

A. In so far as it discourages a company from dominating the market and thereby achieving economies of scale and being able to apply sophisticated technology to improve productivity to be able to penetrate overseas markets, it could be dysfunctional.

### Public companies

Q. How does the Bill address the operation of public companies as opposed to private companies?

A. It makes no distinction between government-owned and privately-owned companies although it does exempt any business carried out by a ministry or department of Government. Certainly if the Government is active in a commercial market and is seeking to derive profits therefrom, it should be subject to the same regulations as apply to private entities with which it is competing.

Q. What is the position with a company being set up in a field where there is no existing competition, it being the pioneer?

A. Then it would instantly find itself in a dominant position and be subject to such constraints as are applicable to dominance.

Q. Is it practical to talk about controlling uncompetitive practices? Who determines that?

A. Who determines uncompetitive practices? That's what the lawmakers are presuming to do. My own view is that competition, market forces and consumer activism should be allowed to deal with uncompetitive practices, not legislation. If there are unrestricted competition and discerning consumers, someone engaging in uncompetitive practices will soon find himself deserted by consumers and put out of business. Instead of sharpening the eyes and ears of the market, we are attempting to think and speak for the market. We can't do that.

Q. Does this mean that businesses...

to safeguard their actions?

A. Only if the provisions were to be enforced in such a way that involves investigation and prosecution. But then I have already expressed doubt as to the extent to which they can or will be enforced.

Q. What advantages does the Bill give to the businessmen or company, if any?

A. The only advantages would be in those instances where it removes restrictions to new players entering the market but these are few and far between.

### Anti-dumping

Q. There does not seem to be any mention of anti-dumping. Should not this be a part of the provisions?

A. Anti-dumping, I believe, is supposed to be treated as a separate piece of legislation. Anti-dumping and consumer protection are hardly, compatible in a single statute since one is designed to protect the producer/supplier while the other is aimed at protecting the consumer. Anti-dumping legislation has been promised for several years but I don't get the impression that it is being pursued with any alacrity. It is badly needed, it is a painful irony that the multilateral agencies which are dominated by the USA and Western Europe have pressured us into not only opening up our market and reducing tariffs but also with drawing subsidies from local producers. Our producers must now compete with cheaper and more easily available imports, some of which are heavily subsidised by American and European governments. And it doesn't matter whether these subsidised imports are raw foodstuffs or processed food in cans. Our farmers, in particular, have gotten a raw deal and it is simply not fair.

Q. Has the business sector taken any active role in formulating the provisions or have they been apathetic?

A. A number of private sector organizations had made submissions to the Ministry when the Bill was being formulated. None has so far made any submission to the Select Committee as far as I am

THE DAILY GLEANER, WEDNESDAY, OCTOBER 28, 1992

NEWS

## Fair Competition Act raises many questions

A LONG debate on the Fair Competition Act took place yesterday at a sitting of the Standing Committee of Parliament which is studying the legislation prior to its passage into law. Legal advisor in the committee, Derrick Metey, opened the discussion when he queried whether the Bill should "provide a floor or the action of those seeking to change it". He said the crucial issue was whether "one should rely only on a definition of a general dominant market position or should assume a percentage to exist at particular per centage of the market". Mr. Bruce Golding...

## Fair Competition Act sparks intense debate

By Gary Spaulding

A PROVISION in the Fair Competition Act intended to prevent the "abuse of dominance in a market", drew an intense debate in yesterday's sitting of the Joint Select Committee which met to consider the Bill. Designed to create a level playing field in the marketplace, the Bill contains, among others, a provision which states that "an enterprise holds a dominant position in a market if it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors. The objective of this provision is primarily to prevent any form of abuse in the market, aimed at having the effect of "lessening competition" by preventing or impeding other firms from coming into the market. The participation level in the deliberations was high, with Government members, Karl Samuda, Horace Dalley and Senator Lloyd Goodridge defending the inclusion of the provision; and Opposition mem-

bers, Bruce Golding and Anthony Johnson, opposing it. Mr. Golding, the Opposition Spokesman on Finance, argued that it was "going against the fundamental purpose of the Bill" and was "interfering with fair competition". Expressing puzzlement as to "why there is a provision in law to put forth prohibition", Mr. Golding questioned the necessity of the clause for such as this "He described any situation which might be considered abuse of dominance as a "function of market force, not one of statute". [More on the debate on Page 3]

## Golding raps aspects of Fair Competition Act 'Trying to make competition sterile'

THE DAILY GLEANER, SATURDAY, OCTOBER 31, 1992

## Fair Competition Bill Committee ends study

The Joint Select Committee of Parliament has completed its study of the Fair Competition Bill. The committee has recommended that the Bill be passed with amendments. The amendments include changes to the definition of dominant position and the removal of certain provisions. The committee also recommended that the Government should consider the possibility of introducing separate legislation for anti-dumping and consumer protection.

### Fair Competition act

# Committee debates dominance clause

The Minister of Production, Mining and Commerce, Carlyle Dunkley, has noted that at this stage in the nation's development, our society has begun to insist on the highest standards of integrity, truth and

THE joint select committee of the Fair Competition Act is undecided him any restriction over and above what is applied to a normal player competitive," he said. He pointed to the need to differ-

Fair Competition Act to aid business ethics

THE GLEANER, WEDNESDAY, FEBRUARY 10, 1993

PAGE THIRTY-SIX

# Competition review for banking sector

8/27/2018

Fair Trading Commission promoting competitive markets | News | Jamaica Gleaner

## Fair Trading Commission Promoting Competitive Markets

www.jamaica-gleaner.com/business

Published: Monday | August 27, 2018

■ OP-ED CONTRIBUTION: MARKET COMPETITION

■ OP-ED CONTRIBUTION: FAIR COMPETITION

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FINANCIAL GLEANER FRIDAY, DECEMBER 23, 2016

■ COLUMN: FTC SHOPPING ADVICE TO CONSUMERS

## Store or national-branded goods: the choice of Christmas past

www.jamaica-gleaner.com/business

THE GLEANER, TUESDAY, DECEMBER 30, 2014 • www.jamaica-gleaner.com

FTC study on microfinance sector to be released

## JGRA still angry, RUBiS welcomes FTC

THE BUSINESS OBSERVER Wednesday, July 9, 1997 Page 7B

Legal affairs

## FTC wins right to probe Jamaica Stock Exchange

JSE argued that the Commission Act was under the Fair Competition Act, the former superseded the latter. The judge declared that they were both passed by Parliament the same day. The JSE argued that the staff of the FTC acted improperly and were acting in a biased manner.

## FTC taking Digicel/Claro merger to Privy Council

BY PAUL HENRY  
Co-ordinator — Crime/Court Desk

the Telecommunications Act, a subsequent agreement between the parties relating to the transfer of the licence cannot be reviewed by the Act (FCA). The FTC is of the view that there need not be collusion or a conspiracy for an agreement to be made.

December 2011, challenged the merger between the two telecommunications companies, contending that it would result in a lessening of competition in the telecommunications market and would adversely affect customers.

Claro merger  
... to challenge

6 Friday, July 3, 2015 FINANCIAL GLEANER

www.jamaica-gleaner.com/gleaner/etg

## Crichton fined for selling misdated car

The FTC accused Crichton of false and misleading advertisement, but the dealership resisted the allegation on the ground that it believed that the information on the document it received from the Singaporean exporter was correct. Crichton also argued that Jamaican government agencies, including the Trade Board and Customs, had acted on the same

## Privy Council clears FTC to resume challenge of Digicel-Claro merger

THE WAY has been cleared for the Fair Trading Commission (FTC) to continue its challenge of Digicel's 2011 acquisition of Claro. The Privy Council has ruled that section 17 of the Fair Competition Act governing anti-competition market as it does in other markets. It further ruled that section 17 of the Fair Competition Act governing anti-competition

## Mergers

THE Fair Trading Commission (FTC) has been empowered to investigate whether any enterprise is engaging in business practices that have an effect to any agreement or arrangement that has an anti-competitive purpose or effect in a market. The scope of the FTC's jurisdiction over merger agreements and business combinations has been the subject of many debates, and notably so in the Jamaican telecommunications industry.

BACKGROUND

In March 2011, Digicel Jamaica Ltd, trading as "Digicel" and Oceanic Digicel Jamaica Ltd, trading as "Claro" entered into a merger agreement whereby control of Claro's operations was transferred to Digicel. The parties also obtained the approval of the prime minister required for a transfer of telecommunications licences or associated business un-

BUSINESS OBSERVER 18  
November 13, 2017



# We have come this far - looking to the future

By Wendy M. Duncan, *Legal Officer*

The blank page gaped at me as I wondered whether the words would come. Throughout the years I had written numerous magazine articles on various aspects of competition law, but now, for the first time, words eluded me. Perhaps pen paused and pondered the breadth of the journey that I wished to capture – a purely legal approach would not be enough this time. Juggling these thoughts, and straining to overcome writer’s block, I was mildly irritated when the plaintive voice of a legendary crooner floated up from someone’s nearby Smartphone:

*“It’s been a long time, a long time coming  
But I know, I know a change gonna come  
Ohhh yes it will...”*

As the words filled my thoughts, irritation melted and the music melody took soporific effect. I closed my eyes and drifted back to the memory of that first meeting more than eighteen years ago.

It was my first week as a young lawyer at the Commission and I was being quickly ushered into the conference room to be introduced to the Board of Commissioners. As I entered the room, bated breath, and met several stolid stares, I was unnerved momentarily until I caught the understanding gaze and gracious smile of the Chairperson, Mrs. Shirley Playfair. Mrs. Playfair warmly extended her hand and, taking mine, welcomed me into the Organisation. Her simple and memorable gesture somehow impressed upon me the power of gracious leadership, a sense of the significance of the work, and the confidence which she reposed in the Staff. This lady had

great expectations. Even though I was never to meet her again as stunning news struck two months later of her tragic and untimely death, her mantle has continued to inspire and fuel my sojourn at the FTC.

Up to the time of my joining the staff, the Commission had undertaken only a handful of cases involving offences against competition. The first of these was the ***FTC v Jamaica Stock Exchange***. December 1993 of the Commission’s first year brought a complaint from a new enterprise, Dehring, Bunting & Golding Securities Limited (DB&G), against the Jamaica Stock Exchange. DB&G had applied for membership to the Jamaica Stock Exchange and, more than one year later, had not received a definitive response. An investigation commenced under the Fair Competition Act (“FCA”) and the Jamaica Stock Exchange was summoned to respond to the allegations.

Resisting the summons, the Jamaica Stock Exchange immediately applied to the Supreme Court for several declarations and an interim injunction restraining the FTC from continuing the proceedings. Among the declarations sought was that the action and proceedings by the Commission whereby it was performing the functions of complainant and adjudicator, were in breach of the rules of natural justice and void. In 1997 the Court ruled in favour of the Commission. The Jamaica Stock Exchange appealed the decision.

No sooner had I joined the legal team than I was involved in preparations for the imminent appeal and made aware of the importance of its positive outcome for the effectiveness of

the Commission. It was an instant baptism of sorts. Over the next two and a half weeks I diligently carried bags, fetched documents and humbly gave my views on request as the 'QCed' legal heavy weights on both sides expertly delivered their arguments with oiled finesse and pinpoint precision. As the hearing unfolded, point for point, I listened, watched, and waited. As the trial wore on, however, I sensed that there was trouble ahead. Intuition proved accurate and the 2001 judgment was a knockout. The Court of Appeal declared that the action being taken and the proceedings being pursued by the Commission could be in breach of natural justice and void, since it was performing the functions of both investigator and adjudicator. This was seen as a crippling blow to the enforcement powers of the FTC, effectively removing the Abuse of Dominance leg—a veritable hamstring injury!

The following year brought the Commission's challenge to the General Legal Counsel. The Legal Profession Act prescribes rules that regulate the conduct of attorneys-at-law - the Canons of Professional Ethics. These rules contained certain restrictions on advertising which the Commission viewed as anti-competitive and inconsistent with the FCA. It was felt that these rules created restrictions on advertising which prevented the public from gaining easy access to information in respect of the range and quality of legal services. The Commission argued that the Canons of Professional Ethics were 'agreements' within the meaning of the Act which gives it a broad meaning and that the term, used in its broadest sense, covers all types of arrangements or understandings within the expanded meaning of arrangements. The Supreme Court held that the Canons did not constitute an agreement within the meaning of the Act; reasoning that they amounted to conduct prompted by State Action and that the General Legal Council did not join with the Bar Association or any other organization to issue the Canons. This judgement was another blow to the work of the Commission.

It was followed by yet another. In the 1996 case of *Regina v Dennis Woodbine, Director of J&J Garage Limited* allegations of breaches of the FCA arose from a complaint by a disgruntled consumer who had transacted business with J&J Garage Limited. When the Respondent, on being summoned by the Commission, objected and did not appear, the matter was brought before the Resident Magistrate Court. This action proved unsuccessful as the Court identified issues of natural justice which needed to be, and subsequently were, addressed by the Commission.

For the better part of 15 years, the bulk of the Commission's case work was based initially on consumer cases involving misleading representations by enterprises carrying on business in several industries. These included the automobile, health, banking, roofing, housing, furniture and appliances, telecommunications, education, sports and entertainment, food and beverage, insurance, and the airlines industries. Most of these

were successfully pursued in court or concluded by way of consent orders or agreements. The first major challenge to the FTC's jurisdiction with respect to these types of matters, however, arose from complaints by several aggrieved consumers who had bought into a housing construction and development scheme and did not get what they expected.

This was the 2002 case of *SBH Holdings v Forrest Hills Joint Venture Limited*. Developers promised prospective purchasers of townhouses "*Elegant Living at its Dignified Best*" and boasted facilities such as swimming pool, clubhouse, tennis court, jogging trail and security fencing. Despite having collected millions of dollars in deposits, however, they failed to deliver on any of these. The Supreme Court did not agree with the FTC's view that this constituted misleading representation in breach of section 37 of the FCA and accepted the Developers' defence that the advertised facilities were not provided because they did not have the capital to finish the project as the purchasers were in arrears and there was a slump in the economy. The Court held that the Developers had not breached the FCA because at the time of making the representations they had not intended to honour them.

This loss was critical for the FTC and raised concerns that the consumer provisions of the FCA, which at that time formed the basis for most of the complaints received by the Staff, could become virtually unenforceable if respondents could simply extricate themselves from their obligations and the harm caused to the public by putting forward this defence. The outcome of this case signalled the loss of yet another leg of the FTC.

The FTC appealed the matter. Again, there was a flurry of activity in preparation for this case as we were acutely aware of the significance of the outcome for the Commission. This time the result was favourable and the Court of Appeal held that the offence of Misleading Representation does not require the proof of intention. This was a huge milestone for the FTC and the development of competition case law in Jamaica and paved the way for the successful pursuit of several cases involving misleading representations; some of which were settled on the Court's doorsteps by way of consent orders and consent agreements. These settlements contained various conditions aimed at addressing competition including terms requiring the offenders to correct the consumer harm, provide compensation to consumers, pay the costs of the investigation, and issue public apologies.

Among these matters was a car dealer who had sold new vehicles with defective parts to over 60 consumers and who was required by the FTC to provide compensation to these consumers. Another, settled by consent order in the Supreme Court, involved a promotion which scheduled a concert in 2006 and misleadingly advertised 'VIP' tickets for one price although they were actually being sold at a higher price. Among the terms of that order were the issue of a public

apology in the Daily Gleaner newspaper, a directive that the promoter sell the tickets at the advertised price, and the payment of costs for the investigation. The offender complied with all of the directives. Another case of note was against an educational institution which had promoted an athletic event featuring particular athletes who failed to show up. A consent agreement with similar terms and requiring a public apology was the outcome.

The success of the *SBH Holdings* Appeal led to the 2008 Supreme Court case of *FTC v Errol Bailey t/as Music Foundation Showcase* in which a promoter widely advertised in the print and electronic media that a number of popular local celebrities, and the internationally renowned singing star Peabo Bryson, would perform at a concert to be staged at the Constant Spring Golf Club. When the artistes did not show up, the promoter claimed that it had contracted with all of the artistes to perform and was not responsible for the artistes' breaches of the contracts. The promoter was held liable on the principle that intention is irrelevant.

In February last year the Court of Appeal further cemented this principle into judicial precedent by upholding the Supreme Court decision in *FTC v Crichton Automotive Limited* where the Court held that a car dealer who had sold a motor vehicle by misleadingly representing its model year in its invoice, had breached the FCA. Though the Dealer sought to blame the Trade Board, which had issued the import documents, (and despite having itself provided that body with the information used in the documents) the Court rejected these arguments.

Having gained success in the *SBH* and subsequent cases, the FTC was next called upon to enforce a major arm of the legislation, *agreements which lessen competition*, in 2011 when Digicel Jamaica Limited and Claro Oceanic Digital Jamaica Limited signed a merger agreement by which Digicel acquired all of Claro's shares, assets, and spectrum licences. The transfer of the spectrum licences was applied for and approved under the Telecommunications Act.

The FTC formed the view that the Agreement breached section 17 of the FCA and filed proceedings in the Supreme Court. Digicel and Claro challenged the FTC's jurisdiction with respect to telecommunications and, on that issue, the Court held that the FTC has jurisdiction over telecommunications matters and the transactions between Digicel and Claro. On appeal by Digicel and counter-appeal by the FTC, the Court of Appeal ruled that the FTC has jurisdiction over telecommunications matters, though not over transactions between the parties. This case essentially would result in the removal of a major enforcement tool as a result of the Court's interpretation of the term 'agreements'. The FCA's wide definition of agreements allows the FTC to examine and review *any* agreement which has the purpose or effect of substantially lessening competition. The Court, however, applied a very narrow interpretation, holding that only collusive agreements – that is

in the sense of conspiratorial or secretive – could be reviewed under the Act. The practical result of this judgement and reasoning would be that whereas previously the FTC could review or examine most agreements, it would no longer be able to do so. A wide variety of agreements which the FTC had previously investigated and which could affect competition, could no longer be investigated.

The FTC appealed and on August 24, 2017 the Privy Council found in favour of the FTC and reinstated the finding of the Supreme Court. Among the key findings of the judgement was that the FCA does not exclude any particular sectoral market from its powers to intervene and therefore no particular sectoral market is excluded from the FCA; and that section 17, though it does not refer in terms to mergers, '*establishes a regime of control over a class of transactions which includes mergers*'.

One of the most spectacular features about these legal battles is that they were accomplished with very limited resources. I remember that early on the cry, among those of similar agencies in other jurisdictions, focused on the lack of resources. But then visionaries, with whom we were blessed, began to look at what we could do with what we already had. I have often smiled with amusement at the astonished reaction to the response to a query about the size of the staff. A saying by Mahatma Gandhi comes to mind:

*"A small body of determined spirits fired by an unquenchable faith in their mission can alter the course of history".*

What of the future? Of course, our mandate remains the same as set out in the long title to the Act: *to provide for the maintenance of competition in the conduct of trade, business and the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices*. The landscape, however, is constantly changing -and with increasing rapidity - as markets take new forms and enterprises find new ways of competing. Concepts such as the digital economy, multi-sided markets and digital markets create challenges as well as opportunities for the FTC to retool, reorganize and rethink its approach to encouraging fair competition in our markets. It is crucial that the Commission be sufficiently well equipped to respond to these and similar issues in a relevant, fast and effective way so that competition is never hindered. The concept of the ever vanishing horizon, captured by a quote from Lewis Carroll's beloved classic *Alice in Wonderland*, seems relevant here:

*"...here we must run as fast as we can, just to stay in place. And if you wish to go anywhere you must run twice as fast as that".*

Well, my song of inspiration has long ended, but the page is now full. We have come this far and must continue to adapt to the times. Mrs. Playfair, if you could see what we have done! Still more is yet to come.



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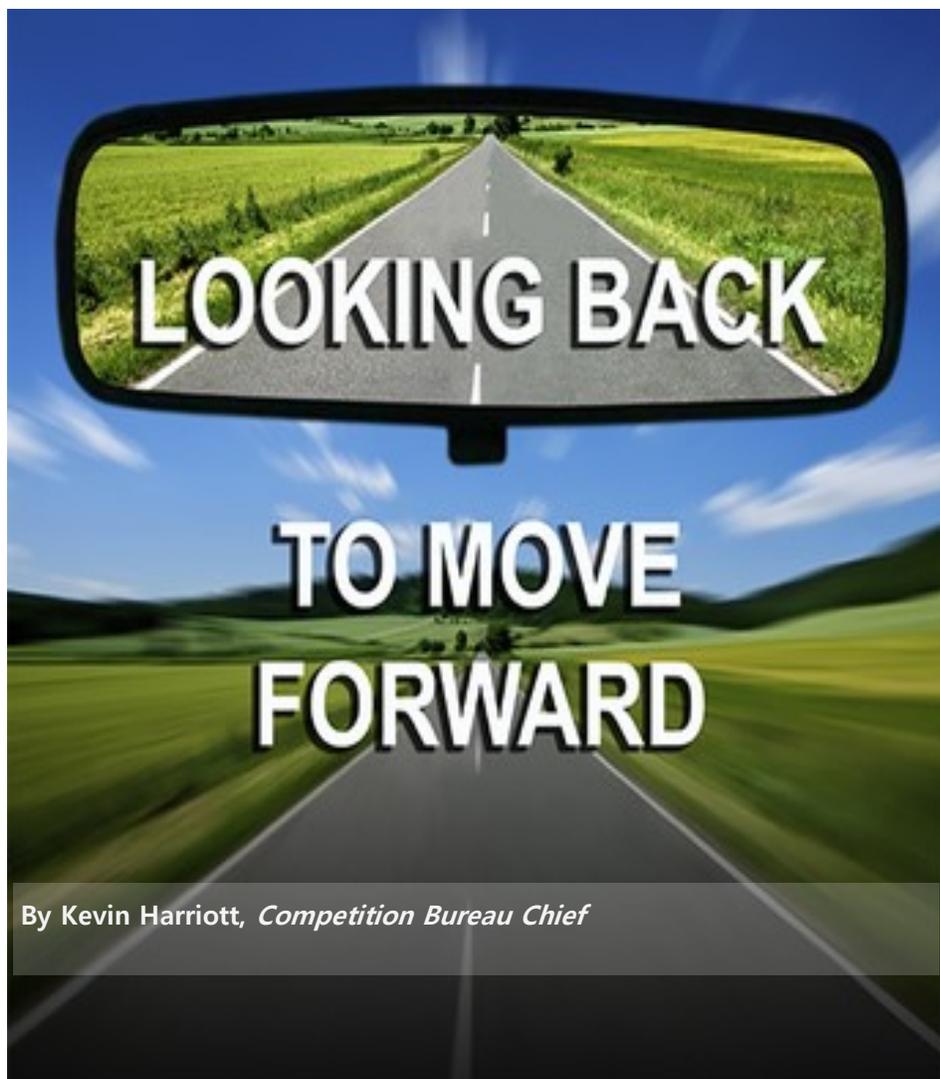
A competitive market system is not without its flaws; but certainly not unique in this regard. Truth be told, is that no other economic system implemented in the history of mankind has the demonstrable potential to deliver greater benefits to the public than competition does. Safeguarding a competitive business environment should be the most important component of any strategy designed to bolster the economic development of any nation. The Fair Trading Commission (FTC) has been championing this cause in Jamaica since the Fair Competition Act (FCA) was passed in 1993.

### Looking Back

The work of the FTC involves a great deal more than competition law enforcement. In retrospect, it would have been naïve for the FTC to expect that the mere passing of the FCA would be sufficient to deliver the benefits of competition law observed in more mature jurisdictions located in Europe and North America.

Fortunately, the FTC recognized from very early that to extract the full benefits of competition with the limited resources at its disposal, it had to forge alliances throughout wider system in which commerce takes place within Jamaica. In particular, commercial activities take place among consumers and merchants within a legal system shaped by policymakers.

To build alliances, the FTC would have had to cultivate a 'culture of competition'. Key stakeholders such as policymakers, consumers, legal professionals and merchants would have to be sold on the idea that competitive markets represent the best platform for advancing the economic welfare of the country. These stakeholders would have to understand the nature of competition and appreciate that even with its obvious shortfalls, competition is still the best mechanism developed to efficiently organise the scarce productive resources of the economy. This implies that the



successful implementation of competition requires adequately informed consumers, merchants, policymakers and legal professionals, among others.

In building allies, therefore, the FTC designed and implemented two strategies to complement its law enforcement mandate: (i) Public Education; and (ii) Competition Advocacy. Through public education and competition advocacy, the FTC sought to induce a cultural shift in the wider superstructure which influenced competition law enforcement.

### Public Education

Public education activities were geared toward exposing the general public to the nature and benefits of competitive markets as well as advising the public of

their obligations under the FCA. In this regard, the FTC has sought to inform a host of distinct groupings of the general public through a variety of media including: face to face meetings; website; social media platforms; and mass media (print, television and radio).

Creating a better pool of informed/trained individuals meant that the curricula pursued by formal institutions of learning/training would have to be revised to accommodate competition law. To this end, the FTC assisted in the development of a course in competition law, delivered at the University of West Indies and has also designed and delivered for lawyers, courses on competition law accredited by the General Legal

Council. The Staff also facilitated multiple Training Workshops aimed at exposing sitting Judges in various Caribbean jurisdictions to competition law.

### Competition Advocacy

Competition advocacy efforts were geared toward the promotion of competition using non-enforcement methods. Since 2006, the FTC has been involved in over fifty of such efforts spanning numerous industries. In a few instances, the FTC conducted *ex-post* evaluations of its intervention and documented the public benefits gained through its intervention.

Successfully instilling a culture of competition is a long term strategy as it was never expected to bear fruit overnight. Indeed, even though the FTC has been promoting competition extensively for several years, recent debate in the

public domain arguing for the re-introduction of regulations of banking fees belies the inherent mistrust, if not misunderstanding, of the nature of the competitive process on the part of key stakeholders in the society.

### Consumer Redress

Even as the FTC pursued the long term strategy of developing a culture of competition in Jamaica, it concurrently pursued a strategy of "picking the low hanging fruits"- that which is described in the field as "consumer redress." Through consumer redress, the FTC from the outset has been resolving specific issues which individual consumers have experienced with specific merchants. The FTC now has devoted less attention to this activity since 2003 when policymakers established the Consumer Affairs Commission to jointly seek

individual redress on behalf of aggrieved consumers.

### Looking Ahead

In essence, therefore, the FTC has spent its first 25 years of existence building alliances by bolstering the institutional framework in which competition law and policy is administered. Through continued efforts at public education activities and competition advocacy efforts, a solid foundation has been built; upon which it can now reasonably be expected to make competition a staple in the local business environment. Looking ahead at the prospects for the next 25 years, it is clear that the Fair Trading Commission is recognized now to be crucial for sustainable economic development, more so than it was twenty five years ago when it first opened its doors to the public.

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# Competition still Alive at 25

By Desroy Reid, *Competition Analyst*

In whose interest is it anyways? Ask yourself this question if you ever wondered who benefits from one enterprise controlling the market, compared to ten enterprises competing in it. The answer may not surprise you; consumers benefit more when they have more choices, but each enterprise would prefer to have no other enterprise in the market. The "father of economics", Adam Smith, in '...the Wealth of Nations' explained why this is so and how it is done: *"The monopolists, by keeping the market constantly understocked...sell their commodities much above the natural price... The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest..."*

In the 1980s, the Government of Jamaica (GOJ) embarked on a program of reformation to improve the level of competition in the economy. The program included the liberalization of most sectors, the privatization of state-owned enterprises, the lifting of import quotas and the removal of several trade barriers. Before its implementation, market power being concentrated in the hands of a single and/or few enterprises was regularly observed. Although market concentration was typical for small developing countries, successive GOJ policies failed to address this issue- and in

some instance, exacerbated the distortionary effects. For example, the Trade Law of 1951 enabled the government to fix the prices of manufactured goods or put a limit on the mark-up that sellers were allowed to charge customers in an attempt to keep prices low. This practice ran counter to the tenet of competition which posits that it is the market that should determine the price of each good. The setting of a maximum price that enterprises may charge has the potential to create a shortage of the good. This, in effect, could exacerbate the problem; that is, the suppression of prices below its "natural level" drives up demand and the consequent upward pressure on prices. Such an environment facilitates illegal parallel markets where goods are sold above the regulated price. Other attempts to protect consumers through regulation of prices also proved counterproductive. An amendment to The Trade Act in 1970 saw the government establishing the Prices Commission. The Prices Commission's primary focus was to prevent excessive pricing. In doing this, it regulated the prices of over 100 groups of products through surveillance and using rigid price controls. This proved to be a herculean task in futility and was made redundant by changes in the GOJ's focus from the controlling of trade to trade liberalization in the 1990s.

## Markets Liberalized

Consumers need protection and markets need regulation, but not by the government dictating how it should behave. This failed in Jamaica and in other countries who have attempted it. The focus therefore locally and globally was to free the market to determine prices and to have competition as its regulator. History had already given us a blueprint that competition is the best means of getting the greatest level of protection for consumers. Promoting competition as the primary means of organizing economic activity, therefore, would be one of the most efficient means of safeguarding consumer interests.

The two main factors that allow the competitive market to function efficiently are (i) the self interest of the participants; and (ii) the level of competition that arise from everyone acting accordingly. As Adam Smith points out *"It is not from the benevolence (kindness) of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."* Since other self-interested enterprises are competing in the marketplace, everyone's self-interest is kept in check. Together they form what Smith calls the *invisible hand*, which guides resources to their most valued use.

On one hand, self interest is as natural to man as breathing and therefore

no assistance is necessary in this regard. On the other hand, competition does need some support as self interested persons may act in a manner that serves their interest but adversely affects competition – for example, competitors can join forces to raise prices. An agent is, therefore, needed to ensure competition is not adversely affected. In 1993 the GOJ sanctioned the creation of such an entity – the Fair Trading Commission (FTC). The FTC is tasked with the mandate of enforcing the Fair Competition Act which sought to prohibit restrictive business practices and abuse of monopoly power. Examples of these practices include price-fixing, and abuse of dominance. For markets that were once significantly controlled, this meant a major shift in how market participants conducted business as well as the role of the government.

**The Impact of Competition: A case study**

The liberalization of markets, which started in the late 1980s through to the 1990's, enabled the development of technology, reduction in prices of goods and services and increases in consumer choice. In Jamaica, the market with the most conspicuous benefits from liberalization is telecommunications.

Before the GOJ initiated the liberalization of the telecommunications sector in 2000, Cable and Wireless Jamaica was the monopoly supplier. This resulted from an exclusive licensing agreement, granted to them by the GOJ. The shift to a more competition-focused regime meant that bridles on competition was released resulting in a more vibrant economy filled with increased choices for consumers and an overall improvement in other interdependent sectors ranging from finance to manufacturing. There were new ideas, new services, and new ways of doing business. There was a climate of business opportunities for entrepreneurs and a windfall of benefits for consumers. The impact of competition was observed when Digicel Jamaica Limited acquired 100,000 customers in approximately 100 days of entering the



market in 2001 as consumers relished in the increased choices.

Years after seeing Digicel Jamaica growing its operations to become the market leader, the telecommunications market welcomed another entrant in 2008 - Oceanic Digital Jamaica Ltd (trading as Claro). Over the period of 2001 to 2008, Digicel significantly increased its market share, so much so that it was able to charge prices higher than its competitors and still maintain its market share. Competition then intensified in the market with Claro's entry and consumer benefits were at their highest since 2001. Noticeably also, was

the increased promotions from both incumbents, significant increase in value offerings to consumers and dramatic reductions in prices.

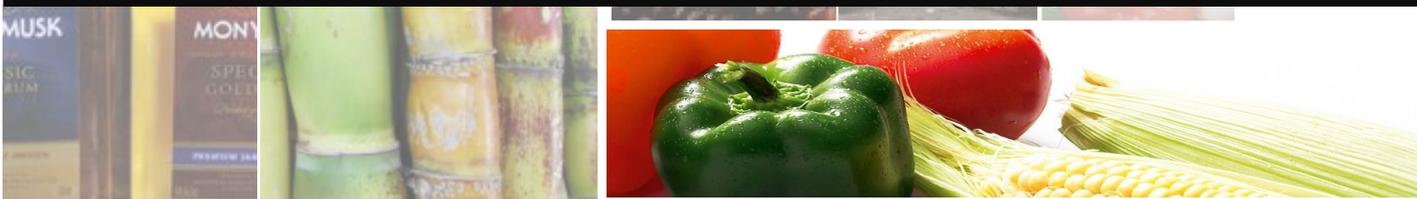
**Conclusion**

Due to the liberalization of the telecommunications sector, competition was allowed to develop. This eventually mitigated the instance of limited consumer choice and the low levels of product innovation which came to characterise the sector prior to liberalization. This transformation of the telecommunications sector can be realized in any sector in which competition is prominent.



# Importance of a Competitive Environment for Increased Growth in Exports

Contribution of the Jamaica Manufacturers & Exporters Association



Jamaica is highly integrated into the global economy as both an importer and an exporter. In 2016, Jamaica's exports stood at 31.13 per cent of gross domestic product (GDP). In acknowledging the important role that exports play in the development and growth of our economy, the government along with several public and private sector stakeholders formulated the National Export Strategy (NES).

The NES is a collaborative national initiative which seeks to maximize the export sector's direct contribution to economic and social development by focusing on market-driven interventions in a select number of priority sectors. A target of 15 per cent growth per annum from the second year of implementation onwards was set for Phase II.

Examination of the figures for total exports for the period 2016-2017 shows an increase from JM\$ 136,727,136 ('000) to JM\$ 158,532,135 ('000). These figures show a 15.9 per cent increase which is in line with the government's national export target. Sector performance, however, shows that there is still room for improvements in sectors such as aquaculture, which displayed an increase of 11.6 per cent which is below the target.

The Jamaica Manufacturers and Exporters Association (JMEA) enables export growth in businesses through lob-

bying, capacity building programmes and workshops and mentorship. The JMEA is a strong supporter of an outward orientation to economic development which is grounded in export promotion and expansion.

The Association has long recognized the imperative for environment, fostering competition for increased exports. Competition propels industry growth and development by allowing producers to be more efficient, innovative and provide better quality and prices. Studies have revealed that less market concentration, more market share instability and more perceived exports in industries result in better export performance.

Firms that operate in highly competitive sectors continually seek ways to be efficient in their production processes to gain profit increases or competitive advantages. The reduced production costs are often passed on to the consumers in an effort to attract and maintain additional market shares. Competition also engenders innovation within the market which results in new products and services and a wider variety for consumers to choose from. Firms that are efficient and innovative tend to exhibit high levels of productivity. Highly productive companies in an economy are usually engaged in export activity.

Strong local competition enables

companies to be better competitors globally as the Jamaican proverb states, *"yuh haffi dance a yaad before yuh dance abroad."* Domestic competition is likely to influence a country's competitiveness, that is its ability to compete globally with other products in export markets and locally with imported products.

Local competition in the form of Foreign Direct Investments also help to drive export performance. A study examining the impact of competition on exports in India revealed that the presence of multi-national corporations (MNCs) can cause increased export activities. MNCs take with them knowledge of various global markets, advance production techniques, as well as international marketing skills that often spillover into local sectors.

Trade literature posits that markets with several equally sized firms rather than markets with few large firms engage in more export activities. Low market concentration, however, does not invariably ensure increased exports. Market structure is also a determinant. Examination of the leather industry in Ethiopia showed that market structure factors such as alliances, horizontal and vertical linkages and other anti-competitive practices hamper the development of efficiencies in the market due

to lack of competition and in turn leads to reduced exports. On the other hand, markets that possess variability in market structure usually export more.

Competition, however, is not automatic and can be hampered by inappropriate government policies and anti-competitive conduct by firms. The promotion and protection of competition, therefore, is essential in the drive towards growing Jamaica's exports. Competition policy is law that is formulated

to achieve this end. Governments utilize these laws to maintain free and fair markets by reducing artificial barriers to entry and facilitating entry and exit. Effective competition policy, however, focuses not only on producers but also on consumer welfare and economic progress.

CARICOM has embraced these realities and the establishment of the CARICOM Competition Commission lends to increased competition regional-

ly which will enable our developing economies to adjust to increased trade and to develop the efficiencies needed for success globally. With the establishment of the Caribbean Single Market & Economy (CSME), participating governments are required to institute competition policy and law to strengthen the business climate, monitor and investigate anti-competitive practices that force out competition and enforce competition policy once it is legislated. The competition framework promoted by CSME is fairly advanced and allows for free trade of goods and services, free movement of skills and capital and the cross-border establishment of businesses.

"Competition is the process by which market forces operate freely to assure that society's resources are employed as efficiently as possible to maximize total economic welfare".<sup>1</sup> Competition policy, therefore, should include provisions that take into consideration factors that fall outside of firms' behavior. These include clauses to address non-competitive input markets, lack of affordable transportation and limited access to raise capital for entry into markets. Each market, however, has its own idiosyncrasies in regard to distortions in competition which must be uncovered over time.

The JMEA has been a champion of competition but more importantly, fair competition practices to engender sustainable growth and development.

ENDNOTE

<sup>1</sup> Kolasky (2002), "What is Competition?" Address at the Seminar on Convergence Sponsored by the Netherlands Ministry of Economic Affairs.



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# Loud Competition Laws in a Silently Capitalist Jamaica

By Matthew A. Royal, *Samuda & Johnson*

Contribution of the Jamaica Chamber of Commerce

In 1974, the Jamaican Government unapologetically espoused Democratic Socialism as the political philosophy of the country<sup>1</sup>. This came in a period characterised by the United States of America's quasi-religious devotion to capitalism and their conviction of the system's virtues which was shared by their many disciples the world over. The stark contrast between these political views is evident in the economic policies to which they naturally give rise. Indeed, *socialism* and *capitalism* are every bit as much economic constructs as they are political ideologies<sup>2</sup>.

The socialist view espoused by the Jamaican Government of the 1970's is loosely expressed as:

*"A political and economic theory under which the means of production, distribution and exchange are owned or controlled by the people; and where the opportunities of society are equally available to all."*<sup>3</sup>

The contrary view, which largely characterised the nation's political philosophy and consequently its economic policy from the 1980's, *ad praevisum in futurum*, is capitalism. Capitalism is defined in the Oxford Dictionary as *"an economic and political system in which a country's trade and industry are controlled by private owners for profit, rather than by the state"*<sup>4</sup>.

Capitalism is largely characterised by a market driven economy where firms seek to maximise shareholder profit. Socialism asserts that profit should be equitably distributed and that the people, through the agency of the State, should own the means of production. If political philosophies were members of the same family, capitalism would be the more charming and much more

adored older brother and socialism would be the runt of litter, the family's 'black sheep'.

Unlike the era of the 1970's and 1980's where socialism and capitalism were at loggerheads for world dominance, the dust has virtually settled to reveal, at least in the Western Hemisphere, capitalism as the victor<sup>5</sup>. Particularly in nation states like Jamaica where political discourse has not escaped the cries for "light, road, water" and, of course, "justice", political philosophy and its accompanying economic policies have largely developed without much definition in the public space.

At this point, the question may legitimately be asked: "what does any of this have to do with Competition Law and policy?" The answer, really, is "everything!"

Accepting capitalism as the silent, but profoundly well-articulated, (at least in practice) political philosophy of modern Jamaica and without any commentary on the comparative virtues of capitalism *vis a vis* socialism, one might be surprised to find that the capitalist doctrine, left unchecked poses a threat to the objectives of consumer rights, market place fairness and equal opportunity<sup>6</sup>. An inherent tension exists between the policy objectives being pursued by the Fair Competition Act which operates a regime of checks and balances on the ideological thrust of the Jamaican capitalist economy and the very objectives of this economic model.

The first of these checks and balances is the investigatory powers of the Fair Trading Commission (section 5). The Commission's investigatory jurisdiction covers *'the conduct of business in Jamaica'*, *'matters falling within the provi-*

*sions of [the] Act'* and the *'abuse of a dominant position by any enterprise'*. The Commission is further empowered to summon witnesses.

Another of the statute's regimes which could be seen as intrusive is its limit on commercial/contractual freedom. The freedom of juristic persons, to enter into contract is a hallmark of capitalist market environments. Contract Law theory well supports this capitalist ideal as its various doctrines are designed to preserve the integrity of commercial contractual arrangements and limit the circumstances in which commercial parties may repudiate contractual undertakings<sup>7</sup>.

The Act, however, allows the state to restrain the capacity of firms to enter into agreements in pursuance of commercial strategy that tends to limit competition; block a merger or acquisition; and even declare void provisions of certain agreements. Through these intrusive features, the Commission, an unintended third party, is given the power to intervene in private contractual undertakings and then exercise a power not easily exercised by the contracting parties themselves.

To some it may seem that the Act threatens fundamental capitalist ideals of market freedom. However, the better view is that the Act encourages the growth and enhancement of healthy capitalism while restraining the worse impulses of the doctrine<sup>8</sup>.

There is an inarguably legitimate aim being pursued in imposing restraints on the exercise of corporate power. Left unchecked by the ebb and flow of healthy competition in the market, firms would have the freedom to set prices that could put a strain on large segments of the population to afford essential goods and services.

Notwithstanding the broad investigatory powers of the Commission, the legislation itself is sufficiently narrowly tailored to limit the exercise of the Commission's powers to genuine instances of market manipulation and

unfair trade practices and allow distinctions to be drawn between proscribed activities and aggressive but legitimate business practices.

It can be fairly concluded that the Act helps to prune the worst tendencies of capitalist society and allows that society to benefit from the genuine virtues of that political/ economic system. The mischievous may even contend that Competition Law and Policy is a vestige of a not so dead and not so forgotten socialist conscience in the modern capitalist world by requiring fairness in the dealings of firms, giving smaller firms a fair shot at making profit, thus resulting in a more level playing field for the average firm and consumer.

As a direct and immediate result of effective Competition Law and Policy, both businesses and consumers are

guaranteed a level playing field<sup>9</sup>.

It is important to view Competition Law in light of political philosophy for the mere fact that philosophy guides policy. It is the duty of businesses and consumers to ensure that the political philosophy under which we are governed promotes market-healthy policies that encourage competition. It is then that all are able to enjoy the virtues of a truly free market.

ENDNOTES

- <sup>1</sup> Kaufman, Michael. "Democracy and Social Transformation in Jamaica." *Social and Economic Studies* Vol. 37, No. 3, September 1988 pp 45 – 73, 49. JSTOR, <https://www.jstor.org/stable/27862947/>
- <sup>2</sup> Korani, Janos. "What the Change of System From Socialism to Capitalism Does and Does Not Mean." *Journal of Economic Perspective*, Vol. 14 No. 1, Winter 2000, pp 27 – 42, 29. American Economic Association <https://pubs.aeaweb.org/doi/pdf/10.1257/jep.14.1.27>

<sup>3</sup> Morrison, Floyd. "Democratic Socialism and PNP Renewal". *The Jamaica Observer*, July 11, 2016. [http://www.jamaicaobserver.com/columns/Democratic-socialism-and-PNP-renewal\\_66686](http://www.jamaicaobserver.com/columns/Democratic-socialism-and-PNP-renewal_66686)

<sup>4</sup> "English Oxford Living Dictionaries" Oxford University Press, September 28, 2018, <https://en.oxforddictionaries.com/definition/capitalism>

<sup>5</sup> Duignan, Brian. "Capitalism". *Encyclopaedia Britannica*, September 28, 2018, <https://www.britannica.com/topic/capitalism>

<sup>6</sup> Liu, Wai-Man et al. "Good Capitalism Versus Bad Capitalism: Effects of Political Monopoly of The Ruling Elite on The Extent of the Market, Income Distribution, and Development". Monash University Department of Economics, Australia. May 2001.

<sup>7</sup> Morgan, Jonathan. "A Victory for 'Justice' Over Commercial Certainty". *The Cambridge Law Journal*, Vol. 66 No 2, July 2007, pp 263 – 265, 264.

<sup>8</sup> United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972) "*Antitrust laws ... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.*"

<sup>9</sup> Hawke, Catherine, et al. "Understanding Antitrust Laws, Competition, the Economy, and Their Impact on Our Everyday Lives". National Council for the Social Studies, *Social Education* Vol. 75 No. 2, pp 68

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# Competition in the Transport Sector?

By Verlis Morris, Competition Analyst

*"As the avenues and streets of a city are nothing less than its arteries and veins, we may well ask what doctor would venture to promise bodily health if he knew that the blood circulation was steadily growing more congested!" — Hugh Ferriss*

**A**fter 25 years of promoting competition in Jamaica, the Fair Trading Commission (FTC) now looks forward to a new era wherein competition is afforded greater priority in determining market outcomes such as price, product variety, product quality and rates of product innovation.

Recent recommendations to increase competition in the provision of taxi services are indeed a positive step going forward. These recommendations received a lukewarm reception from the general public with individuals citing concerns regarding the likely negative impact on public service requirements such as accessibility to transport; mobility of the work force; the environment; public safety; and access to health services. These concerns are far from being unwarranted or mere speculations given that there have been evidence to show that uncontrolled deregulation had negatively impacted public service requirements.

Complete deregulation is synonymous to allowing market forces to solely determine the outcome of the market in question. That is, in this specific case, "the invisible hand" decides the type and number of taxi routes; the number of operators operating on such routes; and the fares to be paid by passengers. The economics discipline also provides evidence that market forces tend to promote efficiency, lower prices and spur innovation. There is, however, little guarantee that the competitive outcome will result in these social benefits unless they coincide with achieving the market outcome. For example, one national objective is the availability of transport to everyone. This is a reasonable social expectation since walking sometimes is a poor alternative to motorised transport especially when time is of the utmost essence. On one hand, a market driven outcome will likely be at a level so that the fare attained is too high for some commuters; such as the very poor. This is typical of rural areas. On the other hand, in urban areas the market outcome of the number of taxi operators can result in congested roadway networks, pollution and deterioration in public safety.

Therefore the need to regulate the public transport sector is not without merit since regulation aims at achieving public service obligations that may not necessarily be fulfilled by private service providers. For example, failure to access transport is likely to adversely affect other critical segments of the economy such as health, jobs and education. Nonetheless, our best effort to maintain these obligations at the expense of competition will likely come at a higher cost whereby society misses out on efficient allocation of scarce resources

and innovations. Heavily regulated markets tend to face difficulties in cost recovery due to inefficiencies and restricting market forces can create illegal markets that rival the regulated market. These phenomena are evident in Jamaica's economy where we observe a public bus company unable to cover its cost and the plethora of illegal taxi operators that poses risk to public safety.

Currently, taxi fares and routes are regulated with licensing requirements which limits the number of operators, among other restrictions. Nonetheless, news reports indicate that the sector has been failing to achieve obligations such as public safety and accessibility. Limits on licence likely create the situation of illegal operators which poses a risk to public safety, while regulation has failed to incentivise operators to serve in some rural areas. The proposed changes aim to increase entry, the number of routes, as well as innovation by allowing operators to craft their own routes. These changes are steps toward facilitating market forces in taxi services and could bring some of the benefits associated with a competitive market. Specifically, public safety could be achieved under competition where operators in the illegal market have adequate incentives to transition to the legal market thereby reducing that associated risk to commuters. Additionally, more operators will serve previously underserved communities once operators have the authority to establish their own fares.

## **Where do we go from here?**

A study of the European public transport sector revealed that controlled introduction of market forces has more favourable results than maintaining strict regulation or suddenly removing all regulation. Specifically, these results include improvements in quality, cost recovery and maintaining some public service requirements. Demand levels and cost recovery were the benchmarks used to make the comparisons. These observations are in keeping with the general principle that competition could be restricted for the fulfilment of public service obligations. Nonetheless, competition need not be restricted more than is necessary.

The changes being proposed is a strategy that is consistent with the strategy employed in the European market. That is, making changes to entry conditions thereby allowing for easier entry and the consequent increase in competitive forces. We demonstrate that public service obligations such as public safety and accessibility can also be resolved by market forces.

As the transport sector is poised to enter into a new era where competition is at the forefront of policy decisions, the FTC anticipates that the changes will not end with altering entry conditions but eventually reach the point where taxi operators determine their fares. After all, the true hallmark of a competitive market is one in which price is determined by the market.

# Startups: competition policy and entrepreneurship

By Paul Cooper, Research Officer



In this age of technology and continued technological advancement which have significantly changed our status quo and overall traditional means of doing things, attention must be focused on the factors which drive the continuous explosion of new innovations. While there are several factors which could be attributed to the ever changing and volatile business landscape, competition and competition policy are considered as being important. The aim of this article is to show the relationship between startups and competition policy. Particular focus is placed on how competition policy directly influences the existence of the startup business model and the residual effects on consumers and the economy through continuous innovations.

## What on earth is a startup?

According to renowned startup enthusiast Steve Blank, "a startup is a temporary organization designed to search for a repeatable and scalable business model". This model is designed to grow and has the flexibility to be scaled up very quickly. However, a startup initiative is not to be confused with a traditional small business venture. While a startup uses technological innovations to introduce a new product or service to the market or revolutionize an existing product or service; a small business is operated based on a fixed business model and according to Blank, refers to businesses such as grocery stores, hairdressers, bakers, travel agents, carpenters, electricians, etc. Startups are driven by entrepreneurs who, according to the Oxford dictionary, "are persons who sets

up a business or businesses, taking on financial risks in the hope of profit". Entrepreneurs otherwise referred to as founders in the startup parlance, envisage opportunities to supply solutions to the needs of the market using innovations. These innovations include apps, other software solutions and devices that aim to make everyday living and conducting business easier. The founders are usually professional coders, web designers and other entrepreneurs whose goal is to change the world by developing products to attend to specific needs. The aim is to either scale up the activities of the startup or bring the model to a point where it can be sold-off to a usually larger entity or merged for greater success. Additionally, Natalie Robehmed of Forbes Magazine explained that, "having a staff complement not exceeding 80 – 100 employees and revenues not exceeding US\$20 million per annum," are parameters of what a startup should be.

## Entrepreneurship and startups

The forming of a startup has its genesis deeply embedded in the discipline of entrepreneurship. Some benefits of entrepreneurship as explained by economist, Trudi Makhaya include, "capability development, employment generation and economic growth". Entrepreneurship seeks to combine several elements including land, labour, natural resources and capital to create profit. Two main features of entrepreneurship are risk bearing and innovativeness.

The founder(s) of a startup must be able to chart a course into the uncertainty associated with conceptualizing,

establishing and operating a business against the background of a high failure rate of new businesses. According to Small Business Trends, over 50% of startup businesses in the United States fail within the first four years of operation. For a startup to succeed, innovation must be the order of the day as survival is pinned to the ability to introduce new, ground-breaking and revolutionary products to the market to address the needs of customers.

An important input for any startup is funding and access to funding. The founder usually relies on his own savings, funds from family or friends or a bank loan. If the startup can run successfully and does so over a period, the founder would at that time have the option of trying to access additional funding by pitching to angel investors, venture capitalists or through an Initial Public Offering (IPO). At this stage, the injection of additional capital raised through the various funding options, has the effect of taking the startup to that next level of product development, marketing and distribution.

## What is Competition Policy?

According to the European Commission, "competition policy is about applying rules to make sure businesses and companies compete fairly with each other". The European Commission also stated that, "this encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality". The rules of competition policy are applied in a free market situation where business activities are not regulated by the government. How-

ever, steps must be taken in applying the rules to ensure that businesses do not engage in anticompetitive activities which usually filters down to consumers being adversely affected. The objective of competition policy is to discourage businesses from becoming involved in agreements which tend to lessen competition, abuse of a dominant position, among other anticompetitive behavior.

### Competition Policy and Startups

Competition policy provides the conditions necessary for a startup to enter an existing market and compete fairly as businesses have an equal opportunity to participate in the economy. Conditions are favorable for startups where the barriers to entry are low and there are little or no restrictions as it relates to non-compete agreements, fees, exams, and intellectual property rights. Competition policy promotes innovation at a

faster pace, product quality improvements and the lowering of prices to consumers. In this type of environment, startups are less restricted and can explore their true potential as it relates to research and development of products and services.

As startups are allowed to proliferate due to favourable market conditions, the economy benefits based on the fact that the labour market also expands as more persons are being employed. Therefore, it can be concluded that competition policy has a positive effect on startups as it provides an environment of economic freedom and facilitates entrepreneurship.

### The Future of Startups

If Jamaica is to advance and achieve sustainable developmental goals, technological innovation must play a vital role. With a more developed economy

and better infrastructure, the living conditions of our people would be greatly improved. With these things in place, Jamaica would be on the path to achieving our National Development Plan, (Vision 2030) which aims to make "Jamaica, the place of choice to live, work, raise families and do business". This proliferation of technological innovation can only be sustained by the fostering and nurturing of a startup business environment. The future of successful startups is not guaranteed when all the necessary factors are considered, but stand a better chance of materializing where there is effective competition law enforcement. In this future, startups have the opportunity to compete with other startups as well as with established businesses hence, benefiting consumers and contributing to economic growth.

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# Importance of a Transparent and Comprehensive Merger Control System in Jamaica

By Kerri-Anne Mayne, *Associate at Myers, Fletcher & Gordon*

In recent times, Jamaica has seen numerous mergers and acquisitions take place including in the banking, media and telecommunications sector. The competition landscape in Jamaica continues to evolve with the Fair Trading Commission (FTC) indicating its intention to introduce a formal merger review framework. This is a timely development in light of the recent decision of Privy Council in the case of *FTC v Digicel Jamaica [2017] UKPC 28* which highlighted the need for clarity with respect to aspects of the competition legislation.

## **FTC v DIGICEL**

The Board of the Privy Council considered whether the FTC had the jurisdiction to intervene in the market for telecommunications services; whether the Fair Competition Act (FCA) applied to mergers at all; and whether the FCA applied to transactions which were approved by the Minister under another statute.

The Board found that the FTC is empowered to investigate whether any enterprise is engaging in business practices contravening the provisions of the FCA, including giving effect to any agreement which contained provisions that have as their purpose the substantial lessening of competition. It was decided that such agreements included merger transactions, because the reduction in the number of significant competitors in a market is likely to have the effect of lessening competition. The Board further found that there is no provision of the FCA excluding any particular sector from the FTC's powers of intervention.

A determination was made on the FTC's ambit in circumstances where a transaction required approval from another authority pursuant to another statute. It was held that where the lawfulness of an agreement depends on its compliance with any number of different statutory requirements, all the requirements must be satisfied if they are relevant.

## **WAY FORWARD**

While *FTC v Digicel* provided clarity on several issues that may arise in the competition arena, there are pertinent factors which must be considered in order to achieve an effective merger control system. An assessment of merger control sys-

tems in other jurisdictions may prove useful in this regard. Below are some considerations which should be borne in mind as we aim to develop a transparent and comprehensive merger control system in Jamaica.

### *Procedure for assessment of merger transactions*

Assessment of a merger transaction is generally undertaken, at first instance, by the regulators. However, in some jurisdictions a two-tiered system of assessment is employed in order to determine whether a transaction has the likelihood of resulting in the reduction in competition. As a result, where clearance has not been given after a preliminary assessment, a secondary more in-depth review by independent assessors knowledgeable in the industry in question is done. This may be a mechanism for providing greater transparency in the assessment process and increasing the likelihood that the regulators will arrive at a fair and balanced decision.

Definite timelines for assessment of relevant issues on the part of the regulators (and secondary assessors, if applicable) should also exist in order to ensure predictability in the application of the law.

### *Triggering events or Thresholds*

Triggering events which would warrant regulatory intervention must also be considered. Will any situation where two or more enterprises cease to be distinct as a result of being brought under common ownership or control suffice? Or will thresholds based on, for example, the combined revenue of the merged entity be relevant? Merger regulations could conceivably apply to any kind of multiple transactions, be it an acquisition of a majority or minority interest, a joint venture, a merger or any other transaction that involves an acquisition of assets or voting security, as in the case in the United States (US). Therefore triggering events or thresholds are necessary to avoid the regulators being overburdened with transactions which may not require their attention, especially in a small and developing economy such as exists in Jamaica.

### *Notification System*

An objective determination on whether there will be a voluntary or mandatory notification system must be made. In the

United Kingdom (UK), there is no requirement to notify the competition authority of an intended merger. As is the case in Jamaica presently, the competition authority in that jurisdiction can open an investigation on its own initiative or on the basis of a complaint. This can be contrasted with the position in other jurisdictions where notice of the merger transaction is required. In the US, in particular, filing of notice of a transaction is considered mandatory only where certain threshold requirements are met and no exemptions are available.

Of course, where requirements for notice exist, other considerations arise including responsible party to give notice, point at which notice must be given and any filing fees (and how they will be calculated). Care has to be taken in instituting a specific deadline for filing a notice. In the US and France, parties can submit filings at any time after the execution of a letter of intent (which can be non-binding) or a definitive agreement.

#### *Role of the Regulator*

Delineation of the parameters of the power of the regulator is of utmost importance in order to ensure that the regulator's legal authority is clear. Stakeholders must be aware from the outset of whether the regulator is empowered to block a merger transaction of its own volition, as is the case in the UK; or whether the regulator will have to go to the court to get an injunction as exists in the US.

#### *Stakeholders' responsibilities*

There must be clarity of stakeholder's responsibility including obligations on any third party including those intimately involved in the transaction (for example, attorneys), taking account of any pre-existing duties of confidentiality. Additionally, rights of third parties (for example, competitors) to participate in the process must be outlined if such exist.

#### *Confidentiality*

Mechanisms to ensure confidentiality in relation to the transactions under review by the regulators are of utmost necessity. This requires a consideration of whether any aspect of the merger review in relation to particular entities will be publicized. In some jurisdictions, all aspects of merger review remain confidential while in others, only the very fact of a review is publicized.

#### *Other Important Considerations*

Remedies (for example, commitments or undertakings) that can be imposed as conditions of clearance to address competition concerns of the regulators should also be considered.

Penalties for non-compliance with interim measures and/or investigatory requirements of the regulators must be clear.

Rights of appeal on the part of merging entities are of necessity; however the procedure for appeal will be affected by the considerations above.

Creation of a formal merger review is no small task. It requires consideration of many serious issues as the regulations

created will significantly affect Jamaican businesses. Therefore, a determination of the above considerations must be made having regard to Jamaican commercial realities. It is important that the system which is created is comprehensive and the process employed, transparent in order to prevent the deterioration of business confidence. For these reasons, as conversation regarding the importance of the merger control system continues, stakeholders must keep at the forefront of their consideration, the importance of maintaining balance which will not stifle freedom of doing business while also protecting the consumer and promoting competition.



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# MARKET DEFINITION UNDER THE FAIR COMPETITION ACT

## *Illuminating an Elusive Statutory Concept*

*By Marc Jones, Legal Officer*

### **The statutory context**

Everything in competition law depends on defining the market. As a practical matter the Commission's enforcement jurisdiction in any given case is more or less co-extensive with the relevant market or markets, how so ever defined.

Therefore the first port of call in any investigatory voyage under the Fair Competition Act must be section 2(3) which provides that:

"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."

The language of this provision is not new or even unique to Jamaica. Its lineage can be traced from statutory ancestors in Australia and New Zealand.

The first ancestor was Australia's Trade Practices Act 1974. As originally enacted that statute tersely defined "market" as meaning "a market in Australia". However, in 1977 the statute was amended and that terse definition was expanded with the addition of the following words in section 4E:

"For the purposes of this Act, "market" means a market in Australia **and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.**" (emphasis supplied)

Most of the Australian jurisprudence on market definition springs from this amended definition.

Across the Tasman Sea, New Zealand, in seeking harmonization of its commer-

cial laws with Australia under the 1983 Australia/New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), enacted and amended its Commerce Act 1986. The amended statute defines "market" in analogous terms to that of Australia:

"Every reference in this Act, except the reference in section 36(a)(1)(b) and (c) of this Act [which deals with trans-Tasman markets], to the term 'market' is a reference to a market in New Zealand 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." (emphasis supplied)

While the New Zealand and Australian statutes share similarities in terms of syntax and substantive legal standards (i.e. "substitutability"), the Commerce Act introduced the phrase "as a matter of fact and commercial common sense". Jamaica's Fair Competition Act inherits this trait from its New Zealand ancestor.

Notwithstanding the statutory difference between Australia on the one hand and New Zealand and Jamaica on the other, the New Zealand courts have deliberately harmonized their jurisprudence on market definition with that of the Australian courts. Similarly, the Jamaican Court of Appeal has applied Australian jurisprudence in interpreting provisions of the Fair Competition Act.

Consequently, in light of the statutory antecedents of section 2(3) of the Fair Competition Act and the alignment of the Australian, New Zealand and Jamaican courts on matters of interpretation in the competition law field, this article will draw on the case law of the former two countries as guides to the meaning and application of the provision.

### **The composition of a market**

Although the definition of "market" under section 2(3) repeats the word "market", it is plain enough on the language of the provision that the concept encompasses "goods" or "services". Those latter terms are in turn defined under section 2(1) of the Act.

Over the last 25 years, it was the prevailing interpretation that the exclusion of "real property, money, securities or choses in action" found in the definition of "goods" under section 2(1) meant that such subject matter could not constitute a market for the purposes of the statute.

However that view no longer prevails and the settled interpretation now is that the statute does not exclude any particular sectoral market. In light of this, and given the broad definition of "service", it has been argued that trade in real property, money, securities or choses in action could constitute markets for services under the statute.

It is also plain enough that the statutory concept of a market encompasses not only one type of good or service. It is a flexible concept capable of expanding to include "other goods or services" separate from the first mentioned good or service (or in appropriate cases contracting to exclude those "other goods or services").

This flexibility in turn hinges upon the criterion of "substitutable" which goods or services must possess in relation to each other in order to comprise a market.

### **The scope of a market**

However this begs the question, what is contemplated by the statutory concept of "substitutable"? Australian case law suggests that, at a minimum, the con-

cept of substitutability under the statute contemplates a functional analysis of goods or services that are said to comprise a market, together with their cross-elasticities of demand.

Yet substitutability is not a one dimensional concept that is focused only on the demand side of the market. The High Court of Australia has stressed that:

"...in delineating the scope of the product market demand substitutability has often been emphasized at the expense of supply side substitutability. But this does not mean that supply substitutability is irrelevant to the task of market definition: see *Europemballage Corp. and Continental Can Co. Inc. v E.C. Commission*.

Rather, the definition of the relevant market **requires** a consideration of substitutability both on the demand and on the supply side." (emphasis supplied)

The High Court is correct in its insistence on a consideration of both dimensions of the product market. In this regard, exclusive reliance on demand side substitutability, while affording the competition authority the benefit in enforcement proceedings of narrowing the relevant market (which in turn provides support for a finding of market power against respondent firms), ignores the multi-dimensional nature of product markets.

Conceptually, this exclusive reliance could produce anomalous results in some cases. For example, two goods which share no overlap or similarity in their manufacturing processes could be held to be in the same market only on the ground that some consumers perceive them to serve similar uses.

Conversely, two goods which do share an overlap or similarity in their manufacturing processes could, nonetheless, be held to be in separate markets only on the ground of consumer perception, which can be the subject of idiosyncrasies. Arguably, consideration of supply side substitutability could be useful in correcting for such anomalies,

thereby affording the tribunal a more comprehensive definition of the relevant market in any given case.

### **The threshold of substitutability**

The question remains, how strong must be the responses from (potential or actual) buyers and sellers? Can substitutability be established on a showing that on some occasions, some people will interchange one product for another?

On the authority of *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) that does not appear to be the case. As Justice McHugh remarked in that case: "that some goods have some interchangeability with other goods is insufficient to establish that they are in the same market..."

His Honour observed further in *Boral Besser* that:

Section 4E should be taken to require **close substitutability** because in one way most products are substitutes for one another, meaning that market power would always be understated. Professor Chamberlain stated that 'the only perfect monopoly conceivable would be one embracing the supply of everything, since all things are more or less imperfect substitutes for each other.' **Close substitutability and competition are evident when more than a few consumers switch from one product to another on some occasions.**" (emphasis supplied)

Reminiscent of the "strong substitution" threshold referenced in earlier Australian case law, the foregoing passage emphasizes "close substitution" as the threshold to be met. But again this begs the question, what is the difference in degree between "some interchangeability" and "close substitution"?

Admittedly, the foregoing passage does not provide a definitive answer to that question. Yet a better understanding may be distilled from Justice McHugh's resolution of the market definition issue on the facts of *Boral Besser*.

The case concerned allegations that the Appellant, Boral Besser Masonry Ltd (hereinafter "BBM"), had misused its

market power in breach of section 46 of the Trade Practices Act.

BBM was a subsidiary of a corporate grouping which operated in the areas of building, construction materials and energy. More specifically, BBM were manufacturers of concrete masonry products such as blocks, bricks and pavers.

On the question of market definition, the primary judge in the Federal Court (Heerey J) identified the relevant market as the general market for walling and paving products. He did so, on the basis that the uses to which concrete masonry products were put could also be achieved with other building materials such as asphalt, precast concrete, tilt-up panels and other walling systems. In the primary judge's view "a wall is a wall". There was also evidence of some degree of interchangeability, albeit temporarily in the 1980s, between concrete masonry products and some of the other building materials.

On the other hand, the Full Court of the Federal Court (Beaumont, Merkel and Finkelstein JJ) disagreed with the primary judge. Their Honours more narrowly defined the market as one for concrete masonry products. The Full Court based its decision on findings that the characteristics of concrete masonry products were sufficiently different from other building materials, and that there was only a limited degree of switching by builders because of the specific needs of each construction project.

In the High Court, Justice McHugh preferred the views of the Full Court. In addition to the previously stated reasons of the Full Court, his Honour found as persuasive internal documentary evidence of BBM, which showed that its corporate strategy mainly focused on keeping in check its rivals in concrete masonry products. This evidence was accepted as an indication of how the respondent firm, as an industry participant, defined the market in which it competed; which Justice McHugh reasoned to be a relevant factor in market definition.

Arguably, the sharp differences of opinion among Australia's federal judges on the scope of the market in *Boral Besser* indicates that the difference in degree between "some interchangeability" and "close substitution" may lie somewhere among the relative weight to be assigned to evidence in any given case on a range of factors including product functionalities, the views of in-

dustry participants (including the respondent firm) and historical cross elasticities of demand and supply.

In other words market definition belongs not in the realm of 'bright line rules' but rather in the elusive realm of value judgments. It is therefore little surprise that the New Zealand and Jamaican statutes speak to substitutability as "a matter of fact and commercial

common sense".

**Conclusion: implications for competition law enforcement**

In conclusion, "market" under section 2 (3) of the Fair Competition Act is a conceptual chameleon which is capable of shape shifting on the basis of both demand and supply side substitutability while drawing its complexion from the factual matrix of a given case.

The threshold for establishing that goods and services are substitutable is the standard of "close substitutability", which requires more than a slight or temporary interchangeability between goods and services.

In that regard the difference in degree between "some interchangeability" and "close substitution" may lie somewhere among the relative weight to be assigned to evidence in any given case on a range of factors including product functionalities, the views of industry participants (including the respondent firm) and historical cross elasticities of demand and supply.

Those considerations are implicit in the phrase "as a matter of fact and commercial common sense" found in section 2(3) of the Fair Competition Act.

Finally, the chameleon-like nature of the statutory concept of a market, and in particular the relative nature of the threshold for substitutability, has important practical implications for competition law litigation.

Indeed, it may be posited with some confidence from the case law that the weaker the empirical basis for an opinion on market definition the more likely it will be challenged by an opposing party or rejected by the tribunal.

Furthermore where there is an appellate process, it may be difficult to successfully challenge on appeal a trial judge's conclusion on market definition. This is due to the aforementioned opened textured and value judgment laden nature of the analysis, which signals to an appellate court that it should be slow to interfere with a trial judge's conclusion unless a clear error in fact or law was committed.

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