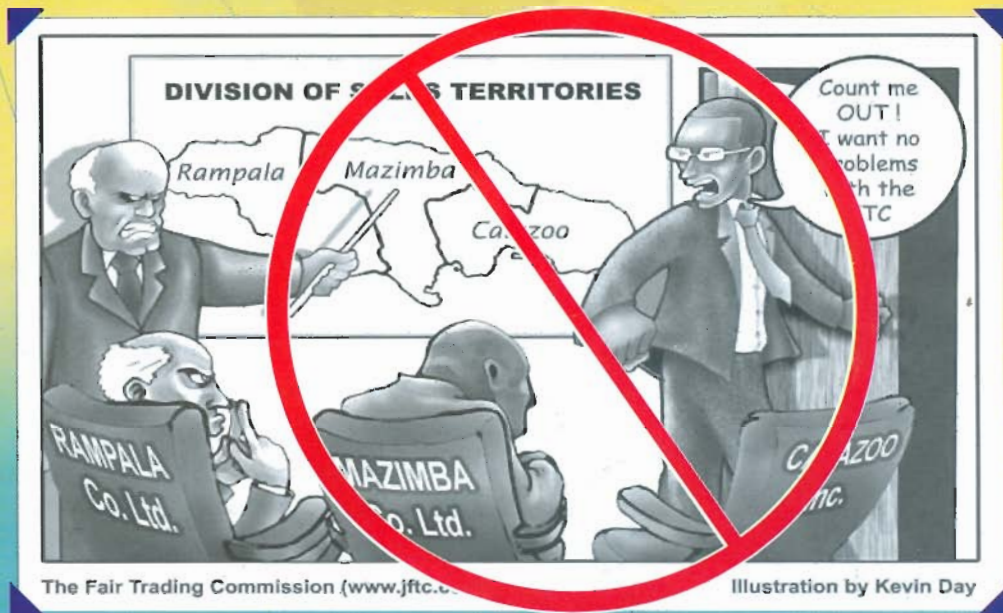


The
FAIR TRADING COMMISSION
is 10 years old !
1993 - 2003



The Fair Trading Commission (www.jftc.co.zw)

Illustration by Kevin Day

10 years of working to encourage & maintain a competitive environment for the benefit of all.

Let's continue the journey.

NEWSLETTER

Volume VIII, December 2003

FTC'S MISSION:

To provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica, with a view to providing consumers with competitive prices and product choices.

CONTENTS

Message from the	
Governor General.....	3
Prime Minister.....	3
Leader of the Opposition.....	4
Minister of Commerce, Science & Technology.....	5
Minister of Industry & Tourism.....	6
Chairman, Fair Trading Commission.....	7
PSOJ.....	8
The New Economy Project's Assistance to the Fair Trading Commission.....	9
Bid-Rigging, An Offence against Competition.....	11
Protection of Local Industry versus Competition.....	14
FTC 10th Anniversary Collage.....	16
Competition Issues in the Provision of Network Access.....	18
The Unavailability of Goods Advertised at a Bargain Price	21
The Role of Competition in Jamaica's Economic Development and How the Fair Trading Commission Facilitates this Process..	22
Price Fixing.....	24
Through the Years - Life with the FTC.....	25
Misleading Advertising.....	28
Fourth Annual Shirley Playfair Lecture.....	29
Abuse of Dominance under the FCA.....	30
Complaint Statistic.....	31
FTC Word Search.....	32

Editorial Committee: *Simone Lopez (Chairman), Evona Channer, Wendy M. Duncan, Ann-Marie Grant, Melissa Johnson*

MESSAGES

As a country develops it is always necessary to establish institutions to deal with the complex matters that arise in the administration of its affairs. In the Jamaican context, one of the most important institutions that has been established to regulate matters is the Fair Trading Commission. It ensures that high standards are maintained, particularly in advertisements, that the public is protected and the quality of the product is sustained. Consequently, we are better able to compete in the global marketplace.

The Fair Trading Commission has done an excellent job and it is obvious that the high standards set are maintained. There is no doubt in my mind that if the Commission continues along its current path, in a short while Jamaica will be able to produce goods equal to the best in the world.

Finally, it is my wish that the organisation will extend and increase its activities, so that the producers and traders will always be conscious that only the best is good enough.

I extend congratulations to the Officers of the Fair Trading Commission on this your tenth anniversary. May your celebrations be truly rewarding.

*His Excellency the Most Hon. Sir Howard Cooke,
O.M., G.C.M.G., G.C.V.O., C.D.
GOVERNOR GENERAL*

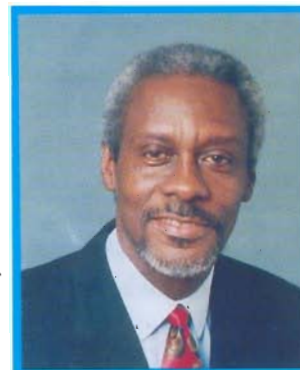


I congratulate the Fair Trading Commission on its 10th anniversary, a milestone that deserves recognition. The FTC has a tremendous responsibility to effectively monitor and foster healthy competition while keenly observing the realities of emerging markets to ensure the right balance in all business and service practices.

The Government of Jamaica is proud to have established this agency, which is the first of its kind in the Caribbean region.

In its initial stages, the Fair Trading Commission was an immediate response to the growing concepts of liberalisation, privatisation and deregulation. The full advent of globalisation now dictates that the agency concentrates on its capacity strengthening so that businesses of all sizes in Jamaica and the CARICOM Region will not be vulnerable in the global marketplace.

Since its inception in 1993, the Fair Trading Commission has been pivotal in the development of national competition policy as well as for cross-border Caribbean trade and operates as a key reference in these



matters to CARICOM member states.

And as the Caribbean advances toward further Integration and the full establishment of the Caribbean Single Market and Economy, the Fair Trading Commission will be vital in preparing companies for a smooth transition and sustainable operation and development in the new environment.

Entities such as the FTC are sometimes taken for granted, mainly because of the lack of understanding in its relevance. It is however critical that businesses and consumers develop an awareness of the importance of fair competition and then to take full advantage of the benefits that regulation by the Fair Trading Commission provide in terms of consumer satisfaction, quality service and best practices with an efficient business environment.

The organisation has not been without its share of challenges but through admirable professionalism it continues to administer quality regulation and mediation services in competition matters and consumer protection.

I wish the FTC every success in all future endeavours confident that the high level of commitment it has already demonstrated will not wane in the years ahead.

The Most Hon. P.J. Patterson, O.N., P.C., Q.C., M.P.
PRIME MINISTER

The importance of a competitive business environment cannot be over emphasized. If consumers are to receive reasonable prices, good service and the benefits of the latest technology, strong competitive forces must be at work.

The Fair Trading Commission has been attempting to ensure that the Jamaican market place is competitive and that consumers have a powerful counter weight to the power of large business firms. It is noteworthy that the Commission has challenged several of these powerful corporations and has gained judicial decisions which have provided redress to consumers.

I congratulate the FTC and its staff on ten years of useful work in the service of the nation, during one of the most trying and challenging periods of economic adjustment. It is noteworthy that no one has claimed bias or prejudice in its actions and I hope that its record of service will continue.



The Most Hon. Edward Seaga, O.N., P.C., M.P.
LEADER OF THE OPPOSITION

MESSAGES

The 10th Anniversary of the Fair Trading Commission is for me a very special event. Special, because I have been associated with the organization from conception to birth, but more-so, because I have been privileged to participate in its growth and evolution as a national institution fundamental to free enterprise and critical to the protection of consumer interests.

We accept that a free market system holds the best prospect for a country's economic development and the improvement of the welfare of its citizenry. We believe that a competitive market will increase the efficiency of competing firms thus delivering the optimal combination of the lowest possible prices and the highest possible quality of goods and services to consumers.



The move towards a liberalized market economy often times brings with it not only fierce and vigorous competition, but also some amount of anti-competitive practices, as firm's jostle for economic advantages. In order for a market economy to deliver the benefits to the citizenry that it promises, the State must ensure that the appropriate infrastructure is in place.

The Fair Trading Commission in fulfilling its mandate has dispelled the notion that a free market means a free for all and a withering away of the State.

As part of the free market infrastructure the competition agency ensures that the rules of the game are observed, that some players are not allowed to use their market power to deny other players an opportunity to compete. Importantly also it ensures that the economic gains which are derived from productive activity are not diverted away from consumers to firms which are able to distort market structures.

The hard working and dedicated professionals who are employed to the Staff of the Fair Trading Commission, along with the Commissioners continue to work tirelessly to ensure that the Jamaican market place is covered by the most appropriate laws and practices, which will lead to the fastest possible improvement in the welfare of the Jamaican people.

In commending the Fair Trading Commission on the attainment of this important milestone, I am confident that you will continue to be the relentless watchdog of the Jamaican market place, securing relief for individual consumers who have been wronged, while increasingly seeking to ensure that business conduct is such that no action taken by any business will deny consumers all the possible benefits which a free and fair market can deliver.

The Hon. Phillip Paulwell, M.P.
MINISTER OF COMMERCE, SCIENCE AND TECHNOLOGY

The issues of Competition and the protection of Consumer rights are of immense local importance and over the years, the Fair Trading Commission (FTC) has been ensuring that consumers and traders in Jamaica are treated fairly in the world of business.

As its mission dictates, the Commission is geared towards providing consumers with competitive prices and product choices and a more effective voice with which to articulate their views on products bought or services received.

In 10 years, the Commission has made its voice heard in every area of business ensuring that businesses employ good practices that would enable them to deliver good services and products to the consumer at competitive prices and as efficiently as possible.

Having myself been involved with the Commission from its inception, I can proudly say that it executed its mandate with pride and a sense of purpose, as its objective is to ensure that both consumers and businesses alike are protected. The support I received from fellow Commissioners and hardworking staff of the FTC, who are passionate to see the Commission succeed, enabled me to effectively carry out my assignments as past Commissioner and Acting Chairman of the FTC. I extend appreciation to you all for the assistance received during my tenure.

On this your 10th Anniversary, it is my delight to extend heartiest congratulations to you all and wish for you many more successful years. I also wish you success in your anniversary celebrations.

Happy 10th Anniversary!

The Hon. Aloun Ndombet-Assamba, MP
MINISTER OF INDUSTRY & TOURISM



MESSAGES

It is my pleasure to serve as Chairman of the Fair Trading Commission (FTC), following after our first Chairman, Mrs. Shirley Playfair, and Minister Aloun Ndombet-Assamba, who served as Acting Chairman, after Mrs. Playfair's untimely passing. Mrs. Playfair and Minister Assamba guided the FTC through its infancy, and the task of taking the FTC into adolescence has fallen to me.

All new organizations experience some birth pains and uncertainty in the formative years. The FTC has been no different. It takes time to establish oneself, and to gain the confidence and respect of the general public. I think the FTC has made tremendous progress over the past 10 years. The business community and the public in general, are aware of the presence of the FTC and the role that it plays.



There are many who believe that competition policy is in conflict with industrial policy because it does not favour any particular interest but rather supports the development of efficient markets. Promoting competition is welfare-enhancing because it forces firms to be efficient and strikes a perfect balance between ensuring competitive access to current products and encouraging innovation and the development of new products. This translates into consumers having access to the best quality products at the cheapest possible prices. Competition also means that markets will not be foreclosed to any firm that wishes to offer its goods or services to the Jamaican people.

The FTC will continue to strive to make the Jamaican marketplace as competitive as possible. We recognize the responsibility that the Government and people of Jamaica have bestowed upon us. Once the decision was taken that the Jamaican economy would rely on market forces to allocate the means of production and to satisfy peoples' material wants; it was incumbent on the Government to establish a body such as the FTC to ensure that the market system was allowed to work, as it ought.

I have the honour of working with a group of dedicated Commissioners and a very enthusiastic Staff. I would like to take this opportunity to thank them for the work that they are doing. I would also like to take this opportunity to thank former Commissioners and Staff who have served in the past, for the contributions that they have made to the advancement of the FTC as an institution and to the development of a properly functioning market economy for Jamaica.

Dr. Peter-John Gordon
CHAIRMAN, FAIR TRADING COMMISSION

MESSAGES

Those of us who are old enough will remember when the regulatory landscape was characterized by two phenomena: (1) institutions such as the Prices Commission and the various commodity boards which determined the prices of goods and services and (2) the absence of advocacy with a view to influencing a regulatory framework which promoted healthy competition.



In 1993 we therefore lauded the establishment of the Fair Trading Commission (FTC) to administer the Fair Competition Act. As a competition agency and consumer advocate the FTC is charged with the responsibility of guiding businesses and consumers with respect to their rights and obligations under the Fair Competition Act, functions which the Commission has discharged most effectively.

Another important mandate which the FTC has fulfilled quite commendably is its role in supporting the consideration of competition principles by Government in the process of market reform and privatization. The FTC has demonstrated that it recognizes that both anti-competitive conduct by businesses and inappropriate regulatory intervention, severely impact the market environment. As such, the FTC was particularly instrumental in preparing the regulatory framework for full liberalization of the telecommunications sector.

We also applaud the FTC for maintaining its commitment to educating the public on the role and function of competition and on the launch of its re-designed web site in 2002. Among other things, the re-designed web site includes a wide range of information and an online complaints form.

In the ten years since its inception, the FTC has made considerable progress in achieving public awareness on competition and in influencing the regulatory framework to ensure a competition-friendly environment.

The Private Sector Organisation of Jamaica extends sincere congratulations to the FTC on the occasion of its tenth anniversary and offers our best wishes for the continued growth and success of the FTC.

The relationship between the Fair Trading Commission (FTC) and the United States Agency for International Development (USAID) started back in 1993 when the USAID partnered with the Government of Jamaica (GOJ) to provide assistance for the establishment of the Jamaica Fair Trading Commission. The USAID, recognized that the Fair Competition Act (FCA), which had been passed in Parliament in March of that year, could not succeed without the establishment of an effective implementing agency charged with the enforcement of the legislation.

In May 2002, the USAID was asked by the FTC to assist it in its efforts to improve its enforcement capabilities under the FCA; and to strengthen its technical capacity in the area of competition law and policy. The USAID assigned the task of developing a programme for the FTC to its New Economy Project (NEP). The assistance programme developed by the NEP was divided into three (3) sections, namely:

- Provision of technical expertise in the areas of competition law and economics. Financial and technical assistance to enhance the FTC's knowledge of anti-trust issues and increase the technical capacity of its staff
- Appointment of a consultant to guide the process towards enhancing the legal framework within which the FTC operates
- Assistance with designing, procuring and implementing a reliable and efficient database workflow management system

The objectives of the programme were defined as:

- Improvement in the technical capacity of the FTC to carry out investigations and assessments and enhancing its capability to address competition matters and anti-competitiveness in all sectors. By extension, the training program will contribute to improvement in the Commission's caseload management and increase the awareness of Jamaican practitioners in respect of key issues in competition law.
- Assist beneficiaries in adopting globally accepted best practices in competition policy.
- Establishment of workflow patterns which will enable the FTC to develop clear business processes for faster and more accurate processing of complaints.
- Reduction in the time taken to resolve cases/matters relating to anticompetitive practices in trade and business by at least 40%.



(Left to Right) Martin Taschdjian, Telecommunications Consultant; Cheryl Francis-Nurse, Case officer, NEP; David Miller, General Manager, FTC; Barbara Lee, Executive Director, FTC; Sharon Black, Telecommunications Consultant; Robert Otto, Executive Vice President, CARANA Corp.; Michael Julien, Chief of Party, NEP.

June 2003 saw the start of the Training Programme which included practitioners from public sector institutions like the Attorney General's Department; the Office of the Chief Parliamentary Counsel; the Ministry of Commerce Science and Technology; the Jamaica Intellectual Property Office and the Office of Utilities Regulation. It also included private attorneys.

The consensus among all participants is that the information which was provided was practical, useful and invaluable to the development of their individual institutions.

The insight provided with respect to the process of improving the legal structure of the Commission formed the basis for a comprehensive analysis of legal structures adopted by competition authorities worldwide. This has assisted the Commission greatly in its quest to determine the most appropriate structure for Jamaica.

Much progress has been made in the creation of the Commission's Database Management System, which will allow for improved workflow processes and the capture and preservation of all information within the Commission's domain.

It is difficult to imagine any of these achievements without the generosity of the NEP. The professionalism of its Staff and of the experts which it has provided have made the project a rich and gratifying experience.

We thank them wholeheartedly.

BID-RIGGING, AN OFFENCE AGAINST COMPETITION

What is Bid-rigging?

Bid-rigging, also known as collusive tendering, is one of the offences prohibited by the Fair Competition Act. Section 36 makes it illegal for two or more persons, in response to a call or request for bids or tenders, to either: (a) agree not to submit a bid; or (b) submit bids or tenders arrived at by their prior agreement. It is particularly likely to be encountered in the engineering and construction industries where firms compete for very large contracts.

Purchasers, who are often government entities, but who may also include private entities, seek to acquire goods and services by soliciting competing bids. Bid-rigging occurs, for example, when the competing suppliers

conspire and agree in advance on the bids to be submitted by each, so as to control the outcome of the bid. By so doing the suppliers effectively raise prices, or keep prices high, and reduce or eliminate competition in the market place.

Like other anti-competitive offences of its kind, bid-rigging is costly to the economy. It costs the purchasers of the bid, as they end up paying far more than they would have had to pay otherwise. This in turn increases the cost to the consumers, as the higher prices are inevitably passed to them. They end up paying far more than the fair market value of these goods and services.

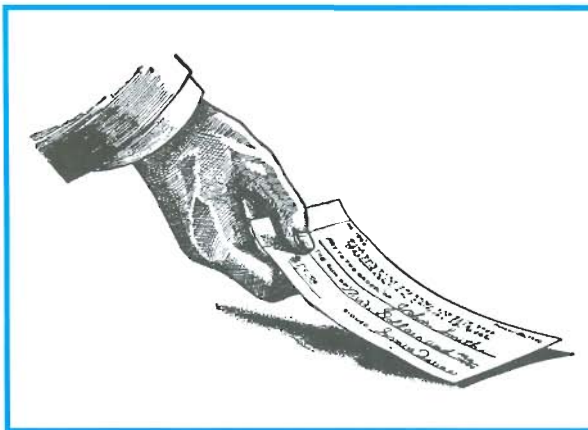
How is the offence committed?

There are myriad ways in which this offence is committed and there seems to be no limit to the forms which it can take. It may range from the simple scenario of a group of friends agreeing not to outbid each other at a small auction, to large companies orchestrating their bids so that a pre-selected supplier wins a large contract.

Bid-rigging is likely to take one of the following forms: **Bid suppression, Complementary or “cover” bidding, Bid rotation, Subcontracting and Market Division.**

Bid suppression

This is an agreement among the bidders to either refrain from bidding, or withdraw a bid so that a pre-selected supplier's bid is accepted.



Complementary bidding

In Complementary bidding, there is the appearance of genuine, competitive bidding but, in fact, some suppliers will have agreed to submit bids that are too high or which contain special conditions which will be unacceptable to the buyer. This enables another supplier's bid to be accepted when a minimum

number of bidders is required. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding to conceal secretly inflated prices.

Bid rotation

This is a systematic or random method by which conspirator suppliers allocate tenders among themselves. In Bid rotation schemes all suppliers agree to take turns in submitting the lowest bid and by so doing they all receive an equivalent share of the contracts.

Sub-contracting

In exchange for either not bidding, or for submitting a bid which they know will lose, suppliers sometimes receive lucrative sub-contracts that effectively share among themselves the benefits of the illegally obtained bid. For instance, after conspiring with other suppliers who agree not to submit bids, an office supplies company wins a government contract at a greatly inflated price. The

Company then passes on an equally lucrative sub-contract to a participating supplier as a reward for participating in the scheme.

Market Division

In Market Division agreements, suppliers agree not to compete with each other in specific territories or for specific customers or products. One supplier might therefore be permitted to bid on contracts offered by particular customers and in return, he will refrain from bidding on contracts offered by customers allocated to other suppliers. In other instances suppliers will agree to sell only to customers in certain territories and not to customers in territories allocated to conspirator suppliers. For example, a supplier of janitorial services might agree to bid on contracts offered by government agencies for providing janitorial services to hospitals in the parish of Kingston and Saint Andrew, and refuse to bid on contracts for the provision of those services in hospitals in Manchester and Saint Catherine.

Bid-rigging across the Globe

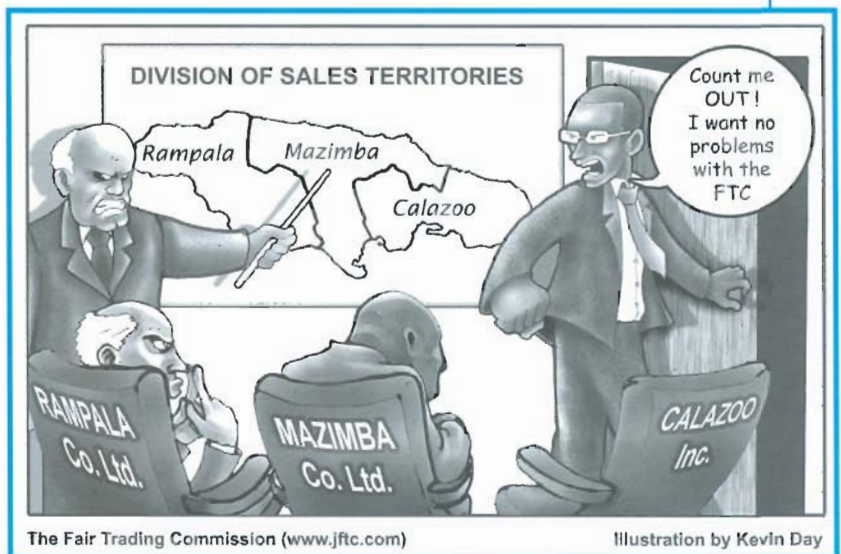
Bid-rigging has occurred with frequency across the globe and is a criminal offence in some jurisdictions.

In the United States of America, in the state of Washington, 63 corporations and 57 individuals were convicted in 1994 and approximately US \$60 million in fines were imposed in respect of cases involving the rigging of bids in supplying dairy products to public school districts. In one case, the former manager of a Dairy Company, in a conspiracy from 1986 to 1990, intentionally submitted high bids on some contracts to help the other conspirators win school dairy contracts. That Company pleaded guilty to five milk bid-rigging cases and has paid a total of U.S. \$4 million in fines and penalties, while twenty-seven individuals were sentenced to 6 months imprisonment. In the United States individuals found guilty of bid-rigging are subject to a maximum fine of US \$250,000 and/or three years imprisonment, while corporations are

subject to a maximum fine of U.S. \$10 million.

In Canada, bid-rigging is also a criminal offence and firms and individuals convicted face fines at the discretion of the Court or imprisonment for up to five years.

Bid-rigging in Japan is an offence under the Antimonopoly Act and in 1994 the Japanese Fair Trade Commission took legal steps in 19 cases



involving bid-rigging. In one of these cases, seven major Japanese electrical equipment manufacturers pre-determined the bid-winner based on the coordination among bidders in the public bid for large-scale colour projection equipment for use in sports stadiums. The sanctions there are both civil and criminal, and the Company was forced to pay huge fines.

In Jamaica, bid-rigging is a civil offence and an enterprise that is found guilty of bid-rigging may be fined a penalty of up to 5 million dollars. Section 48 of the Fair Competition Act allows individuals to recover damages for any loss caused as a result of the offence.

What do I look for?

In an effort to assist the public in detecting this form of collusion, the Fair Trading Commission

(FTC) highlights certain general patterns which may indicate the possibility of collusion. Some of these are:

- The same company always wins a particular bid.
 - The same suppliers keep submitting bids for particular contracts and each supplier seems to get a turn at being the successful bidder.
 - Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
 - A smaller number of competitors than usual, submits bids.
 - A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
 - Bid prices drop whenever a new or infrequent bidder submits a bid.
 - A successful bidder sub-contracts work to competitors that submitted unsuccessful bids on the same project.
 - A company withdraws its successful bid and is subsequently sub-contracted by the company whose bid becomes the winning bid upon the other's withdrawal.
- Ask for bids to be broken down into as much detail as possible.
 - Keep records of bids for comparison purposes.
 - Insist that main contractors assign sub-contractors through a competitive process.
 - Seek information from bidders about their affiliated companies.

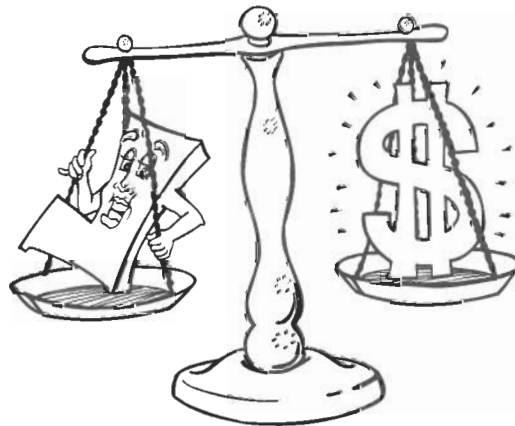
The offence of bid-rigging can be difficult to detect. The patterns of collusion mentioned earlier, while arousing suspicion are not, without more, conclusive proof of collusion. Once these indicators of collusion are brought to the attention of the FTC the matter will be investigated to determine whether collusion exists or whether there is a legal rationale for the behaviour in question.

If you suspect that you are the target of a bid-rigging operation, contact the Fair Trading Commission. It needs your help in ensuring that the rules of fair competition are adhered to by all. ■

What can I do?

Purchasers soliciting bids must be alert in detecting any of the above patterns of behaviour and should create effective policies which reduce the likelihood of bid-rigging operations. The following steps, recommended by the Office of Fair Trading (OFT) in the United Kingdom, will help purchasers tackle bid-rigging:

- Make any bid qualifications as broad as possible so that they can be met by the widest range of suppliers.
- Advertise widely and shop around for suppliers when inviting bids.



PROTECTION OF LOCAL INDUSTRY VERSUS COMPETITION

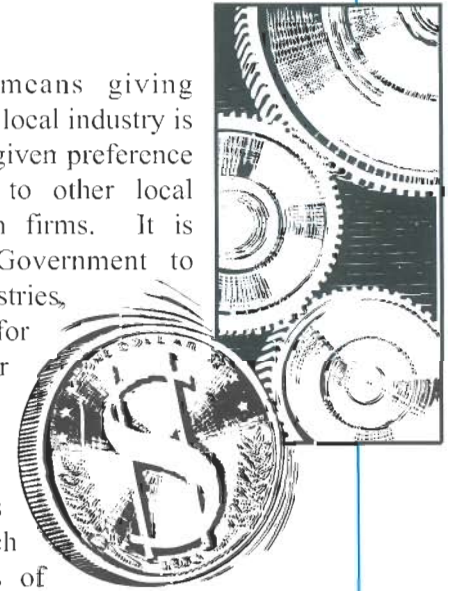
The issue of protection of local industries has been in the news recently. Some organizations and individuals have lent their support to a more protectionist stance by the Government, while others have opposed. It is clear from some of the commentary which appeared in the daily newspapers around this topic, that the issues involved are not well understood. The issue for the most part has been posited as foreign competition versus Jamaican jobs.

Implicit in some of the comments made is the idea that when the Government of Jamaica protects a local industry, it is somehow transferring resources from foreign producers to local producers. This is not so. The Government of Jamaica (especially since Jamaica is a small country) does not have the power to shift resources from a firm operating outside the country to one operating within the island by using tariffs. What the Government of Jamaica has the ability to do with the tariff instrument is to shift resources from one segment of the Jamaican economy to another. Protection given to a local industry is not protection from foreign competition (as is often assumed) but rather protection from other local economic agents: consumers and other industries.

High tariffs on the importation of a product cause the local production of that product to become absolutely and relatively more profitable for that producer. The increased absolute profitability occurs of course because consumers and other producers who purchase from this industry pay higher prices than they would have in the absence of the high tariffs. A high tariff transfers resources not from the foreign producers to the local producers, but instead from the domestic consumers and domestic firms to the local producers who benefit from protection. Because the protected industry becomes relatively more profitable than other local industries, resources will flow out of other industries into the protected industry. Profits and wages being relatively higher in the protected industry will attract capital and labour away from the unprotected industries. Protection therefore gives an advantage to a local industry relative to other local industries.

Protection merely means giving preference to. When a local industry is given protection, it is given preference primarily in relation to other local industries, not foreign firms. It is impossible for the Government to protect all local industries, just as it is impossible for a mother to prefer all her children.

Protecting one industry therefore hurts other industries, which are not the recipients of protection. One might argue that it is in the national interest of the country for the makers of banana chips to use local bananas, and therefore the Government should protect the local banana industry by imposing a high tariff on the importation of bananas. This will guarantee profits and employment within the banana industry. But what effect does this policy have on the producers of banana chips. If these manufactures are forced to pay higher prices for the bananas, which they use, then banana chips manufactured in Jamaica will be less competitive than if the producers were allowed to obtain bananas from the cheapest source. Higher prices for banana chips will cause a fall in their sale, both on the domestic and export markets. Reduced sales will lead to less employment in the banana chip industry. The protection of the banana industry and the jobs therein will result in the retardation of the banana chip industry and the number of persons employed in that industry. The protection of agricultural jobs (bananas) lead to the destruction of manufacturing jobs (banana chips). Should the Government protect the banana industry? If the objective is to maximize social welfare, then on strict economic grounds, one could determine the net social benefit by totaling the benefits of protection (increased profits and employment in the banana industry, which are easy to measure) and subtracting the cost of protection (loss of profits and jobs in all affected industries, and the loss of consumer welfare due to higher prices and reduced choice, which are not as easy to quantify as the

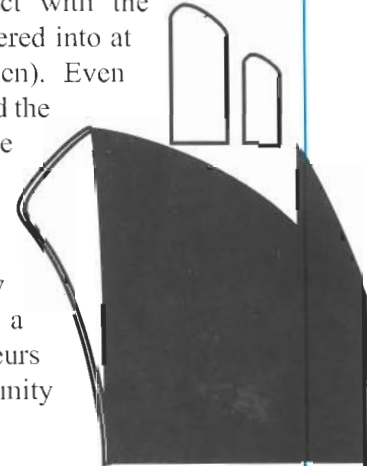


benefits, but just as real). A determination can then be made as to whether costs of protection outweigh the benefits.

Many times a firm which seeks protection argue that it need this protection only for a limited time period. It claims that the company needs more resources than it is able to generate from sales it would receive in a competitive environment, in order to make the necessary investment to reach efficiency levels which would make it competitive. The firm further argues that with the increased resources which temporary protection provides, it will attain profitability at efficiency prices in the future. Financial institutions exist to move resources from net savers to net borrowers. Financial intermediates lend only to firms who are net borrowers in the present and net savers in the future. A credible borrower is one who will be able to repay in the future. If the proposed investment will make the firm profitable in the future, the question then arises, why doesn't the firm convince a financial institution to transfer some of the firm's future profits to the present in the form of a loan to be repaid when the firm becomes profitable.

An often used argument for protection of a local industry is the infant industry argument. This argument was first proposed by Alexander Hamilton in his Report on Manufacturers. The protection given here is supposed to be temporary. The rationale here is not a shortage of resources as in the argument above, but rather that the local industry cannot meet the efficiency levels which would deliver comparable prices to the imported products. The reason for this lack of efficiency is that the local players are simply not as good. The argument continues that it takes time for the local players to learn, since learning comes only by doing. Protection (i.e. forcing the domestic consumers and other producers who use the output of the protected industry) is required during the time it takes the local players to learn. The problem with this infant industry argument is that the infant never grows up. The market discipline which forces efficiency has been suspended (presumably for a limited time) so in fact there is no compelling reason for the

protected industry to strive for efficiency. The protected firms know that the deadline for the removal of the protection is re-negotiable (irrespective of the contract with the Government which they entered into at the time the protection is given). Even if the infant does grow up and the contract concerning the timing of the removal of the protection is honoured, a further question arises: why should the rest of the society bear the cost of preparing a select group of entrepreneurs and workers for the opportunity of making private gains?



Another argument for protectionism which was also proposed by Alexander Hamilton and which seems to find currency today is "free trade is fine, if everyone practiced it." The underlying argument here is some notion of fairness. Let us assume that other countries did not practice free trade, what should Jamaica do? A country must do what is best for that country irrespective of what other countries do. Jamaica must ask itself what is its level of welfare if it has free trade while other countries practice protection and also what is its level of welfare if it also practices protection while other countries practice protection. It must then compare the welfare levels under both those situations and pick the course of action which gives it the highest level of welfare. Since protection does not transfer resources from foreign producers to the domestic producers (especially if the domestic market is small by world standards) it is unlikely that protection will lead to a higher level of welfare for the Jamaican society. Simply shooting oneself in the foot because others are doing the same is not particularly sensible public policy.

The argument for protection is usually couched in terms of creating local jobs. Public policy should not be primarily about creating jobs. The society doesn't simply need jobs; it requires productive jobs. Efficiency is not primarily about the lowest cost in

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10th Anniversary

FAIR TRADING COMMISSION



Anniversary

10th Anniversary

SAT. SEPTEMBER 6th

Consumer Outreach at the Manchester Shopping Centre

SUN. SEPTEMBER 7th

Church Service at the Boulevard Baptist Church

MON. SEPTEMBER 8th

Media Breakfast at the Knutsford Court Hotel
Topic: Competition in a Liberalized Economy
Chat Room on go-jamaica.com

WED. SEPTEMBER 10th

Courtesy Call to His Excellency,
The Most Hon. Sir Howard Cooke, Governor General

THUR. SEPTEMBER 11th

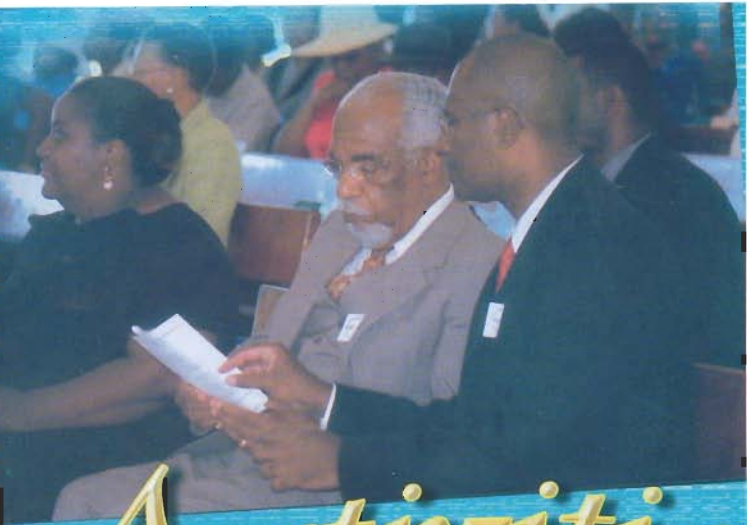
Shirley Playfair Lecture at the Knutsford Court Hotel
Presenter - Dr. James Mathis, Lecturer, Amsterdam Law School
Topic: Competition and Regulatory Policies in the WTO:
Implications of a Multilateral Competition Policy Framework

SAT. SEPTEMBER 13th

Dinner and Dance at the Terra Nova All Suite Hotel
Guest Speaker - Hon. Phillip Paulwell, M.P., Minister of MCST



SCHEDULE



Activities

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Introduction

Network access and in particular Internet access has been increasingly important in the Jamaican environment. This paper discusses to expand Internet access to as many consumers as possible. In order to provide Internet access an ISP needs to have a transmission network. This network uses two types of complementary infrastructure that we can call non-competitive inputs (or bottle neck inputs) and competitive inputs. The non-competitive inputs are transmission infrastructure such as dedicated circuits (switched and non-switched) and telephone lines and require access to a public switched telephone network (PSTN).

In most countries, due to the legal monopolies that existed before liberalization of the telecommunications sector, these transmission facilities have to be leased from a single network operator. Problems of a competitive nature may arise when the incumbent who controls and owns the non-competitive input, also competes in the downstream competitive market. The basic allegation that is usually levied against a monopolist facilities provider is that its dominant position in the basic telecommunications market would allow it to compete unfairly by extending its market power in the upstream market into the downstream Internet access market.

In Europe the central tool for ensuring open access conditions for ISP's is the Open Network Provision Directive issued by the European Commission. It has efficiently opened the networks of the incumbents, all of which continue to hold significant market power. In Jamaica however, there is no similar sector-specific access provisions for ISP's. The current Telecommunications Act addresses the obligations of a dominant carrier with respect to the interconnection of public voice networks of different carriers but fails to address the obligations of a network operator in its provision of facilities essential for downstream telecommunications services (e.g. leased circuits). We therefore have to apply the provisions of the Fair Competition Act (FCA) whenever anti-competitive behaviour in the Internet market becomes obvious.

Application of the FCA to access issues

Anti-competitive behaviour in this market is likely to take one of two forms under the FCA: the making of anti-competitive agreements which falls under Section 17; or the abuse of a dominant position which falls under Section 20. In fact, in some cases the behaviour in question may take both forms. The major focus of Internet access cases currently being dealt with under Competition Law however, has been the incumbent's abuse of a dominant position and these are the issues which this presentation will address.

It is important to note here that whether a company is dominant does not depend only on the legal rights granted to that company. The mere ending of legal monopolies does not put an end to dominance. Under Section 19 of the FCA an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors. Notwithstanding the full liberalization of the Jamaican telecommunications industry set for March 1, 2003, the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.

The cases of abuse of dominance prevalent in the Internet market can be placed into three main categories:

- Refusal to supply access to facilities
- Unreasonable delay in the supply of access
- Pricing Issues (excessive and discriminatory)

Refusal to supply access to facilities

Service markets in the telecommunications sector will initially have few players and refusals to supply access will therefore affect competition in these markets. There is no absolute rule however, that a dominant operator's refusal to supply access would in all cases be found to be abusive. A refusal will not be held abusive if an objective justification for the refusal can be demonstrated, provided that

the conduct was indispensable to achieving its objectives.

Broadly speaking, there are two relevant refusal to supply scenarios:

- a refusal to supply access for the purposes of a service where another operator (usually an affiliate of the dominant operator) has been given access by the access provider to operate in that service market.
- a refusal to supply access for the purposes of a service where no other operator has been given access.

Scenario A

With respect to the first scenario, a refusal to supply access in these circumstances would constitute discriminatory treatment, and if it restricts competition in the relevant market, it would be an abuse. In the absence of objective justification, a dominant operator should provide access in such a way that the facilities offered to the downstream company is available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.

Scenario B

As to the second scenario, the issue is whether the network operator should be obliged to allow the service provider access to the network. Any analysis by the FTC of this refusal, would have to take into consideration the existence of any capacity or technical constraints. Where these constraints are not an issue however, and the facilities are proven to be essential then the operator should be obligated to provide access.

The key issue is therefore what constitutes an essential facility. In the determination of what is essential it is not sufficient that access to the relevant facility would place the access seeker in a more advantageous position. A facility will be deemed essential if in the absence of access, the access seeker would not be able to participate in the relevant service market due to a lack of feasible alternatives.

Unreasonable delay in supply of access

Outright refusal to supply is probably the most obvious form of anti-competitive behaviour relating to the supply of access. Another way however, in which an access provider can frustrate the competitive process is the time taken to provide access. Dominant network operators have a duty to deal with requests for access efficiently and unreasonable or unjustified delays may constitute a breach of the FCA. It is difficult however, to establish a rule of thumb as to what constitutes an unreasonable delay and the FTC takes a case by case approach when dealing with such cases. In making its determination, the Commission will consider, among other things:

- the usual time frame and conditions applicable when the access provider grants access to its own subsidiary; and
- the explanations given for any delay.

Pricing Issues

In examining whether there is a pricing problem under competition rules, it will be necessary to demonstrate that costs and revenue are allocated in an appropriate way. The telecommunication industry is characterised by economies of scale, arising from substantial fixed costs and economies of scope, which gives rise to common costs. As a result of these characteristics, telecommunications firms tend to be multi-product firms and their pricing policies therefore need to take into account the recovery of these fixed and common costs.

It is also necessary to make a distinction between wholesale and retail pricing. The prices levied in the wholesale market can significantly affect competition, because by increasing the wholesale charges for facilities required by its competitors a vertically integrated firm may be able to raise rivals' costs anti-competitively. For example, an integrated firm might increase its wholesale charges and seek to use the increased revenues to allow it to reduce its retail prices. An increase in wholesale charges together with a reduction in retail prices could mean that rival firms no less efficient than the integrated

firm were subject to a price “squeeze” rendering them unprofitable.

Excessive Prices

Often times pricing problems that have to do with provision of access to service providers by a dominant operator will revolve around excessively high prices. This is of particular relevance in the wholesale market where in the absence of another feasible alternative to the facility to which access is being sought, the dominant operator may be inclined to charge excessive prices. The European Court of Justice has defined excessive prices as being “excessive in relation to the economic value of the product.

There is no easy way to determine when a price is sufficiently high to constitute a breach of the FCA. In making its decision however, the Commission will consider the cost characteristics and the pattern of prices (both over time and across products which have same cost base). Appropriate cost allocation is therefore essential in determining whether the price is excessive. For instance where a company is engaged in more than one type of activity, it will be necessary allocate the relevant costs to the various activities, together with an appropriate allocation to common costs.

The Commission may also use international benchmarking to determine excessive pricing.

Price Discrimination

Price discrimination can be defined in economic terms as a situation in which a firm charges different prices to different buyers for the same product and where the difference in prices does not correspond to the difference in the cost of supplying the product. In the telecommunications industry, such discrimination could likely restrict competition in the downstream market in which the access seeker wishes to operate, in that it might limit the possibility for that service provider to enter the market or expand its operations in that market.

Under the FCA, a dominant access provider may not price discriminate between the parties of different access agreements, where such

discrimination may lead to the substantial lessening of competition in the relevant market.

Conclusion

The FTC believes that development of a competitive and innovative Internet market in Jamaica depends on the establishment of an effective and unbundled access regime. It is our opinion that non-discriminatory access will ensure that consumers have a choice of suppliers of Internet service by ensuring that competing ISP's have the same opportunity to access the PSTN.

The ability of firms to enter the Internet market will be the requisite stimulus for current ISPs to continuously assess and adjust the way they operate. The ability of a firm to adjust and the speed at which such adjustment is carried out, are measures of the firm's competitiveness. This is why we in the Caribbean should embrace competition as a key driver of competitiveness. ISP's should therefore be allowed to succeed or fail in the market place based on their merits as service providers and not based on their preferential access or lack of access to a proprietary, essential input. ■

PROTECTION OF LOCAL INDUSTRY ...

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money terms. Rather it is about using the least amount of resources to produce a product. If this is achieved it would allow the country to reap the maximum amount of output from its limited resources. Protection can in fact create non-productive jobs, but in exchange for productive ones. Public policy must be about the maximization of social welfare, not maximizing profits for a select set of entrepreneurs or securing jobs for a select set of workers. Social welfare must consider the welfare of all the people in the country, these include not only the owners and workers in the protected industry who benefit from protection, but the consumers, other entrepreneurs and workers who are all negatively affected by protection. Competition is likely to provide the greatest benefit for the largest number of people. ■

THE UNAVAILABILITY OF GOODS ADVERTISED AT A BARGAIN PRICE

The main purpose of Section 40(2) of the FCA is to seek to prevent advertisers from engaging in 'bait and switch' selling tactics. Bait and switch refers to the act whereby merchants advertise goods at attractive prices to lure consumers into their stores with a view to selling them some other good(s) apart from the advertised goods. This tactic injures not only consumers but also competing businesses, because it deprives competitors of sales they probable would have had, were it not for the bait and switch tactic.

Section 40(2) of the FCA states:

"A person shall not advertise at a bargain price goods which he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement."

The offence occurs when a merchant advertises a product at a bargain price but does not supply it in reasonable quantities. Merchants expect that their advertisement will lure consumers into the store and that they will be able to sell a more expensive product in place of the advertised product, hence the term "bait and switch".

In determining what is reasonable, the Commission examines:

- the nature of the market in which the merchant carries on business;
- the nature and size of the business carried on by the merchant;
- the nature of the advertisement; and
- historical data on quantities sold during similar sales at the store to determine reasonable quantity.

A merchant may avoid committing the offence by ensuring that he takes steps to obtain a reasonable quantity of the advertised product. The FTC will not penalize merchants who are unable to do so due to circumstances beyond their control. Similarly, the merchant would not be held in breach of the Act if he proves that he had provided a reasonable quantity of

the product, and that the demand for the product had exceeded his reasonable expectations.

It is not sufficient, however, for the merchant to prove only that he took the necessary steps to obtain a reasonable quantity; he must also be able to prove that he had taken the necessary steps to ensure availability of supply at the time of the advertisement.

It must be noted that there is no precise definition of what is meant by "reasonable quantities" nor is there a precise amount. In practice, it will depend on the size of the retail outlet, the market in which it is operating, the likely demand, based on experience, and the nature and extent of the advertising as set out in the Act.

The sale of goods and services involves many different steps from the setting of the price, to advertising and promoting and making the final sale. At each step suppliers may contravene the provisions of the FCA if their trade practices are likely to mislead or deceive customers. ■



"This article is the winning essay from the FTC's Essay Competition held in November 2003. It was written by Rean Goulbourne of Clarendon College."

Competition plays an important role in stimulating Jamaica's economic development. Defined by John Ivancevich, 1994, "competition is the situation in which many firms, large or small, compete for business rather than a monopoly." Stephen Danks, 2001, defines monopoly as "a business environment where a single supplier dominates a market."

An economy is a communities system of using its resources to produce wealth, and development can be seen as the increase in the quality of life of persons living in a particular country. Development can also be seen as "the ability of a nation to produce economic wealth which, in turn, transforms society from a subsistence or agriculture-based economy to one where most of society's wealth is derived from the production of manufactured goods and services." N. Girvan, 1995.



(Left to Right) Ms. Charmaine Chutcon, teacher of Clarendon College; Rean Goulbourne; Cherice Worgs and Camisha Morgan, students of Merl Grove High School (2nd and 3rd place respectively); and their teacher Mrs. Michelle Green-Spencer.

The act of monopoly travels far back in history and it is still prevalent in the Jamaican economy. Under this system the dominating firms determine the price at which the product will be sold or the quantity of output it is prepared to supply. Firms operating under monopoly usually provide goods and services which are essential to the well-being of persons in the country. These goods and services will therefore be in high demand. However, these products are usually highly priced as there is no other firm supplying the same product. As a result, for

various reasons, most potential customers will be unable to afford these products to enhance their quality of life and development is therefore retarded. For example, Cable Wireless Jamaica once dominated the cellular phone market as they were the only firm providing the service. The purchasing and maintenance cost for these phones were very high as the firm had total control of the market. Inevitably, not all persons were able to increase their standard of living through the use of cellular phones as their prices rendered unaffordable by most potential customers.

The act of providing quality products at cheap prices is sometimes practised by these firms. However, these products are usually available only in limited supply a thus, not every member of the society will be able to benefit from these quality products.

The Caribbean and thus Jamaica has had the history of being a producer of raw materials for the developed nations. This had been their experience and that of monopoly which is hindering economic development. Therefore, if economic development is to take place, one has to move into the era of producing secondary and tertiary products. This therefore leads us to look at using competition to break the monopolistic cycle of business that has persisted for too long.

Competition contributes to Jamaica's economic development in many significant ways. In a competitive economy, there will be cheaper prices, better terms and conditions, and goods and services of higher quality as the firms will try to gain the competitive advantage over their competitors. Employment opportunities and an increased Gross Domestic product will also be achieved through competition. One of the most significant and recent changes to Jamaica's commercial landscape has been to the introduction of competition into the telecommunications sector with the new cellular service provider 'Digicel'. The end of the monopoly era in telecommunications has brought about investment, innovation, and consumer choice.

Lower prices can result in equality among members of the society which is imperative to

development. Lower prices contribute to equality in the sense that persons from each part of the society will be able to afford quality goods and services which are capable of satisfying their desires. Each person in the society will then have a greater standard of living and quality of life.

Globalisation is occurring at a fast rate as the world is being made a smaller place through new innovations in technology. Technology is an important factor as it raises consumer expectations as they expect and demand more sophisticated and innovative products.

Competition allows for the introduction of these new innovations in technology by our local businesses, which will then be able to compete both on the local and the International market. Through these innovations, more income can be earned for further investment and expansion which will enable us to make maximum use of our resources and a wider range of goods and services will be available for meeting the various sophisticated demands of consumers.

Businesses which are in competition try to prevent the production of faulty goods and services so as to reduce scrap and rework costs and to increase customer satisfaction which is their main goal. Hence, it is fair to say that competition enhances the quality of goods and services available.

The various tasks involved in business competition create room for employment which is inevitable to our development. Job opportunities are usually created in production, marketing, or personnel. These job opportunities may enhance the role of women in society as they can attain high job prospects and citizens on a whole will be able to have a satisfactory standard of living and social harmony.

Competition is crucial to the development of the Jamaican economy. However, the process is hindered by anti-competitive activities which prevent businesses from having an equal opportunity to participate in the development of Jamaica's economy. Specific anti-competitive practices include tied selling, price fixing, collusion and cartels and bid rigging. To ensure that the benefits of the competition process are unhindered by anti-

competitive activities, the Fair Competition Act was formulated and the Fair Trading

Commission was established to administer the Fair Competition Act. The objectives of the Fair Competition Act are to encourage competition in trade and business, ensure all legitimate businesses have an opportunity to participate in the Jamaican economy, and to provide consumers with better products and services and a wide range of choices at the best possible prices. The Fair Trading Commission has the power to carry out investigations in relation to the conduct of business in order to determine if the organization is engaging in practices that are in contravention to the Fair Competition Act.

The Fair Trading Commission has the power to obtain any information that it considers necessary for the purposes of the investigation and can also take to court any business or individual who has been found guilty of anti-competitive practices and has failed to take corrective measures after being instructed to do so. As such, the Commission can be seen as a quasi-judicial body whose decisions may be appealed to a judge of the Supreme Court sitting in chambers. Other functions of the Commission includes, carrying out investigations at the request of the governing minister and advising the minister on various matters relating to the operation of the act.

The press-release titled 'Educational Institutions' done by the Fair Trading Commission and dated March 31, 2003 stated that "between January 2002 and January 2003, the number of complaints against various institutions, received by the Fair Trading Commission, increased by 110%. The number continues to rise steadily. The essence of these complaints is that unsubstantiated representations are made about the type and quality of services being offered. "This information was sourced on the website www.jftc.com. The article stressed the point that some institutions make false claims about being accredited by various accrediting bodies; and computers and text books are provided as a part of the course. Upon registration, students realize that they have to make additional payments for these



PRICE FIXING

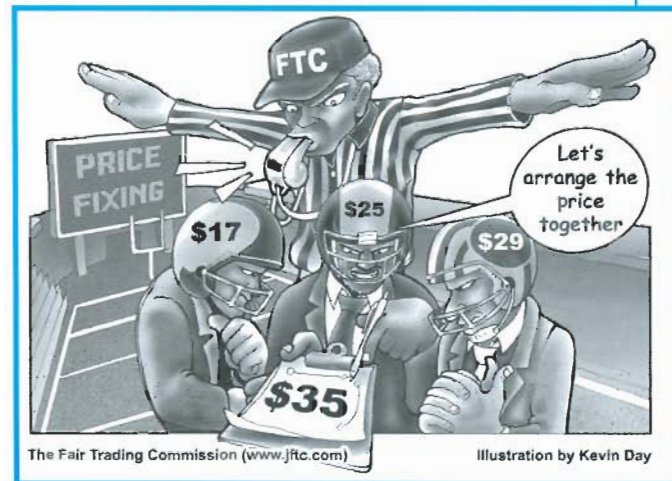
Price Fixing is a form of collusion in which competing companies agree, formally or informally, to raise or fix a specific price or restrict prices within a specified range.

Price fixing can take many forms, and any agreement that restricts price competition violates the law. Other examples of price-fixing agreements include those to: establish or adhere to price discounts; hold prices firm; eliminate or reduce discounts; adopt a standard formula for computing prices; maintain certain price differentials between different types, sizes, or quantities of products; adhere to a minimum fee or price schedule; and fix credit terms.

Ultimately, the consumer loses, as fixed prices are usually inflated. Prices will always be higher than that which would occur if competitive market forces were left to determine price.

Section 34 of the FCA addresses Price Fixing. It prohibits persons from influencing upwards, or

discouraging the reduction of price; refusing to supply goods or otherwise discriminate against any other person engaged in business for any reason, for example discriminating because a business has a low pricing policy. Interconnected companies and principal and agent relationships are exempt from this prohibition. +



THE ROLE OF COMPETITION ...

Cont'd. from page 23

materials. This is referred to as misleading advertising and it is a breach of Section 37 of the Fair Competition Act. Consumers need to be provided with all the information that would enable them to make informed choices. The Fair Trading Commission will treat the matter as a misrepresentation if an institution fails to provide material information before it accepts someone's money, and if it fails to honour the representations made to the public. The institution will be prosecuted and the office can attract a penalty of up to five million dollars (\$5,000,000).

In another case, it has come to the attention of the Fair Trading Commission that some pharmacies charge a prescription fee for the dispensing of over-the-counter drugs, without informing customers of such a fee. Customers become aware of such a charge only after their purchase when their bills reflect a higher price than that of the product displayed. This is sale above the advertised price and is prohibited under Section 41 of the Fair Competition Act. In, an effort to stop this act, the Commission sent letters to a number of pharmacies informing the owners that

failure to inform customers of additional charges, prior to purchases, is a breach of the Fair Competition Act and they can be prosecuted for such an offence.

From these examples of anti-competitive cases which the Commission has dealt with, one can conclude that the Fair Trading Commission facilitates the process of Jamaica's economic development. It is clearly seen that they regulate the process of competition on a whole and ensures that consumers receive quality goods and services at affordable prices and that businesses are given a fair chance at contributing to our economic development. The Fair Trading Commission in its quest for fairness and quality in trade and service is available to all; big businesses and small consumers. It protects both through its many public awareness programmes in schools, churches, the media and other organisations. It is firmly established that by this group that it is only quality and efficiency that will propel the Jamaican economy into the realms of development. ■

Introduction

The Fair Trading Commission (FTC) began its journey on September 9, 1993. It took on the responsibility of being the first competition agency in the Caribbean region, which meant that there were many hurdles to overcome. The persons who framed the Act, which included the then Executive Director, now the Honourable Minister Phillip Paulwell, Minister of Commerce Science & Technology, carried out extensive research into models such as those existing in the United States, Canada and Australia. The Fair Competition Act is seen as “the road code” for businesses in that it ensures that big businesses do not take advantage of smaller ones or of consumers on the competition highway.

The FTC came at a time when there was a view that prices were rising steadily and wage earners in the society were feeling the pinch of hard times. It brought the promise of protection for consumers from anticompetitive actions of businesses.

The passing of the Act was not viewed by all as being positive, however; it was greeted with a mixture of cynicism, indifference and guarded optimism. Members of the legal fraternity feared that it would “tie up” the time of an already overburdened court system. Businesses feared that vindictive competitors would try to manipulate the Act to distract legitimate businesses with ungrounded accusations. Other skeptics saw it as a waste of taxpayers' dollars, as the Act offered little consumer protection.

Within six months of opening its doors, however, views were beginning to change. This was engendered by a few publicized cases. One case which cemented in persons' minds the idea that the **FTC** did indeed “have bite”, was a **Double Ticketing case** in which gas station operators would post one **price** on their large billboards, while requiring **customers** to pay a higher price at the fuel pumps. **FTC** found many gas stations in breach of the **FCA**. The matter was brought to the attention of the Jamaica Gasoline Retailers' Association and the breach was corrected.

Since then, the FTC has been faced with many **battles**, but they have served to shape it into what it is today. The increasing number of cases can be

interpreted as the growing awareness of the institution's role, and an equivalently growing confidence that the FTC is being effective in its efforts. The cases referred to below outline some of the industries that have been affected by the intervention of the FTC over the years. We will also look at publications, which reflect **FTC** policies on various issues over time.

TELECOMMUNICATIONS INDUSTRY

Internet Access Charge

In 1995, claims were made that the access charges leveled by Telecommunications of Jamaica were unjustified, unreasonable and discriminatory. After an in-depth investigation, the staff of the FTC determined that TOJ had imposed an unjustifiable access charge on its Internet users, which amounted to an abuse of its dominant position in the market for telecommunications services. As a result of these findings, the staff lodged a complaint before the Commissioners.

Subsequently TOJ brought suit against the FTC, charging that the regulation of “end-user” rates was outside the jurisdiction of the FTC. The Court did not have an opportunity to rule on the matter as it was settled out of court. In November 1995, TOJ agreed to roll back its charges until it received approval from the Government regarding the increase.

Abuse Of Dominance - Telecommunications Services

Prior to the FTC's intervention, TOJ's residential customers were not allowed to connect certain compatible equipment to the TOJ network. The consumer was required to purchase all equipment from TOJ and if TOJ did not have the item in stock thereby necessitating its purchase elsewhere, the customer was still required to pay a rental charge to TOJ. The FTC took the position that **TOJ's** conduct constituted an abuse of a dominant position in the market for telecommunication services. Following negotiations between the TOJ and the FTC, TOJ agreed to interconnection without admitting liability.

Abuse of Dominance & Misleading Advertising - Messaging Services

In November 1999, the FTC Staff lodged a complaint against Cable & Wireless Jamaica Limited (C&WJ) alleging an abuse of dominance in the

cont'd. on pg 26

messaging services market. The Staff alleged that C&WJ was preventing Answering Limited, a messaging services company, from competing effectively in the messaging services market. It was unreasonably delaying the transfer of Answering's line from one location to another and was charging unreasonably high costs for the lines.

It was further alleged that CWJ's introduction of its Intouch Voice Mail service free of charge, for the period October 1998 to June 1999, constituted predatory pricing; the price of the service did not reflect the cost of providing it.

The unilateral imposition of Intouch Voicemail also caused disruption to C&WJ's customers in the utilization of basic telephone services and electronic equipment attached to their telephone lines.

After negotiations, C&WJ agreed to execute a Consent Agreement, without any admission of liability. Under the Consent Agreement, C&WJ gave several undertakings, including: to remove the Intouch Voicemail feature from all telephones where customers have so requested, within three (3) days of each request; to install Intouch Voicemail only on request; to issue a manual outlining the facilities available for interconnection within sixty (60) days of the date of the agreement; to publicize the minimum time periods for the provision of services requested by potential entrants/investors into the value-added services market within sixty (60) days of the date of the agreement; and to establish and maintain separate accounts for the provision of telephony as against the messaging services market. A settlement in the sum of \$2.5 million, inclusive of costs, was paid to the FTC.

MEDIA ASSOCIATION OF JAMAICA (MAJ)

Prior to the advent of the FCA, media houses by means of the so-called Recognition agreement would pay a fixed commission and extend credit only to "recognized" agents. To be "recognized" an agent had to apply to the MAJ and satisfy it as to certain billing and other structural capabilities. Having been duly satisfied, the MAJ would then pay a fixed commission of 18% to that agency in addition to extending to it a credit period for advertisements placed in the various media. Should the agency fail to pay its bills on a timely basis to even one media house, all media houses would deny that agency credit.

It was the view of the Staff of the FTC that under the FCA those portions of the agreement were illegal. The collusion of the media houses to fix the amount of the commission, in the view of the Staff, constituted both a conspiracy to restrain competition and price-fixing. Conspiracy was also apparent when media houses acted in concert to deny any agency credit. The very tone of the agreement was philosophically inconsistent with the newly established free market regime.

The unequal treatment of unrecognized agents also invited the scrutiny of the Staff, for while the MAJ could certainly put in place reasonable standards for recognition, it was anti-competitive to penalize media houses who chose to extend credit and pay commissions to those agents who did not happen to meet the standards set by the MAJ. The FTC felt that Commercial entities should not be deprived of their ability to engage in independent decision-making vis-a-vis trading partners.

In light of the Staff's views, the MAJ entered into negotiations with the purpose of arriving at a form of Agreement which would not offend the terms of the FCA. The parties developed a Recognition Agreement which conforms to the terms and spirit of the FCA. The MAJ agreed, as part of the settlement with the FTC, that it would institute a 90 day period for the processing of applications for recognition and, should an applicant be denied, that denial may be appealed to a three-person panel which is not connected to the media.

Under the new arrangement, there would be the possibility of provisional recognition, whereby an agency, new to the marketplace, would nonetheless be afforded the legal benefits of a recognized agency. Provisional recognition would automatically expire at the end of one year, at which point the agency could apply for full recognition.

EVENTS AND OUTLETS PROMOTION

The FTC initiated an investigation against the background of complaints highlighted in the media by Big City Brewing, a new entrant into the beer market, that it had encountered difficulties in gaining exposure for its product at Carnival 2002 events. It was alleged that Red Stripe, the leading brewery, had bought out the rights for the sale of brewed products at all Carnival functions.

In addressing concerns pertaining to Red Stripe's sales and promotional practices, the FTC entered into a Consent Agreement which makes Red Stripe's agreements with vendors and event managers more equitable. In addition, guidelines applicable to Events and Outlets Promotion were established for all players in the market.

CONSUMER ISSUES

THE BANKING INDUSTRY

At the request of the FTC, the Jamaica Bankers Association agreed to a review of certain aspects of banking policy. After several meetings and extensive consultation, certain amendments were agreed upon. The issues addressed were:-

Clarity in Banking Documents

It was agreed that a fact sheet in reader-friendly language would be attached to the fact sheet of all loan documents for individual consumers. That fact sheet will contain information the average person would consider material. For example, the sheet would detail, at the very least, the effective interest rate; whether or not there are pre-payment penalties and the total amount of the loan.

The Posting of the Exchange Rate

The banks should indicate whether or not these rates were opening rates only. In other words, the consumer should be put on notice as to whether the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate published is the set rate; and he is therefore entitled to obtain the foreign exchange at that rate.

The Advertising of Interest Rates

Where "add-on" rates are used, they should be designated as such. It was generally agreed, however, that it would be more useful to state the effective rate of interest when advertising. This will minimize confusion and the average consumer will be better able to compare rates among banks.

The Computation of Interest Charges for Credit Card Purchases

The wording of the Terms and Conditions on the back of Credit Card Statements was adjusted to define more clearly, the method used in the computation of

interest charges that are due on purchases made with Credit Cards.

FURNITURE & APPLIANCES

Following investigations into several activities of an anti-competitive nature by Courts (Jamaica) Limited, Galleria Limited and Homelectrix Limited, Consent Agreements were executed and the FTC provided much needed guidance to both consumers and retailers as to the requirements of the FCA as they relate to the advertising and sale of furniture and appliances.

PUBLICATION OF SHOPPING GUIDELINES FOR CONSUMERS

Purchasing of Used Cars

A study of the Used Car Industry found that customers were usually dissatisfied because of initial misrepresentation as to the quality of the vehicles which they purchased. Where lease financing was offered, there were numerous problems and misunderstandings that arose out of the financing contracts.

After analyzing the various complaints which were received, the Commission found it necessary to alert consumers as to the potential problems they may encounter when purchasing vehicles and also to advise them of their rights and obligations with respect to the Used Car Dealers. This was documented in the form of published Guidelines.

Merchants' Refund Policy

Following a review of the nature of complaints, the FTC issued a Merchants' Refund Policy that outlined the requirements of the FCA as they relate to disclosure of information which is material to consumers' purchasing decisions.

The Commission recommended that all Merchants display their Refund Policy prominently in their business places. It is not enough that said policy might be endorsed on the receipt which the customer receives, because the purchase would have already been completed.

The Commission's position embraces the law relating to the Sale of Goods, which stipulates that all goods which are offered for sale must be of a merchantable quality. This means that the quality must be of an acceptable standard. If the consumer

cont'd. on pg 28

MISLEADING ADVERTISING

Section 37 of the FCA contains provisions addressing misleading representations in promoting the sale of any product. These provisions aim to improve the quality and accuracy of marketplace information and discourage deceptive marketing practices. Under the FCA, it is an offense for a business to falsely make any representation, in any form, that is, or is likely to be, false or misleading in a material respect. A representation which influences a consumer's decision to buy or use the product or service advertised is considered material. Misleading representations can have serious consequences on competition, especially when directed toward large audiences, or when they take place over a long period of time.

Advertisements are likely to be misleading based on any description, illustration, or claim about a material fact or characteristic of a good. This may include price, availability, and performance.

Even if everything stated is literally true, an advertisement may exclude significant facts or create a false impression of relevant aspects of the nature of the good. In determining whether a representation is false or misleading, the FTC will consider the general



impression being conveyed to consumers by the relevant representation, as well as its literal meaning.

To ensure compliance with the FCA, Merchants should:

- Avoid using terms or phrases in an advertisement that are not meaningful and clear to the average consumer
- Disclose all material information in the advertisement
- Not use illustrations that are different from the product being sold
- Refrain from making performance claims unless there is evidence to support those claims. ■

THROUGH THE YEARS ...

cont'd. from pg 27

purchases goods which fail to meet this standard, he is entitled, in certain circumstances, to reject the goods and demand a full refund. A Merchant's Refund Policy must therefore be established in accordance with said Law, and any Policy which states "NO REFUND" without more, is by its very nature, in breach of the Sale of Goods Act.

Mobile Telephone Service

As the mobile telephone industry began to expand, consumer complaints increased and the Commission undertook to notify the public specifically about the compatibility of available mobile telephones with the Cable & Wireless Jamaica (C&WJ) Time Division Multiple Access (TDMA) Communications Network or with the Digicel Global System Mobile Communication (GSM) Network. Mobile telephones which were not distributed by C&WJ were unlikely to afford access to C&WJ mobile network; and similarly, only phase II GSM

telephones, which were capable of receiving GSM signals in the GSM 900 band were able to facilitate access to the Digicel GSM network.

In recognition of the problem, C&WJ indicated its willingness to re-set such handsets as are incompatible with its network, to make them compliant. This offer was made by way of advisory published in the Daily Gleaner.

Liquid Petroleum Gasolene

The FTC received numerous complaints about the charges that are associated with the inspection of cylinders by suppliers of Liquid Petroleum Gasolene (LPG). Information obtained from the three (3) suppliers of LPG in Jamaica revealed that the system of charges is quite complex. These charges were clarified and published in the newspapers in a summarised format.

Prescription Fees on Over-the-Counter Drugs

During an investigation, the FTC discovered that

The Fourth Annual Lecture in the Shirley Playfair Lecture Series was held on Thursday, September 11, 2003 at the Knutsford Court Hotel. It was one of the events held during the week of September 6th to 13th, to commemorate the Tenth Anniversary of the Fair Trading Commission (FTC).

Minister Phillip Paulwell, Minister of Commerce, Science & Technology, welcomed the audience. He was followed by Dr. Peter-John Gordon, Chairman of the FTC, who introduced the Guest Lecturer, Dr. James Mathis, Lecturer at the Amsterdam Law School and Law School Instructor of the Department of International Law, University of Amsterdam.

Dr. Mathis is the Managing Editor of "Legal Issues of Economic Integration", a Law Journal published by the Department of International Law and the Amsterdam Centre of International Law, University of Amsterdam. He is also a Consultant to the United Nations Conference on Trade and Development (UNCTAD), the Commission of the European Communities (EC), the African, Caribbean and Pacific (ACP) Group and Consumers International, London.

The Lecture was aimed at a general audience and was entitled "Competition and Regulatory Policies in the WTO: Implications of a Multilateral Competition Policy Framework".

The audience comprised one hundred and twenty-three (123) persons including His Lord Chief Justice, Lensley Wolfe, Minister Phillip Paulwell, Minister of Commerce Science & Technology, Minister Aloun N'dombet-Assamba, Minister of Industry and Tourism and past Chairman of the FTC; members of the business community, lawyers, economists, representatives of Government Ministries and Agencies, as well as students. ■



Dr. James Mathis, Lecturer at the Amsterdam Law School and Law School Instructor of the Department of International Law, University of Amsterdam



(Left to Right) Minister Phillip Paulwell, Minister of Commerce, Science & Technology; Dr. James Mathis; Dr. Peter-John Gordon, Chairman of the FTC.

THROUGH THE YEARS ...

cont'd. from pg 28

some pharmacies charge a prescription fee for the dispensing over the counter (OTC) drugs, without informing customers of such a fee. With the assistance of the Pharmaceutical Society of Jamaica, the FTC urged pharmacies to inform their customers of the fee for the dispensing of OTC drugs, before the purchase is made. It must be noted that the FCA does not prohibit the charging of such fees; what is prohibited is the omission of relevant information, which is necessary for customers to make informed choices. Pharmacies have started to make that information available by way of notices on their walls.

Conclusion

In its ten year existence the FTC has been able to mold behaviour in many industries. It is becoming increasingly apparent that competition does have a positive effect on consumer welfare. This is evident in a number of industries, but is specifically stark in the telecommunications industry, in which prices for some cellular phones services have steadily decreased. The FTC will therefore continue to rise to the challenge of maintaining a competitive environment in Jamaica. ■

Sections 19-21 of the FCA address the abuse of a dominant position. Under Section 19, an enterprise is identified as occupying a dominant position if, by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

Section 20, which contains a non-exhaustive list of abusive activities, provides that an enterprise abuses a dominant provision if it impedes the maintenance or development of effective competition in a market. Examples of abusive conducts as set out in the Act are: restriction of the entry of any person into any market; prevention or deterrence of any person from engaging in competitive conduct in any market; elimination or removal of any person from any market; and imposition of unfair purchase or selling prices or other uncompetitive practices. Section 20(2) provides that an enterprise shall not be treated as abusing a dominant position if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and consumers were allowed a fair share of the resulting benefit; by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

Section 21 addresses the action to be taken by the Commission in respect to a finding of abuse of dominance. It states that the Commission will notify the enterprise of its finding; and direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned. In determining whether the abuse has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is the result of superior competitive performance.

The conduct of a dominant firm may be abusive



or aggressive. It is often difficult to identify and classify such behaviour. Abusive behaviour may be exploitative (charging of excessively high prices) or exclusionary (engaging in actions that exclude rivals).

The charging of excessively high prices can be an abuse of a dominant position in some jurisdictions such as the European Union. In other jurisdictions, including Jamaica, the charging of excessively high prices is an abuse only if it is coupled with an exclusionary conduct. For example the charging of “excessively high” prices for an essential facility may be abusive. Charging final customers excessively high prices, however, is not abusive. The FCA clearly states that an abusive conduct is prohibited if it had, is having or is likely to have the effect of substantially lessening competition in a market. ■

COMPLIANT STATISTICS

FOR SEPTEMBER 1, 2000 - AUGUST 31, 2003

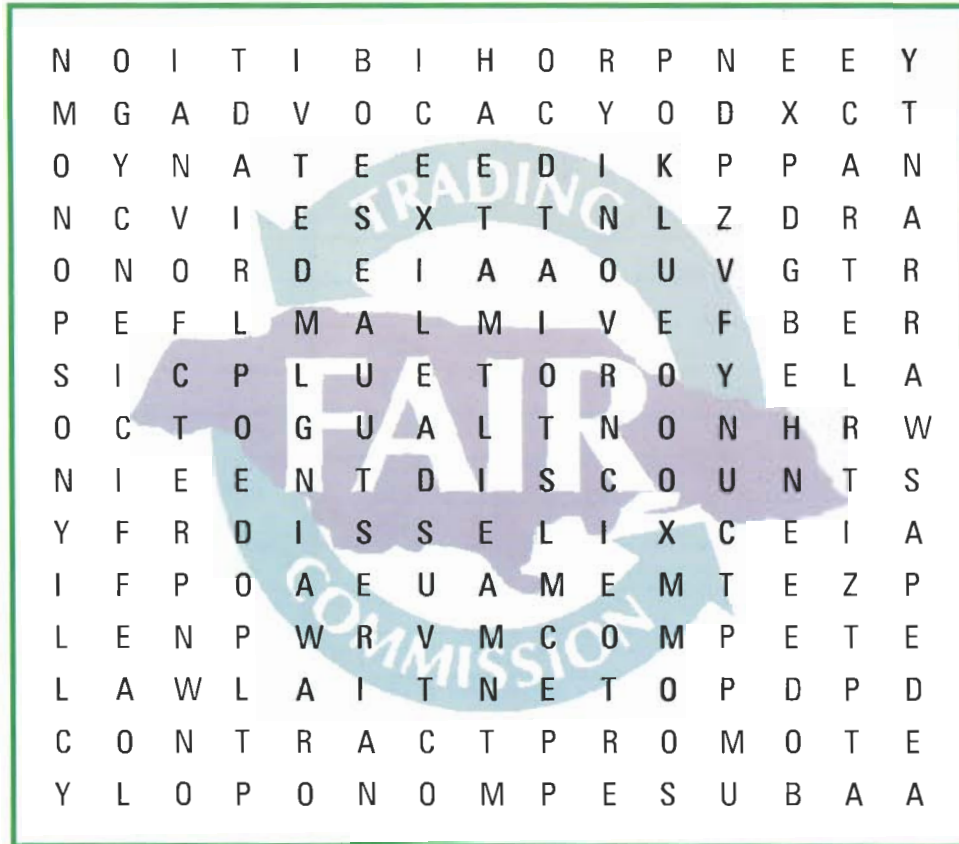
PRODUCTS AND SERVICES	YEAR 2000/2001	YEAR 2001/2002	YEAR 2002/2003
Airline Services	19	3	7
Apparel & Accessories/ Footware	8	17	6
Appliances	65	88	80
Auto Parts & Supplies	8	10	7
Banking/Credit Card	8	7	6
Cellular Phones	15	9	1
Computers	34	31	29
Educational Institutions	8	17	14
Food & Beverages	13	10	11
Furniture	15	26	46
Hardware & Household Fixtures	10	12	10
Internet	3	1	1
Insurance ¹	7	8	6
Lotteries	0	4	0
Machine & Equipment	11	6	5
Motor Vehicle & Bikes	100	154	159
Office Equipment	1	9	3
Petroleum	4	2	5
Real Estate	11	13	13
Services	24	44	22
Telecommunications	18	45	72
Transportation	1	9	0
Utilities	5	5	1
Other ²	29	48	79
TOTAL	417	578	583

NOTES

- 1 Insurance includes Life, Health and Motor Vehicle Insurance
- 2 Other includes product areas such as Agriculture, Consumer Welfare, Health, Pharmaceuticals and Optometry.

FTC WORD SEARCH

HOW TO PLAY: All the words listed below appear in the puzzle horizontally, vertically, diagonally, or backward. Find them and **CIRCLE THE WORD**.



- ABUSE**
- ADVERTISE**
- ADVOCACY**
- CARTEL**
- COLLUDE**
- COMPETE**
- CONSUMERS**
- CONTRACT**
- DISCOUNTS**
- ECONOMIST**
- EFFICIENCY**
- EXEMPT**
- EXPLOITATION**
- FREE**

- INNOVATE**
- LAW**
- MISLEADING**
- MONOPOLY**
- MONOPSONY**
- POTENTIAL**
- PROHIBITION**
- PROMOTE**
- REFUND**
- REGULATION**
- RIVAL**
- TRADE**
- WARRANTY**