



# COMPETITION MATTERS

**FAIR TRADING COMMISSION**

*'Ensuring a competitive marketplace'*

**VOLUME XIV, DECEMBER 2009**

**Investigation into NSWMA's operations**

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## COMPETITION IN CRISIS

**Enhancing Jamaica's Competitiveness in  
the Wake of the Economic Crisis**

**PAGES 17-18**

**Competition Policy in Times of Economic Distress**

**PAGES 19-20**



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## FOREWORD

This issue of **Competition Matters** presents a rich collection of articles written by some of the brightest minds in their respective fields, within the context of the theme, '*Competition in Crisis*'.

Competition in crisis can be interpreted in a number of ways, two of which are: the relaxation of competition regulation in response to the current economic downturn and the amplified need to increase Jamaica's competitiveness *vis-à-vis* the rest of the world.

In keeping with the main theme, the articles focus on areas such as public policy, finance and the role of the Government as we all play our parts in overcoming the crisis. The writers bring their own informed perspectives on how best Jamaica can cope and develop in these tough economic times. We have also included two very interesting and thought provoking articles, one dealing with Jamaica's interest rate policy regime and the other providing a comprehensive commentary on a Privy Council decision, which implicates the assessment of dominance under the Fair Competition Act.

Of course, this magazine would not be complete without sharing with you, our valued readers, some of the matters that have been undertaken by the Staff of the Commission, as we work tirelessly to uncover anti-competitive business practices and to ensure that our markets are competitive. We recognize that if firms cannot compete locally then they will have difficulties competing internationally; which is absolutely important for our growth and development. As the Jamaican adage goes "*jig a yard before yuh dance abroad*".

We hope you enjoy reading this issue of **Competition Matters** as much as we enjoyed putting it together.

Happy reading.

*Paul Cooper & Kristina Barrett*

*2009 Magazine Coordinators*



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## New FTC Slogan

During the year we adopted a new slogan, ***“Ensuring a competitive marketplace”***, which reflects more accurately and appropriately our role and function as we administer the Fair Competition Act (FCA). *“A Fair Deal, Your right by Law,”* the previous slogan, was initially embraced given that the main focus of the Commission then was consumer protection.

When markets work competitively and efficiently, not only will the general economy benefit through the best allocation of resources, but there will also be significant benefits for all consumers through greater choice, lower prices and better quality goods and services.

In competitive markets firms aim to satisfy consumers' needs more effectively and efficiently than their rivals; and it is our role at the FTC to ensure that this rivalry ensues within the bounds of the FCA, for the benefit of all.

## FTC signs Consent Agreement with UTECH

The University of Technology Jamaica (UTECH) in promoting the ***UTech Track and Field Classic 2009*** held at the National Stadium on Saturday, April 18, 2009, had advertised that several Olympic stars, including Asafa Powell, Shericka Williams, Andrew Hines, Darrel Brown and Marvin Anderson would be featured. These athletes however, did not participate in the games.

Having received a number of complaints, we conducted an investigation and concluded that UTECH's conduct constituted a breach of Section 37 of the Fair Competition Act (FCA) which prohibits enterprises from making to the public, representations that are false, misleading or likely to be misleading.



We informed UTECH of the conclusion of the investigation and UTECH acknowledged that its actions were likely to have misled members of the public and that the offence of Misleading Advertising pursuant to Section 37 of the Act is one of absolute liability. The Commission exercised its discretion to discontinue the investigation and settle the matter in accordance with the *Fair Competition (Notices and Procedures) Regulations 2000*. A Consent Agreement was therefore entered into by the Commission and UTECH; requiring that UTECH issue a public apology, to be published in the Sports Section of a national newspaper for two consecutive weeks. UTECH was also required to pay the Commission's costs.

## Investigation into NSWMA's operations

The Staff of the FTC has carried out an investigation into the conduct of the National Solid Waste Management Authority (NSWMA) being (i) the statutory monopoly and hence the dominant player in the market for residential solid waste haulage; (ii) the sole operator of the approved dump sites in Jamaica; and (iii) a significant player in the market for non-residential waste haulage. The investigation centered on NSWMA's practice whereby it uses the resources and facilities designated for the haulage of residential waste to compete with private waste haulage enterprises in the market for non-residential waste haulage.

This matter concerned the extent to which a government-funded agency should compete with firms in the private sector, which are not afforded the benefits enjoyed by a State-owned entity.

Our main recommendation is that the principle of competitive neutrality be adopted. That is, if the NSWMA is going to participate in the market for the haulage of non-residential garbage, then it should establish a unit (commercial) which is totally independent of its operation in the haulage of residential garbage (state-funded residential unit).

We have recommended also that there should be no cross-subsidies from the publicly funded monopoly of residential solid waste haulage to the commercial competitive unit which is participating in the market for the haulage of non-residential waste and which is competing with private waste haulage enterprises.

The Staff is currently in discussions with the relevant parties to arrive at the best solution.

## More focus on Market Studies

After cursorily looking at several sectors of our economy over the past 2 years, the FTC has adopted a work plan aimed at gaining in-depth understanding of how sectors, markets or market practices are working.

The work is expected to extend into and should be completed in the upcoming Financial Year. We have chosen market studies as one of our main strategic activities because it has been demonstrated that the information gained through this means can be used to (i) support enforcement activities (i.e., detect potential violations of competition law); (ii) support advocacy activities (i.e., for example, detect potential market failures and explore the effects of deregulation); or (iii) safeguard consumer welfare (i.e., detect potential consumer harm). For example, our recently completed study of the tourism industry provides evidence which suggests that increasing the number of international fairs and exhibitions hosted by Jamaica is the most effective driver of competitiveness; while increasing the intensity of the country's marketing campaign is not the best means of driving further improvements in the competitiveness of Jamaica's travel and tourism product (*See related article on page 26*).

Further, a successfully executed market study will improve the transparency of the operations of the Commission; nurture trust and therefore develop a cooperative



relationship between the Commission and stakeholders; and will increase the likelihood that the recommendations of our studies are adopted where appropriate.

Some of the sectors which we have examined over the years include the petroleum, telecommunications, agriculture, construction, groceries, veterinary, tourism, remittance and pharmaceuticals.

We have commenced work on the health insurance, retail bank, cement and steel industries; and we intend to examine the market for general insurance services.

The FTC, a member of the International Competition Network (ICN) Market Studies Working Group which is creating the ICN Market Studies Handbook & ICN Market Studies Information Store, is the lead agency in the preparation of the chapter on Data Collection. The Handbook is scheduled for release at the ICN 2010 Annual Conference in Istanbul, Turkey.

## Application for Grant to study the Commercial Banking sector

The FTC has applied to the Ottawa based International Development Research Centre (IDRC) for a grant of a maximum of Cad \$40,000 to study certain aspects of the commercial banking sector. Having submitted our proposal, we have been short-listed for one of the competitively awarded grants on offer to competition authorities in developing countries.

Owing to the importance of unencumbered access to the financial intermediation services to economic growth, the general objective of the study is to promote and/or preserve the competitiveness of the sector; and the focus is on the integrally related market for retail banking services, as traditionally, retail banking has served as the primary source of the funds which financial institutions onlend.

The specific objectives are to (i) characterise the extent of information asymmetry on the part of consumers of retail banking services; (ii) characterise the costs which are likely to be faced by consumers in switching from one supplier of retail banking services to another; and (iii) recommend measures to mitigate the adverse effects of the factors identified in (i) and (ii).

### Previous Study

Of note is that our 2007 study of the local pharmaceutical industry was funded from a grant from the IDRC, through a Competition Research for Economic Development (CRED) project. That study will be included in a book series to be launched by the IDRC during the upcoming year.

# FTC hosts Symposium

## Introduction

ON JULY 16, 2009, the Fair Trading Commission (the “Commission”) held a symposium in order to revisit the arguments and solicit views from the public as to the most appropriate body to determine alleged contraventions of the Fair Competition Act (the “FCA”) at first instance.

The objective was to air the different factors that ought to be considered in deciding on the most optimal structure, to discuss these factors with policy makers and stakeholders, and to create a document that encompasses all considerations.

The Honourable Mr. Justice Forte, P., as he then was, in the *Jamaica Stock Exchange v. Fair Trading Commission case*<sup>1</sup> highlighted factors which, in his view, rendered the existing adjudicative process a breach of natural justice. From his judgment, the following challenges relating to the FCA are identified:-

- a. The FCA merges the investigative and adjudicative functions in the same body, i.e. the Commission;
- b. The FCA does not allow the Commission to delegate its functions; and
- c. The FCA allows the Commission to arrive at a finding without being mandated to give individuals who may be affected by its decision an opportunity to be heard.

To place the discussion into its proper context, it should be noted that the effect of the *Jamaica Stock Exchange* case (supra) appears only to relate to those relatively few provisions of the FCA in which the Commission would be required to make a finding (see ss.19-21 and 33). Under the present construction of the FCA, all other contraventions are determinable at first instance by the courts.

The Symposium began with a thematic recognition that the primary aim of competition agencies is to be effective and that this is directly related to the institutional framework or agency structure that is utilized<sup>2</sup>.

Three positions were ventilated. While the presentations contained points of consensus, they constituted distinct suggestions as to how to best meet the current challenges.

The first supported the establishment of an independent specialist tribunal to determine all matters falling under the FCA; the second, that the Commissioners and the courts continuing to make findings or determinations under the applicable sections; and the third, that all matters should be determined by the courts.

## An Independent Specialist Tribunal

The arguments in *favour* of the establishment of an independent specialist tribunal were as follows:-

1. Procedural fairness is more important than efficiency and effectiveness of the chosen adjudicative process and the cost involved because in a judicial review challenge “...the court will only concern itself with...whether the structure and the decisions are procedurally fair to the persons affected by them”; and
2. This option would deal with the concerns associated with the other two alternatives as the tribunal would be “independent” in the sense that it would operate completely separate from the Commission. It would have its own staff, offices and “specialist skills”, would deal only with competition matters and over time develop the requisite expertise in this area.

The arguments *against* the establishment of such a tribunal were as follows:-

1. The cost of competition enforcement, which is related to the institutional structure utilized is expensive, especially in developing countries. UNCTAD in 2005<sup>3</sup> indicated that the average budget of developing countries in this regard varied from 0.06% - 0.08% of the government’s non-military expenditure. Applied to Jamaica for the fiscal period 2004-2005, this would have amounted to JM \$118,000,000 to JM \$157,000,000 compared to the Commission’s budget of JM \$35,845,490 in 2004. The suggestion is that a tribunal would be a considerably more expensive option compared to having matters under ss. 19-21 and 33 of the FCA determined by the Commission;
2. In light of the time it takes to investigate anti-trust/competition cases, it is unlikely that in Jamaica more than two cases would be ready for a hearing before a tribunal within a single year. It would, therefore, seem that the number of cases that would be heard by the tribunal would not justify the cost of its establishment and funding;
3. Jamaica generally lacks the supportive anti-trust legal scholarship and practice, including consultancy firms and law practices that specialize in these matters, from which to empanel persons who are able to exercise the requisite specialist expertise, skill and knowledge to effectively adjudicate these types of matters or even to

do a satisfactory job in this regard. This is unlikely to change in the foreseeable future;

4. It would be harder and would take a longer time to create the requisite specialist expertise in lay persons sitting on a tribunal than in the courts;
5. Members of a tribunal who meet only periodically are unlikely to be afforded the opportunity to grow and learn from the full experience of a competition agency without the current structured mechanism such as Commissioners meetings and Retreats at which generic competition issues are discussed. The current mechanism forces its members to constantly inform themselves of the various principles and general competition issues which they may be called upon to utilize in the adjudicative process. A tribunal would not have this benefit;
6. A tribunal, being unable to carry out investigations, would be left to balance evidence presented by opposing interests which would likely result in excessive caution in making adverse findings, decisions which are less soundly based and less well tailored remedies;
7. A tribunal that is too greatly endowed with the power to enforce its decision, as is currently contemplated, may run afoul of the separation of powers doctrine in the absence of security of tenure and independence from the executive as persons exercising a judicial function;
8. In Jamaica, tribunals have not been effectively supported and often lack the necessary administrative support to operate efficiently and/or effectively;
9. Further, a 2006 report by Cambridge Economic Policy Associates Limited on Jamaica's Regulatory Impact<sup>4</sup> stated that the "experience... [of] having a separate body is associated with....numerous delays (and consequent costs) caused by a strong incentive on the parties to delay implementation of more competitive structures and practices.";
10. According to the 2006 report, this alternative would result in the investigative body becoming, in effect, a prosecutor whose objective would be to win cases instead of serving as an impartial fact finding body; and
11. There are challenges with the *Jamaica Stock Exchange* case (supra) which brings into question its sustainability as it relates to the natural justice principle. The suggestion is that the Commission does not have the power to conduct an investigation that is unfair and that fairness may require the person being investigated to be heard orally. Further, as acknowledged by Forte, P. anyone being investigated

can assert his right to be heard orally if he so wishes. It is also important to note that in a subsequent case, *Olint Corp Limited v. Financial Services Commission* 2006 HCV 01365, decided December 24, 2007, the Supreme Court at p. 71 opined, as it relates to the *Jamaica Stock Exchange* case (supra), that "...it does not appear that consideration was given to the effect of the appeal mechanism in the Act which provided for the court to be final arbiter and therefore with the wide powers given to the court in the Act there was fairness when the entire scheme was looked at as a whole...had this been urged upon Forte P. he would have concluded that there was not likely to be a breach of the principle of natural justice...".

### The Commissioners and Courts

The second alternative is to have the Commissioners continue to determine matters under ss.19-21 and 33 (with the appropriate amendments to the legislation), and having all other matters determined by the courts.

The arguments in favour of this alternative were as follows:-

1. As noted in the UNCTAD and Cambridge Economic Policy Associates Limited (referred to above), this alternative is relatively the most cost efficient one. Having an additional body to adjudicate matters outside of engaging in competition policy is, therefore, economically wasteful;
2. Of fundamental importance is achieving the best substantive decision. Institutional design (structure) affects performance which in turn affects outcome. The best outcomes or decisions are most likely to be achieved if the structure involves the Commissioners. The Commissioners would have developed experience and expertise in the area, and would ultimately be best at determining the relevant matters;
3. The current arrangement facilitates the requisite repeated interface among Commissioners in relation to competition issues as compared to the periodic interaction of a tribunal;
4. This structure would best facilitate the mutual growth and development (and competencies) of the adjudicators of competition matters and the staff of the Commission. Traditional Commissioners meetings allow for intellectual interchange between Commissioners and staff with a view to achieving a deeper understanding of, and implication for, competition law and policy which is supported by interim deep reflection and research by all concerned;
5. The Commissioners would be better able to effectively influence the broader development of competition policy and practice in Jamaica through advocacy and education. Having an additional body to

adjudicate matters outside of engaging in competition policy can be considered wasteful;

6. Other jurisdictions such as the USA, Australia and New Zealand have systems that involve combined investigative and adjudicative functions that have withstood natural justice related scrutiny;
7. In any event, the challenges presented by the *Jamaica Stock Exchange* case (supra) may be remedied by:-
  - a. Amending the FCA to remove the Executive Director as an ex-officio Commissioner and placing the post in the category of staff; by recognizing the staff as the body solely responsible for investigating contraventions of the FCA or allowing the Commission to delegate its investigatory authority to the staff; and stipulating that the Commissioners are solely responsible for adjudication with respect to the relevant sections;
  - b. Establishing thick firewalls and prohibiting *ex parte* communications between Commissioners and staff (with the appropriate sanctions attached) in order to prevent contamination of the adjudication process where relevant; allowing for the hiring of staff to solely assist in the adjudication process with certain and transparent regulations and procedures to ensure that the natural justice requirements are met;
  - c. Providing explicitly in the FCA that a hearing is required before a finding is made by the Commissioners; and
  - d. Continuing to recognize the supervisory function of the courts over all administrative and inferior tribunals particularly to deal with issues of law.

The arguments *against* this alternative were as follows:-

A Jamaican court is unlikely to conclude that a procedure similar to the one existing in the USA, where the same agency performs investigative and adjudicative functions is procedurally fair because:-

- a. The US system has existed for some time and has developed a track record. The public and the US courts appear to be satisfied that it works. A Jamaican court may not take a similar position in the absence of a track record by a similarly structured Jamaican agency;
- b. The smaller an agency the more difficult it is to successfully implement a rule against *ex parte* communication. The size of the Jamaican agency is relatively small when compared to the US agency. When all or most of the investigating staff may be involved in a case, a Jamaican court is less likely to accept that there has been no private contact;

- c. Similarly, as distinct from a situation in which there is a large number of complaints (as in the USA), where there is a relatively small number of complaints (as in Jamaica), a Jamaican court would be much more concerned about the risk of all Commissioners and staff having some *ex parte* knowledge or involvement in the relevant complaint;
- d. There are cultural differences between the Jamaican judge and the US judge as the former may be much more cynical and suspicious as it relates to public officials and therefore, much less likely to accept that an *ex parte* communication rule has been or is likely to be scrupulously followed;
- e. The expressed recommendation by Justice Forte in *Jamaica Stock Exchange* case (supra) was obiter but it is likely to be persuasive to a subsequent local court; and
- f. Procedural fairness considerations would outweigh all other considerations including whether this alternative is the most efficient and effective.

### The Courts

The arguments in *favour* of having the courts determine matters under the FCA were as follows:-

1. The dominant approach (which is almost universally true for small jurisdictions) is to have the competition agency perform investigative functions with the adjudicatory and enforcement functions being performed by the courts;
2. The courts have demonstrated *some* understanding of competition law as was observed, for instance, in the *Jamaica Stock Exchange* case (supra) as it related to the question of whether the Jamaica Stock Exchange was an appropriate object of the operations of the FCA. Most would agree that on that question the court was correct;
3. There are challenges relating to the current administrative arrangements for enforcing competition policy;
4. As more competition matters come before the courts, judges will develop greater knowledge and expertise in competition law as the courts react to the submissions placed before them; and
5. It is the only way to effectively develop the jurisprudence on competition law in Jamaica.

The arguments *against* having these matters determined by the courts were as follows:-

1. The courts have also demonstrated a “woeful ignorance of competition law” and lack the requisite expertise. It is likely that a competition matter would

*Continues on page 11* ➔

# FTC hosts 6<sup>th</sup> Workshop for Members of the Judiciary



ON JULY 18<sup>th</sup> and 19<sup>th</sup>, 2009, the Fair Trading Commission (FTC) hosted another Workshop for the Judiciary of the region. Held in Ocho Rios, Jamaica, it focussed on Restrictive Agreements - Vertical and Horizontal arrangements. The areas covered included the concept of agreements in vertical relationships, evaluation of indirect evidence of cartel agreements and facilitating practices among competitors. Having already covered the general concepts and background of the subject area, the focus was narrowed to build on what was dealt with in previously held Workshops.

The 6<sup>th</sup> Workshop was conducted by Stephen Calkins, Professor of Law and Director of Graduate Studies at the Wayne State University Law School. Thirteen persons attended – eleven Jamaican Judges, including the Honourable Chief Justice Zaila McCalla, one judge from the Eastern Caribbean Supreme Court, and the Executive

Director of the CARICOM Competition Commission. It was considered by all participants to be very informative and beneficial; and they all indicated that workshops of this nature should be held on a continuous basis.

Professor Calkins stated, *“If the comments I heard are any measure [of success], the Judges learned a great deal from their exposure to Competition Law. I’m convinced that they would greet with pleasure word that a Competition case had been assigned to them – and they would handle it better because of this program.”*

The event was funded under an Inter-American Development Bank (IADB) Project aimed at building the technical capacity of the FTC as well as increasing the awareness and knowledge of key participants in the process of Competition Law enforcement. This is the fourth Workshop that has been funded under an IADB Project and we thank the Bank for its continued support. ■

# Tenth Annual Shirley Playfair Lecture

**T**HE TENTH Lecture in the Shirley Playfair Lecture Series was held on September 10, 2009. The Presenters, Mr. Omar Azan, President of the Jamaica Manufacturers Association (JMA), and Mr. Declan Purcell, Director of Advocacy, Competition Authority of Ireland presented their views on “*The relevance of Competition Law in good and not so good times*”.

Mr. Azan, the Chairman and Chief Executive Officer of Boss Furniture, a Jamaican manufacturing firm, worked his way through the ranks of the JMA for over 10 years, from Treasurer, to Deputy President, to President, a position he has held since June 2007.

Mr. Purcell has been a Member of the Competition Authority of Ireland since 1998 and has worked in the public service since 1969, mainly in the Department of Enterprise, Trade and Employment. He has held a wide range of management positions, including responsibility

for policy development in relation to industry, consumer protection, national human resource development and company law.

The event started with Chairman Dr. Derrick McKoy’s Welcome and Opening Remarks, and this was followed by the Honorable Karl Samuda, Minister of Industry Investment & Commerce, who spoke briefly on some of the challenges in facilitating and developing industry and business since the current economic crisis, which began in 2008.

Mr. Azan’s presentation was entitled “*The Pros and Cons of Protecting Local Manufacturers in Light of the Current Challenging Economic Times, while at the Same Time Recognizing the Importance of Competition in the Market Place*”. It spoke primarily about the benefits to our country for supporting local manufacturing enterprises and the challenges being faced by manufacturers.



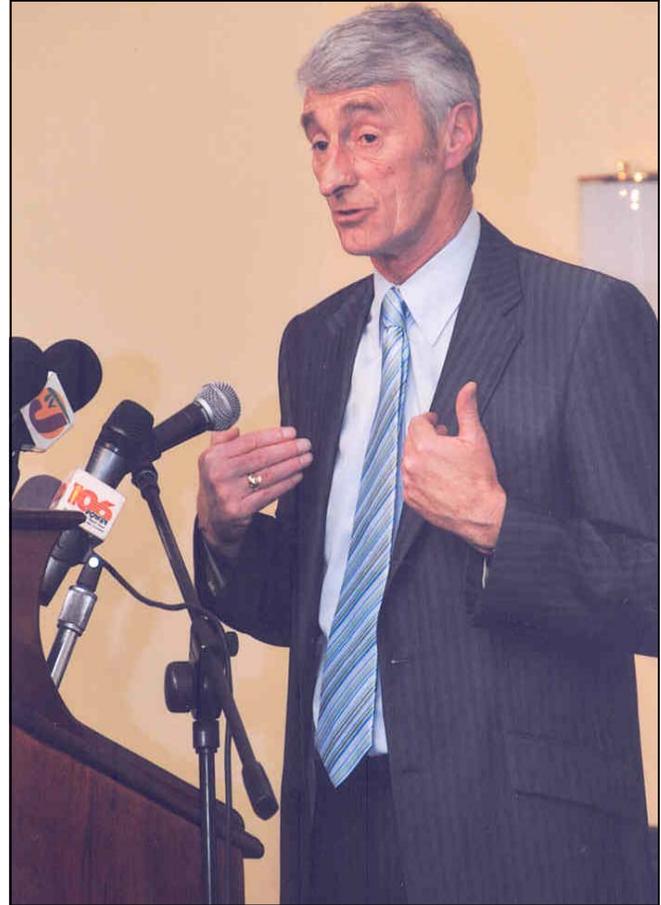
He described a few of the ongoing difficulties of the JMA which have been “amplified by the economic recession”. These include the rise in input costs particularly oil, devaluation of the dollar and high interest rates. He indicated that several manufacturers are further frustrated by declining sales, high receivables and a worsening cash-flow position.

Mr. Azan stressed the need for Government to play a greater role in facilitating the manufacturing sector and after acknowledging the initiatives that had been implemented in recent times he offered suggestions that should serve to drive competition and growth within the sector even further.

From left to right: Dr. Derrick McKoy, Chairman - FTC; Mr. Declan Purcell, Presenter; Honorable Karl Samuda, Minister of Industry, Investment & Commerce; Mr. Omar Azan, Presenter; and Dr. Peter-John Gordon, Commissioner - FTC.



Mr. Omar Azan - President of the Jamaica Manufacturers Association



Mr. Declan Rurcell - Director of Advocacy, Irish Competition Authority

On the other hand, Mr. Purcell engaged the audience in a discussion that emphasized the benefits from enforcing Competition Law irrespective of the economic climate, illustrating his views with several examples from his country.

His presentation, entitled “*Competition Policy in Good Times and Bad Times – the Role of Competition Advocacy*” illustrated some of the many benefits of competition law to policymakers, the business community and society more widely; emphasizing that especially in these times of crisis, “there is a need to show our Governments, businesses and consumers, that an active competition policy will help to pull us out of this crisis”

Mr. Purcell looked at the current economic context and lessons to be learnt from experiences of the past; explored why competition works and why it is important to society; and explained why national champions should not be ‘protected’ if long term goals are to be met.

This led directly into a vibrant discussion where several persons from the business community had their issues addressed by both presenters. In addition, the audience

became engulfed in a broader discussion on the benefits to be derived from competition and a ‘non-protectionist’ approach by Government in stimulating business in both the local and overseas markets.

The Jamaica Information Service (JIS) and Power 106 FM played an integral part in publicizing the event. In the hour preceding the Lecture, both Chairman McKoy and Mr. Purcell were interviewed on Power 106 FM’s radio talk show “*Both Sides of The Story*”, hosted by Mr. Dervan Malcolm. Mr. Azan was also interviewed on the show which was carried live on the radio and on the internet. This was the first occasion that the Lecture was taken live and excerpts of not only the featured presentations but also the Chairman’s Opening Remarks, Minister Samuda’s comments and the Executive Director’s closing remarks were carried live on the radio.

Other similar activities include an appearance by the Executive Director on the radio talk show *Balancing Justice*; and Mr. Purcell being interviewed on *Independent Talk*, as well as on JIS’s television programme *Issues and Answers*. ■

# Perfecting Information: The Critical Role of Government

By *Andrene Collings*

**W**E ARE PERHAPS familiar with the famous adage “what you don’t know can’t hurt you!”. According to the *‘Oxford Dictionary of Proverbs’*, the oldest written version of that saying comes from *‘Petit Palace’* written by G. Pettie in 1576 “so long as I know it not, it hurteth me not.”

It’s not often that we can challenge advice given by a sixteenth century sage but this proverb stands on shaky ground. Ignorance can have disastrous consequences. In a business setting, the difference between inaccurate and accurate information can be the difference between red and black on the bottom line. We also accept that as consumers, perfect information takes us on that brightly illuminated path that economists say will lead us to the perfect market.

The role of Government as an information provider is, therefore, not incidental to the task of governance – it is fundamental. Governments have monopoly power on certain categories of information and by virtue of their vantage point they are best poised to provide critical information to their citizens, who are all consumers. Governments, have an obligation to provide information and this information must be provided in accordance with the principles of fair play.

First of all, information must be complete. Sketchy information is perhaps even more frustrating than no information. The receiver is agitated once he knows that he doesn’t know. Information gaps leave the receiver feeling unfulfilled, hanging, needing more. The facts provided must cover all important details to enable the receiver to take appropriate action. It must pass the basic test of the old journalistic cliché and answer the questions: Who? What? When? Where? How?.

The question ‘Why?’ was deliberately omitted from the above series so it can stand on its own. We would suggest that the second principle to be adhered to by Government is that information should be provided within a frame, a context. For example: ‘Why are new rules or regulations necessary for the scrap metal trade?’ ‘Why are certain

peanut products being recalled?’ ‘Why are adjustments being made to the customs tariff for cement?’ Providing a perspective frame accomplishes several important tasks. It dignifies the receiver as worthy of an explanation. It underscores the fact that the Government considers itself accountable to its citizens. It acknowledges that citizens are an important part of the policy-making process and, implicitly, invites participation or feedback.

However, a word of warning – fullness and context must be balanced with the third principle – relevance. In his famous article *‘The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information’* published by Princeton psychologist Dr. George Miller we are warned that human short-term memory has a finite capacity. Dr. Miller’s research highlighted that experiments in short-term memory had a common factor, that is, the average person could only keep five to nine items in their short term memory (hence the magical number seven, plus or minus two). This classic paper has been often cited as the reason why Bell chose to make telephone numbers seven digits long. This may or not be true but the conclusion is that information has to be relevant and limited to a few key points for it to be retained.

A fourth principle in the provision of information by Government hangs on the rule of equity. Information must be freely and readily accessible to all who have a right or need to possess the information. How does one determine who has a right or need? It is not that complex. If the information is material to a business or the welfare of the individual then the information must be provided in a non-discriminatory fashion. All players in the market have an equal right to the same information. In this regard, it would be best to err on the side of over-exposure rather than under-exposure. For example, if the Government were to adjust the structure for corporate taxation, this may be a fairly targeted audience but it would be better to use a dissemination technique that results in significant over-exposure rather than one that

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*Mrs. Collings is Director of Policy, Planning, Projects and Research at the Ministry of Industry, Investment & Commerce*

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has even the slightest risk of missing some parts of the target population. The principle of equity would, therefore, also directly influence the channels of communication employed.

Fifthly, information must be provided on a timely basis. This will allow the receiver to process and evaluate the information with a view to taking action in a measured, deliberate manner. As a practical example, we can consider the recent tariff waivers granted on the imports of cement into Jamaica. The Government had a clear responsibility to advise existing and potential importers as soon as this development occurred, along with the criteria, if any, that would be used to evaluate applications for a waiver. To advise after the fact, or shortly before the waiver were due to expire, would be an exercise in frustration and futility.

The sixth principle may seem redundant but it is so important, it is worthy of specific enumeration, that is, Government has a responsibility to disseminate information in a responsible manner, to ensure that

appropriate action is taken by the receiver without creating an environment of chaos and panic.

A seventh and final principle for consideration is that information must be consistent. (The reader should note that the limit of seven is an artificial contrivance in an attempt to adhere to Dr. Miller's advice about short term memory). Inconsistency is not only confusing and frustrating, it can create distrust of the message as well as distrust of the sender. People who distrust a message will not take the desired action and it is doubtful that they will believe further messages from the source. We can, therefore, agree that distrust is an emotion that Governments would not wish to engender in its citizenry.

In summary we can conclude, consumers and citizens have a right to know. Governments have an obligation to inform, and, following seven simple principles will ensure that the communication transaction is satisfactory to both the sender and the receiver. ■

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## Symposium

*Continued from page 6*

- come before a judge who is hearing one for the first time;
2. Developing the requisite expertise would become lost in the court system;
3. The courts are often criticized as overburdened, slow and cumbersome and competition matters would require a long time before they are resolved; and
4. Knowledge of competition law by lawyers is still inadequate.

### Discussion Session

Some participants appeared to be of the view that the *quality* of the substantive decisions ultimately reached was the most important consideration and questioned the approach of placing procedural fairness above efficiency and effectiveness.

One participant expressed the view that there was much frustration associated with attempting to explain issues to an adjudicating body that did not understand the issues

involved and that this made her inclined to the view that the Commissioners should continue to determine the relevant matters. She also stated that this area requires, as is facilitated by the current structure, intense immersion especially given that competition analyses can become quite complex.

It was also opined that the adjudication process requires judicial skill and that the courts are equipped to understand the concepts and deal with any evidence placed before it in this regard.

The viability of establishing a single tribunal to determine matters relating to the FCA and other legislation was also discussed. It was concluded that although there were potential cost benefits associated with this option, the essence and hence, proper development of this specialist area, would be lost if such a tribunal were to be established. ■

*The papers presented at the Symposium are available at [www.jftc.gov.jm](http://www.jftc.gov.jm).*

### ENDNOTES

<sup>1</sup> Supreme Court Civil Appeal No. 92/97, delivered January 29, 2001.

<sup>2</sup> Competition Policy Implementation (CPI) Working Group of the International Competition Network, 2007-2009.

<sup>3</sup> "Assessment of Competition Policy in Jamaica", August 2005.

<sup>4</sup> "PPIAF – Jamaica Regulatory Impact Study", October 2006.

# THE CASE FOR COMPETITION POLICY IN DIFFICULT ECONOMIC TIMES\*

## I. Summary

- ♦ **Competitive and dynamic markets have increased productivity and promoted economic growth across the globe.**
- Competition policy has an important role to play in improving the productivity, and therefore the growth prospects, of an economy.
- Effective competition provides significant benefits for consumers through lower prices and better quality goods and services.
- When markets work well, firms thrive by meeting consumers' needs better and more effectively than their competitors, through innovation, increased productivity and a lower cost base.
- The recent economic crisis appears to have shaken faith in markets and in competition policy. There are accusations that unfettered competition has contributed to the crisis. However, the evidence points to the contrary.
- ♦ **Effective competition and competition policy can aid economic recovery.**
- Economic downturns, although temporary, increase protectionist pressures to relax competition with long run effects.
- Relaxing, suspending, or eliminating competition policy during an economic crisis can inadvertently harm consumers and producers by slowing, rather than promoting economic recovery.
- History demonstrates that the costs of restrictions on competition are substantial, often only become evident in the long run and can be extremely difficult to remove or reverse.
- More effective competition and competition policy should be part of the solution to make markets work better in the future.
- ♦ **Competition policy can usefully inform broader**

## policy objectives.

- As governments design economic recovery measures, competition agencies can offer useful advice and insight on likely effects in the market and help ensure that the full benefits of competition are properly understood and taken into account in policy-making.
- This might include countering protectionist measures that would relax competition for incumbent producers and advising government on the economic costs and benefits of alternative proposals.
- For example, as governments consider a range of reforms to the regulatory framework governing financial markets, it is important that they are mindful of the competitive impact of those regimes and seek to promote greater levels of competition in affected markets, relying on competition agencies to provide guidance on how they can achieve that end.

## II. Background Supporting Points

- ♦ **Competitive and dynamic markets have increased productivity and promoted economic growth across the globe.**
- 1. Economists agree that competition policy has an important role to play in improving the productivity (and therefore the growth prospects) of an economy, regardless of the position of that economy in the business cycle. Competition policy also enhances consumer welfare. Competition policy involves the application of legal rules and public advocacy (mainly through relationships with other governmental entities and by increasing public awareness of the benefits of competition) to promote a competitive marketplace.
- 2. When markets work well, firms thrive by meeting consumers' needs better and more effectively than their competitors. Competition provides strong incentives for firms to be more efficient than their rivals, reduce their costs and innovate, thereby helping raise productivity growth across the economy. Effective competition provides significant benefits for

\* This is an excerpt from a document circulated by the International Competition Network to its members, for championing the importance of Competition Policy during times of economic distress.

consumers through greater choice, lower prices, and better quality goods and services.

3. Empirical evidence supports the proposition that competition is beneficial for the economy.

♦ **Effective competition and competition policy can aid economic recovery.**

1. The recent crisis in global financial markets has led some observers to question the effectiveness of markets and competition. However, studies do not reveal any link between competition (or competition policy) and the financial and economic crises that began in late 2008.
2. In short, there is general agreement among economists that competition policy has a strong role in improving the productivity and overall health of the economy, and that neither competition nor competition policy is to blame for current economic ills.
3. A highly competitive financial sector, appropriately regulated in light of the lessons of the past, will be more conducive to positive future economic outcomes than a non-competitive or weakly competitive financial sector.
4. There are many reasons for policymakers to be wary of calls to relax competition policy in recession or during economic crisis.
5. While a relaxation of competition policy may appear, at least superficially, to be a relatively ‘cheap’ option (in that it will not involve spending funds from taxpayers), it is an inefficient means to assist firms in financial difficulty. A relaxation will weaken firms’ incentives to be more efficient, render them less competitive internationally (see discussion of Lewis and Porter research findings, above), and penalize successful firms.
6. State support and special policies that protect incumbent firms from competitive pressures through artificial barriers can also lead to distortions of competition: in addition to weakening the recipient’s incentives to be more efficient, competitors’ incentives will be affected as results are achieved by state support rather than business decisions.
7. Relaxing competition policy is an ineffective, and even counterproductive, means to boost the economy and encourage recovery. A downturn requires firms to adapt and change and competition provides adequate incentives for this to take place. Competition policy is designed to counteract market failure, and in particular the anticompetitive exercise of market power.
8. Consistent with these observations, past government policies to relax competition policy in periods of economic crisis have been economically harmful.
9. For example, one policy response to the Great Depression in the U.S.A. was the National Industrial Recovery Act of 1933 (NIRA). The NIRA attempted to suspend certain aspects of the U.S. antitrust laws and permitted firms to collude to fix prices and quantities in some sectors provided that industry raised wages above market-clearing levels. It is a widely held view among economists that these policies did not help the economy recover from the Great Depression and may even have exacerbated the Depression.
10. In summary, far from being harmful, competition policy is central to economic recovery, and more important than ever in these difficult economic times. Structural reforms coupled with appropriate competition and regulatory policies would appear to be the best approach to promoting economic recovery. Competitive industries, under most conditions, utilize resources more efficiently, are more innovative, and produce more output at lower cost than industries where competitive pressure is weak. Setting aside competition law temporarily during a recession would act as a drag on economic recovery and would be difficult to reverse, due to lobbying by the beneficiaries of reduced competition.
11. Admittedly, the process of firm failures in a recession can be painful, particularly where the impact of firm failures is geographically concentrated. Many economists believe that the most effective policy response to deal with the negative consequences of firm exits is to focus state support on the adjustment process, such as through retraining workers to allow them to move quickly to other, more productive, firms or industries. Maintaining inefficient firms by relaxing competition policy is regarded as a less effective approach, because it misallocates resources and tends to reduce efficiency and innovation, to the detriment of consumer welfare and productive efficiency.
12. In addition, at a time when people are concerned with growing unemployment it is important to note that there is no evidence that increased competition would lead to net employment losses. For example, in the wake of opening the air transport sector to competition, between 1992 and 2001, direct airline employment in Europe rose by 6%. (See study by the UK Civil Aviation Authority on *The Effect of Liberalisation on Aviation Employment* (2004), available at [www.caa.co.uk/docs/33/cap749.pdf](http://www.caa.co.uk/docs/33/cap749.pdf).) ■

# COMPETITION IN CRISIS – IS LONG-TERM PLANNING RELEVANT?

*“Jamaica’s long-term development plan may not focus, specifically, on the current global economic crisis but it zeroes in on the structural economic challenges that need to be tackled regardless of whether or not there is a crisis. The Plan’s resonance and relevance is, therefore, not diminished.”*

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By Wesley Hughes

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## Introduction

**T**HE THEME *Competition in Crisis* speaks to the crisis of competitiveness in Jamaica vis-à-vis the rest of the world. While the current global economic crisis has exacerbated our crisis of competitiveness, it should be pointed out that it further exposes the need for the fundamental transformation of our energy use as well as our domestic industry structures. For this reason, any reflection on this matter must not be in isolation from the long term development vision for the

country. *Vision 2030 Jamaica* National Development Plan speaks to *Jamaica the place of choice to live, work, raise families and do business*. For the country to be the place of choice to do business, we must transform our energy use as well as develop internationally competitive industry structures.

## Role of Vision 2030 Jamaica National Development Plan

*Vision 2030 Jamaica* National Development Plan offers prescriptions as to what can and should be done to allay the crisis of competitiveness. *Vision 2030 Jamaica* encapsulates four broad national goals. Goal 3 is: Jamaica’s Economy is Prosperous. This goal is underpinned by six national outcomes, two of which are Energy Security & Efficiency and Internationally Competitive Industry Structures (National Outcomes #s 10 and 12, respectively). These two outcomes are linked by the common concern of environmental sustainability.

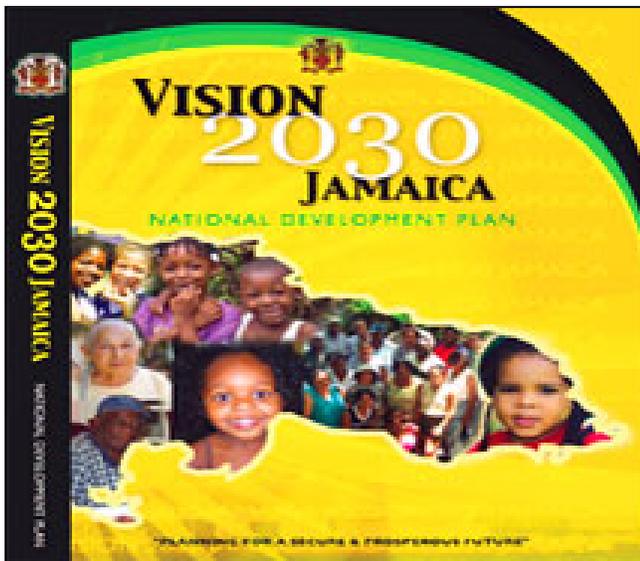
## The Energy Sector

Four issues and challenges emanating from the energy sector are: dependence on imported petroleum; inefficient electricity system, inefficient use of energy; and environmental sustainability – all of which operate in a reinforcing loop to exacerbate the impact energy costs have on the pursuit of international competitiveness. The two national strategies to address the aforementioned issues and challenges are:

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*Dr. Wesley Hughes is a former Director General of the Planning Institute of Jamaica*

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- 10-1 Diversify the energy supply
- 10-2 Promote energy efficiency and conservation

There are a number of selected sector strategies as well as key strategies and actions to accompany each national strategy.<sup>1</sup>

The energy sector is poised to make a great and transformative contribution to attainment of international competitiveness. The Energy Policy (2006-2020) and *Vision 2030 Jamaica* reinforce the need for urgent action to address our energy constraints so as to reduce the oil bills which, while having a macroeconomic impact in terms of the balance of payments, also: increase the operating costs of businesses; reduce the disposable income of consumers; and introduces a level of volatility at both the level of the firm and the household.

Both the energy constraints and the industry structures can be tackled simultaneously because of the inter-linkages.

### Domestic Industry Structures

The Global Competitiveness Report 2008-2009, which gives Jamaica's Global Competitiveness Index (GCI) ranking, places Jamaica 75<sup>th</sup> out of 134 countries. This means that Jamaica has much work to do. *Vision 2030 Jamaica* has identified the issues and challenges that constrain competition, in terms of industry structures, and national strategies that can move Jamaica forward. The main issues and challenges include: the capacity constraints of Jamaican companies; limited inter-sectoral linkages; and limited application of environmentally-friendly processes.<sup>2</sup> These are discussed below because these are tangibles that the Jamaican manufacturer or business person can easily relate to.

The capacity constraints have the overall effect of reducing the business sophistication of Jamaican companies. These constraints include: limited application of technology and management techniques; lack of focus on customer service; limited access to capital for upgrading and retooling; **low levels of energy-efficiency**; and limited implementation of environmental management systems (EMS). The GCI Report, in particular, exposed the competitive disadvantage of Jamaican companies with regards to local supplier quality and production process sophistication.

All these capacities have to be built and this transformation is not a short-term process; it will take time. For this reason, Jamaica's long-term development plan may not focus, specifically, on the current global economic crisis but it zeroes in on the structural economic challenges that need to be tackled regardless of whether or not there is a crisis. The Plan's resonance and relevance is, therefore, not diminished.

The second issue of limited inter-sectoral linkages is particularly important for me as I have always held that Jamaica needs centres of innovation and excellence where companies can reduce their operating costs by capitalizing on the economies of scale and scope that arise from enclaves. We need Silicon Valleys here in Jamaica so that we can begin to export our goods and services rather than rely on imports to drive our economy.

Limited application of environmentally friendly processes is an almost widespread problem. While there has been a move by many manufacturers to acquire new technology, it has tended to be appropriate rather than cleaner technologies because functionality and price outweigh resource efficiency. International competitiveness and sustainable development are mutually reinforcing in this instance as both goals require that our domestic producers improve their facilities through retro-fitting and acquisition of cleaner, cutting edge technologies that, while minimizing operating costs, promote sustainability.

In recognition of the constraints to achieving international competitiveness, *Vision 2030 Jamaica* outlines five national strategies:

- 12-1 Develop company sophistication and productivity
- 12-2 Develop economic linkages and clusters
- 12-3 Develop economies of scale and scope through collaboration among enterprises in the region
- 12-4 Enhance the framework for competition among enterprises
- 12-5 Promote eco-efficiency and the green economy

For Years 1 – 3 of the Plan (2009-2012), there are key strategies and actions to be taken that are aligned to national strategies 12-1 to 12-5. Just as our athletes achieve world-class standards through competition at home and abroad, our productive sectors will benefit from a framework that enhances fair competition among enterprises. The key actions for 12-4<sup>3</sup> are heavily dependent on the Fair Trading Commission (FTC) as responsible agency:

- Finalize amendment to the Fair Competition Act;
- Increase competition advocacy; and
- Participate in discussions concerning regional and international competition policy.<sup>4</sup>

It must be understood that it will take time for these five national strategies to deliver the results as it is the confluence of sector strategies as well as linkages across sectors that will produce optimal results.<sup>5</sup>

### Conclusion

Given the perennial nature of our crisis of competitiveness, it has to be understood that putting a plan in place basically provides the framework for which



the actions to be taken to arrive at the goals can be aligned. Change, however, is incremental and is long-term and it is this kind of continuity and vision that has been lacking in previous plans and which is necessary for the transformation of both the economy and the society. The economy and the society do not exist in silos. Even if a road is built to enable farmers to reduce transportation time and costs to deliver their produce to the wharfs for export, the same road is used to deliver social services and,

as such, is both an economic and social good. Vision 2030 Jamaica embodies integrated, inter-sectoral long-term planning. Vision 2030 Jamaica also seeks to ensure that the steps we take in the short term to address the current crisis also contribute to improving our economic fundamentals including macro-economic stability and labour productivity which are the basis for sustained growth in the long term.

International competitiveness, therefore, does not only speak to getting the prices right or the inputs right e.g. the number of workers, the technology and the capital, it also speaks to the qualitative aspects of international competitiveness, for example the mindset of the society towards work, productivity, etc. which also impact on the goal of international competitiveness.

Some of the remedial actions that need to be taken to increase international competitiveness are, therefore, at the level of the individual firms or companies and even at the level of the individual. Some actions, however, are required at the policy level and require collective action among all stakeholders: Government, the private sector, the trade unions, private citizens, civil society.

*Vision 2030 Jamaica* sets out national strategies and ascribes agents of change who are tasked with implementing these strategies. The Medium Term Socio-Economic Policy, 2009-2012, integrates monitoring and evaluation to allow for recalibrations after each three year period. How can *Vision 2030 Jamaica* be irrelevant when it is so dynamic? The answer is: long-term planning is not irrelevant. Long-term planning is what reminds us where we were going before the short-term crises derailed us. Long-term planning puts us back on the path towards a secure and prosperous future where Jamaica is internationally-competitive. ■

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#### ENDNOTES

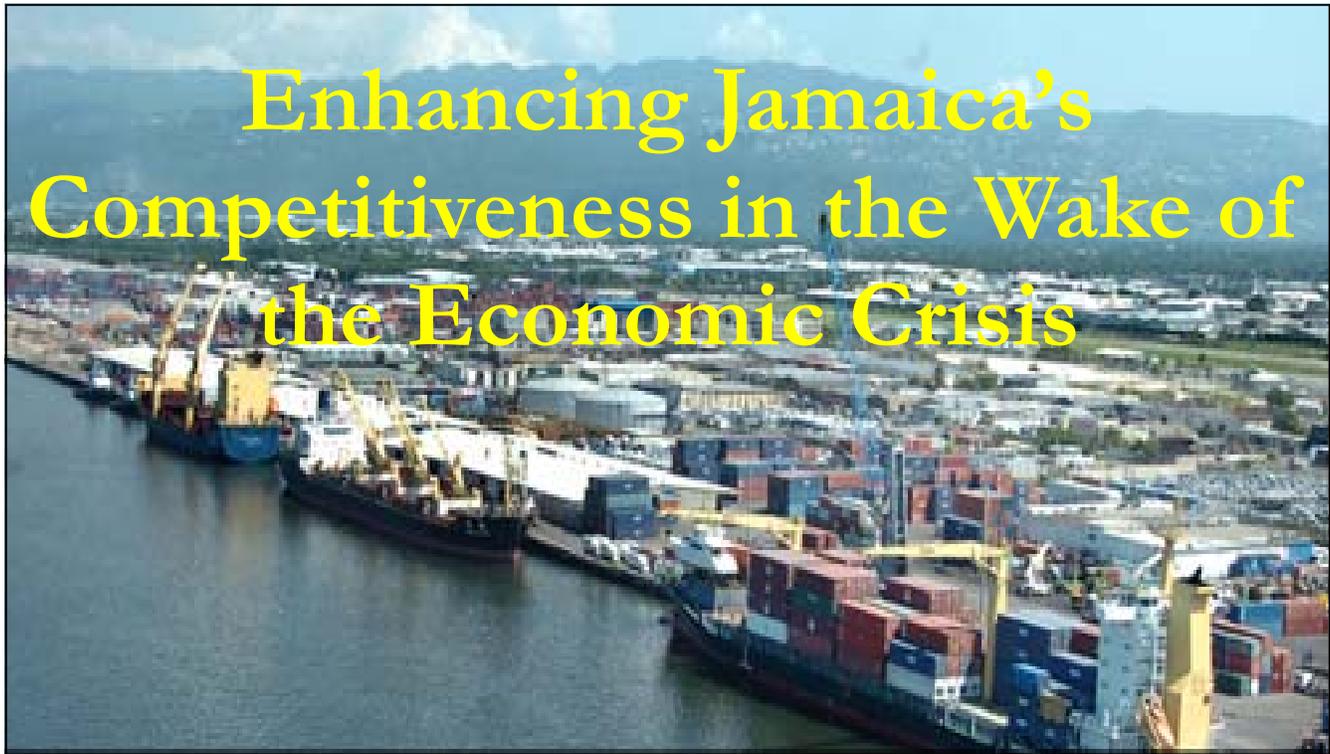
<sup>1</sup>See the Selected Sector Strategies aligned with the two National Strategies in Planning Institute of Jamaica. 2009. *Vision 2030 Jamaica National Development Plan*. "Planning for a Secure and Prosperous Future." Kingston: Pear Tree Press; 181; 183; and 289.

<sup>2</sup>See *Vision 2030 Jamaica National Development Plan*. "Planning for a Secure and Prosperous Future": 195-196.

<sup>3</sup>Please note that only 3 of the 4 actions for this national strategy are the responsibility of the FTC. The remaining key action is to: promote competition in media industry and markets. This is the responsibility of the Broadcasting Commission.

<sup>4</sup>See *Vision 2030 Jamaica National Development Plan*. "Planning for a Secure and Prosperous Future": 292.

<sup>5</sup>Greater detail on the Issues and Challenges facing the Main Goods and Services Producing Sectors and Industries, as well as Selected Sector Strategies for each, can be found on pages 201 – 233 of the National Development Plan.



By Joseph M. Matalon

**T**HE WORLD IS confronting one of the most serious economic crises since the Great Depression of the 1930s.

According to the United Nation's World Economic Situation and Prospects 2009 publication, "...world income per capita is expected to decline by 3.7 per cent in 2009. At least 60 developing countries (of 107 countries for which data are available) are expected to suffer declining per-capita incomes, while only 7 would register per-capita GDP growth of 3 per cent or higher - considered as the minimum required growth rate for achieving significant reduction in poverty - down from 69 countries in 2007 and 51 in 2008. Economic setbacks are expected across the board, though strongest in the Commonwealth of Independent States (CIS), Sub-Saharan Africa and Latin America. Also, the least developed countries (LDCs) will be severely affected, with growth decelerating by 3.5 percentage points from the robust growth witnessed in recent years."

The World Trade Organisation (WTO) has predicted a drop in global trade of over 10 percent for this year. WTO figures indicated before this year, a slowdown in trade from 6 percent growth by volume in 2007 to 2 percent in 2008.

This massive contraction in trade is shown in the falling revenues and increasing layoffs of global transport companies. Across the world, ships, airplanes, trucks, and

railroad equipment with no cargo to carry are being stored or scrapped.

Competition is in crisis in this scenario. Many countries have been increasingly adopting protectionist measures in creative ways, rather than simply raising duties on imports, in order to circumvent the terms of regional and international treaties, although, in many cases, duties have been raised as well.

Jamaican exporters have learnt this the hard way right in our own backyard of CARICOM. Environmental levies and revenue replacement duties applied by some CARICOM member states have negatively impacted exporters. The main issue is the need for transparent non-discriminatory standards among CARICOM member states. Trade tensions have increased in the region, arising out of disputes over the seizure of goods by customs authorities and the application of non-tariff barriers on an ad hoc basis. However, the PSOJ believes that retaliatory protectionist measures would not be the answer. Rather, the focus should be on implementing measures to ensure the sustainable export of Jamaican products.

There is also concern in the region over the application of the Least Developed Country (LDC) category in CARICOM, which allows countries so classified to increase tariffs on products from Jamaica, which falls under the More Developed Country (MDC) category,

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although some of these countries have been experiencing higher rate of growth.

Jamaica is no exception to the trend of protectionism, and the Government has been considering policies to protect local businesses. However, care has to be taken to ensure that policy decisions do not end up achieving the opposite of what was intended. While it is important to develop local productive capacity, this has to be understood in terms of what is necessary for businesses to succeed in a globally integrated economy.

For instance, policies that seek to favour companies that are involved in production using mainly local inputs, in order to create employment, could end up hurting more globally integrated firms that source their inputs internationally. These firms have been able to compete effectively internationally, and should domestic policy negatively impact on their activities, they would have no choice but to relocate to more favourable locations for globally integrated firms. This would have the net effect of decreasing the international competitiveness of the economy and ultimately increasing unemployment, the opposite effect of what was intended.

We can look at examples of this effect in our largest trading partner, the USA, and internationally, to guide our actions at home.

The new “Buy American” provisions of the American stimulus package is said to be threatening more globally integrated firms. This is most clearly seen in the case of Duferco Farrell Corp., a Swiss-Russian partnership operating steel plants in the US, and employing significant numbers of people. The new buy American provisions have been threatening the operations of the company by favouring companies that source inputs locally.

Duferco utilizes global supply chains to spread production among multiple countries in order to achieve efficiencies that give it a competitive edge in the market place. This means that substantial parts of its production process take place in various countries around the world and the finished product sold in the American market. The US

stimulus package for public works requires contractors who would normally buy their inputs from Duferco to utilize local products made in the USA. Hence, Duferco’s customer base has collapsed and its US employees could face layoffs.

Some European countries have required banks receiving bailouts to focus on lending at home at the expense of overseas clients and the quality of the loan portfolio, which could once again jeopardize the financial stability of these institutions.

Other countries have insisted that producers move manufacturing jobs home in exchange for a government bailout, which could end up reducing their level of efficiencies in production, and hence, their competitive edge .

We can also look at history for guidance. To counter the Great Depression, the U.S. adopted the Smoot-Hawley Act in 1930, which raised import duties on most imports, leading to retaliation from trading partners. Faced with that crisis, other countries pursued similar policies that slashed global trade volume from \$36 billion in 1929 to \$12 billion in 1932. Exports and imports among all countries fell dramatically, and the economic crisis was prolonged.

The lesson to be learnt is that it is in the interest of every country to keep international trade flowing smoothly, as healthy international trade can help revive the world economy. Otherwise, history could repeat itself.

Hypothetically, Jamaica could improve its trading position by implementing various protectionist measures, if trading partners do not do likewise. However, it is unlikely that these trading partners would also keep their markets open to the same extent. Hence, all players would suffer a loss. Consequently, the only option for Jamaica is to consult and cooperate with its trading partners to gain important benefits or suffer the consequences from the failure to do so. ■

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# Competition policy in times of economic distress

By Peter-John Gordon



**I**N TIMES of economic distress it is not unusual for governments to come under pressure from their populations to 'act'. The 'action' called for may vary from time to time and place to place. Measures taken may run the spectrum from a stimulus package for the economy to relief to certain industries and/or firms. A stimulus package is usually designed to raise demand within the economy and is often achieved through government expenditure. An example of a stimulus programme would be the government spending more than it otherwise would have on road construction and/or repair. The idea here is that road construction would demand inputs of labour, capital and raw material. The people who provide these inputs would in turn create another set of demands throughout the economy which would require more labour, more capital and more raw materials. The original government expenditure would act as a stimulus for further demand and hence further

economic activity. Another example of a stimulus measure would be a reduction in taxation. Here the idea is that allowing people to keep more money would cause an increase in demand for goods and services and hence there would be a supply response throughout the economy, causing output and employment to rise. An increase in government expenditure and a reduction in taxation are both fiscal expansionary policies and are likely to cause or increase fiscal deficits.

Relief to an industry and/or firm is usually given in the form of subsidies and/or a reduction in taxation specifically to that industry/firm. This type of action usually does not result in an expansion of demand throughout the economy, but rather helps in strengthening the balance sheets of the industries/firms which are the beneficiaries of this relief.

The response of governments to economic distress may or may not have competition implications. Unfortunately many governments in responding to the political cry from their populations to 'act' in light of economic distress; pay little attention to competition implications of their actions.

The efficacy of a stimulus package in achieving the desired effect of stimulating demand throughout the economy, depends on the structure of the economy in question. If demands for the main economic activities within the economy are external to the country, then a local stimulus package is unlikely to have the desired impact of raising demand for the goods and services produced within that country. Likewise if a significant amount of consumption within the economy is derived from imports, increased demand created from a stimulus package is likely to stimulate additional imports rather than local production. Countries which are large enough to affect world demand should engage in stimulus programmes because their actions will help to spur economic activities around the world, thus shorting the economic recession. Small countries are not able to affect world demand, and their stimulus packages will have no effect on world demand.

Competition policy is based on the idea that competition

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delivers the highest level of welfare to the citizens of a country. Consumers vote for the products which they want by their spending patterns, they indicate not only which products should be produced and which should not, but they also indicate which producers should remain in business and grow and which should depart. Firms strive for the approval of consumers by seeking to provide the types of products which consumers want at the prices which consumers prefer to pay. The competitive process if disrupted would prevent the consumers from getting the best possible deals. If consumers are not able to get the best possible deals then obviously they will be worse off. While the competitive process benefits consumers ultimately, they are not the only beneficiaries from it. Some firms also benefit from competition. Those firms that have to purchase their inputs from other firms certainly want the input markets to be competitive; otherwise they will not get the highest quality inputs at the lowest possible prices. This in turn will diminish their ability to grow the markets for their products. If markets are not competitive firms will not be rewarded for doing a good job and this will reduce their incentives to innovate, to keep cost down and to satisfy customers.

Competition can be distorted both by incumbent players in the market as well as by government policy. Incumbent firms often times seek to use 'unfair' methods to stave off challenges from other firms. These 'unfair' methods could include an abuse of a dominant position, refusal to deal with legitimate businesses, predatory pricing among others.

Tax relief and/or a subsidy to one firm in an industry clearly give that firm an advantage over its competitors. Such a move could drive competitors out of the market. This type of policy would clearly be anti-competition. Success in the market would not be due to superior performance, but rather to government generosity. The success of such a firm would be due to a transfer of resources from the public purse to that company.

What would be the implications if tax relief/subsidy was given to all the companies within an industry instead of only one company? Such a measure would not distort competition within that industry, but it would affect the allocation of resources within the economy – one of the primary benefits of using a competitive economic system. Support to one industry, makes that industry relatively more profitable than other industries. This causes resources to flow from the unprotected industries into the protected one since after tax profits are higher. A relief package to select industries during times of economic distress increases the distress on other industries which do not receive similar relief.

What would be the implication if the tax relief/subsidy was given to a domestic company in competition with

foreign firms? In this situation the more likely scenario would be a procurement policy which has the government purchasing from the local firm even if its prices are higher than those of the foreign firm and/or the foreign firms facing tariffs at the borders which cause their products to reach consumers at prices above those of the local firm. Again competition is distorted. If tariffs are used to force the price of imports higher than the domestic prices, consumers will turn to the domestic products. However, these domestic products will be bought at prices higher than the foreign products would have been bought if the tariffs were not applied. Such a policy makes consumers poorer and also makes firms which have to buy these local products less competitive internationally as well as locally. Resources are again attracted away from other industries into this protected industry thus causing the economy as a whole to produce less. A procurement policy which has the government paying more for a locally produced product than a foreign one, means that the government would be able to buy less of everything, not just the particular product involved. The amount of products which can be purchased is inversely related to prices. If prices rise, fewer products will be purchased. If the price of one product rises and the government continues to buy the same amount of that product, it must buy less of other products if it is to keep the level of expenditure unchanged.

When relief is offered to an industry and/or firm in a manner which is not consistent with competition it is usually meant to be temporary, until the economic distress passes. It is certain that economic distress will not last forever. However, it is quite possible that the post economic distress world looks different from the pre-economic distress one. Some industries might decline and others might grow; some industries might relocate from one country to another. Relief and/or assistance to industries which will decline and/or relocate in the post economic distress world could be considered wasted. Even if these resources were seen as bridging over a difficult period, they might slow down the adjustment of the economy to its new growth path.

From time to time governments make decisions for non-economic reasons. This is a part of the course of governance in all countries. Military superpowers are unlikely to outsource their most sophisticated military tools to other countries simply because it would be cheaper. However, such deviations from economic principles carry economic costs. To deviate from the 'economic sensible' thing to do does not by itself imply bad policy. It is however useful for policy makers and the public at large to understand the trade-offs which are made when governments deviate from economic principles. ■

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# Competition and Finance

By Wendy Duncan

## The Crisis

Someone said about the current crisis that "...the world faces the worst finance crisis since World War II." The difficulties being experienced in countries around the world have been likened to the 'Great Depression' which began in 1929. One writer declared that the current crisis is likely to be remembered in history as "The Second Great Depression" or the "Greater Depression." According to economist, Dr. Krassimir Petrov:

*'...the crisis is the ultimate scapegoat for all economic evils that currently plague the global financial system and the global economy...we are repeatedly assured that the ultimate fault lies with the credit crisis itself, if there were no credit crisis all of these terrible things would never have happened in the economy and the financial markets.'*

The impact of the crisis on consumers in the region has been apparent in the increase in the prices of food and commodities, building materials, energy prices, air and ground transportation. The crisis has also resulted in social and economic dislocation, job losses, business closures, and a fall in foreign direct investments.

There are various views about the factors which led to the crisis. Some of these are believed to include increased consumption in countries such as India and China, oil energy price hikes, speculation, unregulated financial sectors, and the exercise of liberal lending policies on consumer loans. Other factors include the failure of government regulators to be proactive; the greed of bankers, barons and capitalists; and that consumers were not making rational decisions. Many of these are of universal relevance. Therefore, while developed countries such as the United States grapple with the role and effectiveness of their financial regulators in the wake of

losses suffered by consumers from individuals such as Bernard Madoff who operated complex and sophisticated pyramid schemes, Jamaicans have also suffered huge losses mirrored in the operation of several unregulated financial institutions such as Olint and Cash Plus. We too have been questioning the role of the financial regulators in protecting consumers and the market on a whole. It is helpful to also explore the role of competition law and policy in the current financial crisis. The following brief analysis of the application of competition to the financial sector is based on a paper published by the Organization for Economic Co-operation and Development (OECD) as a result of a discussion on the financial crisis in the OECD Competition Committee in February 2009.

Traditionally, competition law and policy have been applied with extreme caution in the financial sector. Competition has also been viewed with a certain level of suspicion. Until more recent times, banking was viewed as a special sector, where business was heavily influenced by the monetary and financial policies of central banks and supervisors, rather than by market forces. For instance, in the US there was a *de facto* antitrust exemption for banking until Supreme Court decisions in the 1960's displaced this. In Europe, relevant articles of the Rome Treaty were not applied to the financial sector until the early 1980's when the *Zuechner* case, heard in the European Court of Justice, established otherwise.

## Financial Markets

Financial markets are believed to be unique and to possess certain features that may justify different treatment from that of other markets. Banks are considered special because they are particularly vulnerable to instability originating from the possibility of 'runs' and crises,

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excessive risk taking or 'contagion'.

Runs on a bank can be due to panic as a result of depositors losing confidence in the bank and withdrawing their funds independently of their consumption needs. If depositors believe that a crisis will occur, then all of them will rush to avoid being the last in line and not receiving any of their funds. These panic runs have been described as 'events linked to self-fulfilling prophesy.' Another type of run relates to poor bank performance. For instance, during a recession when the banks' returns are minimal, depositors foresee financial difficulties and withdraw their funds prematurely. This leads to insolvency. It is believed that this sort of run can actually be efficient as it can force the early liquidation of worthless assets.

Another source of instability relates to the problem of excessive risk taking. Because the long maturity of banks' assets make it easier to cover any misallocation of resources in the short run; and the wide dispersion of bank debt among small, uninformed and usually fully insured investors prevents effective discipline on banks from depositors, banks may behave less prudently without being easily detected or paying additional funding costs. They have stronger incentives to take risk than enterprises in other industries.

The third source of instability is referred to as the risk of 'contagion.' This is the risk that the failure of one bank, or even only the release of bad news about its solvency, might lead to the failure of numerous other financial institutions due to the connections or linkages between banks through both the payment systems and the interbank market.

Arising from the discussions by the OECD Competition Committee it was observed that the potential instability of the banking system and the need for consumer protection are the fundamental rationales behind the introduction and development of bank regulation. It was further noted that the origin of bank regulation is important from the perspective of competition authorities. It is suggested that an important objective of regulation that promotes stability and avoids bank runs is the protection of consumer welfare.

### **Applying Competition to the Financial Sector**

While it has been acknowledged that, in one respect, competition in terms of cost minimization and allocative efficiency applies to the banking industry, conversely it has also been acknowledged that the 'standard competition paradigm' may not work fully in the industry because of features such as asymmetric information in corporate relationships, switching costs, and networks in retail banking.

An example of the asymmetry of information is where an

enterprise will accept the least favourable loan rate only after being rejected by all other banks which had set more favourable rates. This implies, however, that the enterprise accepting a loan from a bank offering a higher loan rate has a low credit-worthiness. It has been observed that credit ratings may help to solve the problem of asymmetry to the extent that in many countries there is limited credit information available for consumers. Banks and other lenders therefore face a problem of adverse selection as consumers who leave their home bank to look for credit elsewhere may have been initially refused credit by their home bank, which has the most detailed information on the consumer's credit worthiness. Other banks would therefore be cautious of new customers and would reasonably impose a credit premium for such customers. According to the OECD, ensuring that credit rating information on consumers is broadly available would help to overcome this asymmetric information problem and increase banks' willingness to compete for customers of other banks. It is significant that Jamaica is on the verge of introducing credit reporting legislation.

Surveys conducted in the United Kingdom have proven that although customer mobility and choice are essential to stimulating competition in retail banking, the degree of customer mobility is low and customer-bank relationships are long. One possible explanation for limited switching of current accounts is that both the financial and non-financial costs of switching are significant. In moving from one bank to another, consumers incur costs associated with the physical change of accounts, transfers of bill payments or lack of information. Switching costs therefore represent an important source of market power in retail banking.

Networks may also affect the level of competition by introducing elements of non-price competition in the interaction among banks. For instance, the possibility of banks to share Automatic Teller Machine networks can be used as a strategic variable to affect price competition on the deposit market and deter potential entry. Additionally, in respect of credit cards, merchants may use card acceptance to increase customer base and relax price competition.

The question of the link between competition and stability has been largely unresolved. Up to the 1980's the prevailing view was that competition worsens stability. It was believed that intense competition favours excessive risk taking, thus leading to a higher risk of individual bank failure. Regulation was believed to mitigate this effect. The more recent view, however, is that panic runs can occur independently of the degree of competition in the market although, by raising deposit rates, more competition may intensify the coordination problem

among depositors and increase the probability of runs.

In the current crisis, governments are undergoing pressure to provide support to failing industries by way of subsidies and protection. Simultaneously, competition agencies are likely to be pressured to relax enforcement standards in order to facilitate economic recovery. In past crises, competition authorities have been under strong political pressure to either suspend the importance of competition policy in entire industry sectors or to reduce the standard of enforcement – either by allowing governments to support enterprises in distress with public subsidies, or by relaxing the rules for collusion in order to reduce pressure on prices due to fierce competition.

There is evidence that this approach actually retards the process of recovery from recessions and depressions. In a study conducted by J. Fingleton, empirical evidence shows that the suspension of competition laws in the US during the 1930's made the Great Depression last longer. Additionally, these studies indicate that when the Japanese government restricted competition in structurally depressed industries in the 1990's, the result was a prolongation of Japan's recession. One of the apparent reasons for this is that crises bring about long term benefits by facilitating the exit of inefficient firms from the market while facilitating the entry of better and new competitors. Care must be exercised, however, as according to Fingleton:

*'The fact that banks are fundamentally different from other businesses may exceptionally justify intervention. Bank failure risks contagion effects (i.e. the failure of one bank may lead to a run on others, as opposed to other sectors where the removal of one player would normally be in competitors' interests). The collapse of confidence in turn caused liquidity to disappear, and thus removed an essential lubricant for the banking system to function and brought us close to systemic collapse.'*

Looking beyond emergency actions to stabilize financial markets, the current crisis has emphasized the importance of reconsidering the role of competition policy and competition agencies in these matters in the medium and long term. It will be interesting to see whether, on a global level, competition will be limited in the financial sector or changes will be introduced in the design of competition policy to improve the resolution of crisis situations. What is clear is that this requires a deep understanding of the causes of the current crisis as well as an assessment of its competitive effects in the medium and long run. ■

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# COMPETITION POLICY IN AN ECONOMIC CRISIS

By Tom Amonde

## Introduction

THESE IS already a considerable debate and academic enquiry into the causes and the propagation of the current crisis. To date, there seems to be a general consensus that the current crisis originated in the U.S. financial sector. In 2007 and 2008 world financial markets had entered a period of serious instability. By mid-2008 the world had been engulfed in what has been dubbed (by for example, Alan Greenspan, the former Chairman of the Federal Reserve) the worst global crisis since the Great Depression. Its seriousness has been reflected in the 6.5 percent decline in global output in the last quarter of 2008.

Specifically, the origin of the financial crisis can be traced back to the period when the housing and securities markets plunged into a *black hole*. These outcomes can be attributed to the use of leverage by investment bankers in the U.S. (and elsewhere in the developed world) to invest in derivatives (asset-backed securities, structured investment vehicles, and credit default swaps). Such behaviour was made possible by the apparent lack of appropriate financial regulations and supervision in the U.S. and other major financial markets, on the one hand, and cheap credit from the Fed's low interest rate policy and surpluses from the Middle East and Asia, on the other hand.<sup>1</sup>

## Market Self-Correction: Microeconomics versus Macroeconomics

The current crisis invited State interventions. However, one may ask why governments didn't leave the market to self-correct in the current crisis. The simple answer is – there was market failure; the market failed to self-regulate. Market failure refers to a situation in which a free market fails to achieve an optimal allocation of resources and consequently there is a loss in economic and social welfare. The concept of market self-correction (which is intrinsically related to market failure) consists of two interrelated broad sub-themes in Economics – the microeconomic market self-correction and the macroeconomic market self-correction. Microeconomic market self-correction entails reliance on market forces to determine the most efficient firm to which resources flow. For example, suppose a firm sets monopoly prices,

thereby receiving supra-competitive profits. Here, microeconomic market self-correction will involve prompt new entrants in the market, as long as there are low impediments to entry. The new entrants will share in the supra-competitive profits, thus depleting them.

However, macroeconomic market self-correction involves recovery from macroeconomic shocks (e.g., recession, excessive inflation, serious deflation, etc) without any macroeconomic policy intervention. For the current crisis, one cannot be sure which of these two market self-corrections failed to trigger. However, following the alleged anticompetitive conduct of mortgage brokers and loan providers (who seemed to have pursued predatory lending) it seems that the microeconomic self-correction failed to trigger.

Following the crisis, stimulus packages were provided by governments (e.g., China, Jamaica, the United Kingdom, the United States), all directed at 'cooling down' the hotspots of the crisis in respective countries and regions. In the USA in particular Congress (in September 2008) authorized the US Secretary of Treasury Paulson to spend US\$700 billion (as the first bailout package) to purchase distressed assets and make capital injection into the banking system, as an avenue for encouraging lending and reviving flow of credit.

The crisis has however taught one important lesson – that the banking system plays a critical part in economic expansion as well as economic contraction, with the latter often unintended. Importantly, the crisis has been stimulating increased demand for (1) state intervention in the market; and (2) merger/acquisition by troubled entities.

## State-Aid (Bailout) to the Rescue of Market Failures

State interventions do come in the form of State Aid given to firms facing liquidity constraints and are incapable of raising funds externally. Two of the factors taken into account when considering an enterprise or sector for State Aid are (i) the relative importance of the troubled enterprise/sector to the overall economy<sup>2</sup> and (ii) the potential market distortion that may result from the Aid if granted discriminatorily. These factors are considered within the context of national champion versus

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competition policy – the trade-off between competition policy and *public interest*. For example, a dominant financial institution interconnected with many other financial institutions, and has lending/borrowing relationships with non-financial firms may be considered too important, such that if allowed to fail, bank runs would follow and the banking system may collapse. The collapse of the banking industry would almost ensure a lack of external investment financing for the economy and consequently an economic downturn. For that matter such institutions may be strongly considered for a bailout.

The purpose of State Aid is to facilitate fewer exits from the market and/or restructuring of firms that are in financial difficulties. However, the main concern would be how it is implemented such that it favours the most efficient and not the “too big to fail” enterprises. It is for this reason that some competition authorities have in the past, provided guidelines on the non-discriminatory provision of State Aid. For example, the European Commission (EC) on recognizing that State Aid plays an important role in managing the current crisis, have allowed Member States to design measures to provide bailout to firms that found themselves strapped for cash to become liquid again. However these provisions must fall within the guidelines designed by the EC in line with Article 87 of the European Economic Community (EEC) Treaty. It is worth noting that EC Commissioner Neelie Kroes has always maintained that competition policy and law does not intend to stifle the process of finding solutions to the crisis.

### Mergers/Acquisitions Considered

Together with financial bailout, mergers/acquisitions proposals have been considered and granted in this crisis. Mergers/acquisitions do create a larger enterprise than the size of each of the firms in the pre-merger/acquisition period and as a consequence the number of firms in the market falls.<sup>3</sup> Whenever a merger/acquisition results in only two players left in the market (e.g., the recent Blue Cross and Sagicor merger/acquisition, which left Guardian Life and Sagicor as the only players in the market for health and life insurance in Jamaica), an opportunity is created that may facilitate agreements (collusion) on prices and quantity. Such conduct almost ensures that the relevant market moves much closer to a monopoly. Note that when monopoly is compared to

competitive markets, monopoly almost always leads to a loss in social welfare – the deadweight loss. Thus, a merger that increases the new firm’s market share beyond 50 percent is likely to result in welfare losses.<sup>4</sup>

In practice, however, the dominance hypothesis can be rejected, when in fact the proposed merger may very well have adverse welfare effects. Surprisingly, efficiency gains/losses are never part of the equation when assessing merger proposals, even though competition policy treats efficiency gain or lack of it as the ultimate outcome of competition. Since economics clearly suggests that efficiency loss/saving is an important part of the analysis of the competitive effects of changes in market shares, it is advisable to complement dominance hypothesis testing with efficiency gain/loss test, in the light of a trade-off between efficiency and market dominance.<sup>5</sup>

### What we have Learned

So far we have learned the following from the crisis.

1. Market failure (due to imperfect information) as well as lack of regulatory oversight played prominent roles in the current crisis. That is, within the financial services system, regulations and market discipline lagged developments in the global financial market.
2. The crisis has revived the politics of promoting protectionism as a viable option for promoting economic growth and stability.
3. Major banks and firms will always be bailed out because they are “too big to fail”; the anticipation of the bailout of banks can create a moral hazard that biases decisions towards risk taking.
4. The series of bailout to the affected enterprises has been costly to taxpayers.
5. There have been mismatches between risks and rewards on the one hand, and benefits and losses on the other hand – where taxpayers have continued to pay for the risks created by private enterprises – in pursuit of short-term gains.
6. Risks created in one jurisdiction of the global financial system can quickly spread to other countries and into the non-financial firms, due to the international interdependences among financial and non-financial institutions. ■

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### ENDNOTES

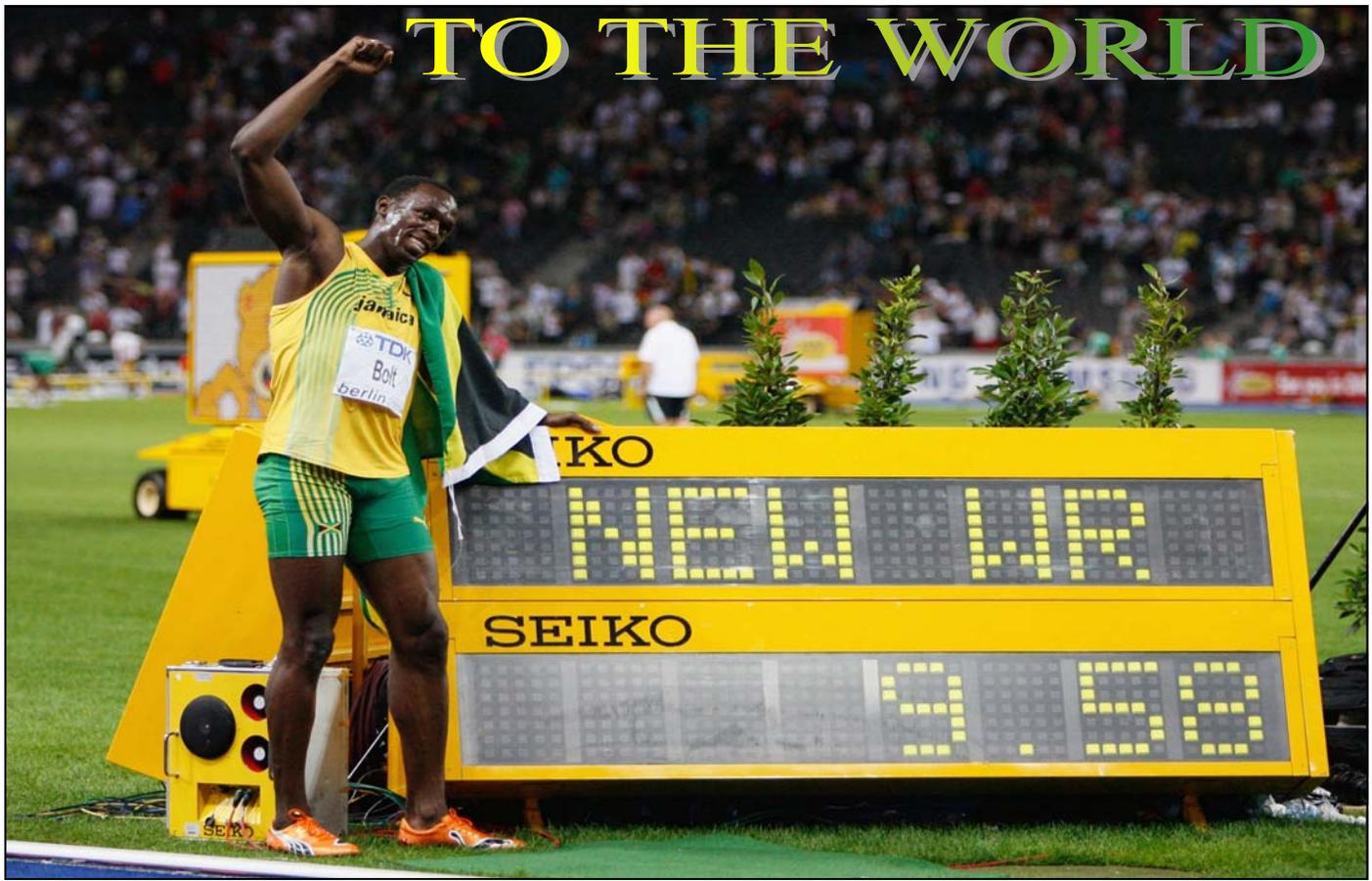
<sup>1</sup> For a detailed discussion of the origin of current crisis, see Gorton Gary (2009), “Slapped in the Face by the Invisible Hand: Banking and the Panic of 2007, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1401882](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401882).

<sup>2</sup> This is in line with the national champion argument of firms being *too big to fail*.

<sup>3</sup> The Lloyds TSB/HBOS merger/acquisition in October 2008 effectively reduced the number of banks in the UK.

<sup>4</sup> Here, an enterprise with more than 50 percent market share is considered dominant.

<sup>5</sup> In some cases the too big/important to fail has also been evoked when assessing merger/acquisition proposals; for example, the acquisition of HBOS by Lloyds TSB and the take over of Northern Rock by the UK government.



## *Jamaica's responses to international competition and the global economic crisis through the portal of its tourism industry*

**T**HE REALITY of the global economic crisis and its attendant effects on disposable incomes and tourism-related travel and activity, has not adversely affected the intense drive by the international hospitality industry to secure the active interest of the relatively scarce tourist.

The economic crisis has, however, wrought a heightened awareness of the actual and potential value of the business of tourism, and brought governments into an even tighter embrace with their respective tourism organizations.

More specifically, the involvement of national and regional governments in the promotion of tourism and the development of tourism infrastructure has never been greater, and the tourism sector is increasingly being seen not only as a long-term growth industry, but also as a short-term, sustainable means of national marketing and foreign exchange inflows at a time when foreign direct investment levels have diminished substantially. In this regard, the United Nations Conference on Trade and Development (UNCTAD) reports that foreign direct investment inflows declined by 54% in the first quarter of 2009.

### **The New Tourism**

Jamaica's response to the challenges of the times falls within the philosophical framework expressed by the country's Minister of Tourism, Edmund Bartlett on June 30, 2009. Dubbed "The New Tourism" the concept features short and long term, measurable objectives, which culminate in tangible cultural and economic benefits for the tourism customer, the provider of the tourism experience, and the host country, Jamaica. At that time Mr. Bartlett revealed an approach to the development of tourism founded on three pillars: marketing, product development and investment. Within the New Tourism framework, seven distinct yet interrelated initiatives were implemented with a view to protecting and strengthening the industry's profile, products and people.

The first was a tourism stimulus package introduced in 2008 to reduce the impact of the global financial crisis, including concessionary financing for tourism entities, a J\$50 million low-interest-rate Development Loan

*This article is contributed by the Ministry of Tourism. It is an excerpt of a presentation made in the Sectoral Debate, House of Representatives, Jamaica.*

Programme for entities to improve their product development, marketing and operational systems, a reduction in import duties to enable the ground transportation sector to maintain and upgrade its rolling stock, and a reduction in consumption taxes normally levied on the tourism industry.

The remaining initiatives, including an aggressive marketing strategy, increasing access to Jamaica by airlift, enhancing the tourism offerings and strengthening the human potential within the industry have served to sharpen the country's edge in the tourism marketplace and elevate it into the enviable position of being one of only three destinations worldwide to have increased visitor arrivals in 2009.

### Marketing

Jamaica's tourism ministry and its agencies have responded to the realities of the global tourism milieu by implementing a strong advertising and marketing campaign, the aim of which is to maintain and enhance the country's strong brand image in the overseas leisure market. In this regard, greater use is being made of Internet campaigning, major local and international events and consumer promotions with product and industry partners. In recognition of the fact that market diversity is essential to market expansion, the Jamaica Tourist Board (JTB) has added South America, China, Japan, India and Russia to its traditional loci of market activity: North America, Europe and the United Kingdom. As the Tourism Minister explained to the Jamaican Parliament in 2008, "We are marketing both sides of the Equator, for when it is summer in the north, it is winter in the south and vice-versa. But it is always summer in Jamaica, and that is one of our big selling points. Our mission to Latin America is to...showcase Jamaica as the preferred destination from the seven key markets of Argentina, Brazil, Chile, Colombia, Mexico, Ecuador and Panama...we plan to further tap into these markets by developing airlift programmes and encouraging charters."

### Aggressive airlift strategy

An intensive airlift strategy was developed by the JTB, with the central objective being the expansion of visitor access to Jamaica by creating blocks of air seats to facilitate direct tourist flights to the island. With this approach, the number of air seats from the United States to Jamaica for the 2009 winter tourist season will increase to 692,000, up from 649,000 for the previous year, while air seats from Canada to Jamaica will increase to 166,000, up from 156,000 in winter 2008. This initiative has been

accompanied by efforts to increase the number of airlines coming into Jamaica, whether large-scale or budget airlines. In this regard carriers such as JetBlue and AirTran, the latter currently the most profitable airline in the United States, are scheduled to make flights to Jamaica, for the first time, during the 2009 winter tourist season. Increased visitor traffic facilitates the growth and development of related segments of the tourism product including Casino operations, for which legislation has been presented to the Jamaican Parliament for debate and approval, duty-free shopping, cruise shipping and business tourism infrastructure (convention centres).

### Domestic tourism critical to international competitiveness

The overseas arm of the tourist inflow strategy is complemented by a major domestic programme to promote Jamaica's services, attractions and accommodations to internal customers – the people of Jamaica. This initiative, named *Experience Jamaica* was officially launched on September 6, 2009. It is not only made to function with a view to increasing local awareness, acceptance and use of Jamaica's tourism infrastructure, but also exists out of a clear recognition that resident Jamaicans, in the year 2007, spent J\$27.5 billion in the local economy, and embarked on nearly 1.3 million same-day trips.

The *Experience Jamaica* programme, which is continuous in nature, is supported in practicality by the various tourism partners who operate attractions, accommodations, ground transport and other services, who also provide special discount packages to local as well as overseas customers.

No one knows when the global economic crisis will end and tangible economic recovery will begin. There are, at the present time, strands of opinion among economic and financial analysts that fledgling signs of improvement – the so-called "green shoots" – are apparent in a number of national economies and financial markets. The Jamaican government through the Ministry of Tourism has developed and implemented the foregoing and other initiatives as frameworks to facilitate the diversity and expansion of the country's tourism industry, and which, simultaneously, contain the inherent elasticity that is vital to containing crises, whether in the short or medium term. ■

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# Going backwards in abuse of dominance: A comment on the Privy Council's decision in *National Commercial Bank Limited v. Olint Corp. Limited*

By Delroy Beckford

THE RECENT Privy Council ruling in *National Commercial Bank Ltd. v. Olint Corp. Ltd.*<sup>1</sup> signals a backward step in how a claim for breach of an abuse of dominance under the Fair Competition Act may be treated by our local courts in the future. An appeal from the Court of Appeal on, *inter alia*, the question of whether a bank by giving reasonable notice can lawfully close an account that is not in debit where there is no evidence that the account is being operated unlawfully, the decision also dealt with sub-issues implicating the interpretation of section 19-20 of the Fair Competition Act, 1993, ('the FCA') and minimally, sections 34(1) (b) and section 35 of the FCA.

The decision doubtless rests on the premise that, by and large, banking law is the basis on which claims such as these should be resolved. Thus, at paragraph 1 of the decision their Lordships noted that absent an agreement to the contrary or statutory impediment, a contract by a bank to provide banking services is terminable upon reasonable notice. Later, at paragraph 6 of the decision, their Lordships noted that the particulars of claim of the Respondent did not disclose that the period of notice given by the Appellant for the closing of the account was unreasonably short.

Absent a claim that reasonable notice was not provided for closing of the account, their Lordships focused on the other claims of the Respondent that might provide the statutory impediment to which their Lordships referred, namely claims under the Banking Act, and claims under the Fair Competition Act, 1993.

The claim under the Banking Act was that a bank's contractual right to terminate an account by reasonable notice is modified by section 4 (3) (c) of the Banking Act; the claims under the Fair Competition Act being that the closing of the account amounts to an abuse of a dominant position contrary to sections 19-20 of the Act, that the closing of the account amounts to a refusal to supply goods or services in breach of section 34(1) (b) of the Act,

and that the closing of the account amounts to collusion to injure competition in breach of section 35 of the Act.

The following note provides a brief critique of the decision from the standpoint of the enforcement of competition law, in particular their Lordships treatment of the abuse of dominance claim.

A convenient starting point may be the decision of *Jamaica Stock Exchange v. Fair Trading Commission*<sup>2</sup>, where the Court of Appeal, in its interpretation of sections 19-20 of the Fair Competition Act, 1993, held counter-intuitively (albeit obiter<sup>3</sup>) that the local stock exchange in Jamaica, the only entity offering that service, cannot be said to be limiting competition 'when there is no evidence of the appellant<sup>4</sup> being in competition with anyone else'.<sup>5</sup> The Court of Appeal, per Panton JA, continued:

*"The facts indicate that the field is wide open for the development of another stock exchange. However, there is no evidence of any such entity being even on the horizon. In the absence of such evidence, it is at least unfortunate that the respondent is alleging that the appellant is impeding that maintenance or development of effective competition to itself. The question of competition can only arise if there is another entity, real, or potential, that can offer competition"*.

In other words, the surprising position is taken that when there is only one player in the market an issue of competition does not arise.

A similar misunderstanding arises in respect to the approach to market dominance. In *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd.*<sup>6</sup> the claimant sought an order to extend an interim injunction to prevent the defendant from closing its accounts, claiming, *inter alia*, that there are serious triable issues with respect to the defendant abusing its dominant position in breach of section 19-20 of the FCA. The Court, however, found no evidence that the defendant bank could be in a dominant position.<sup>7</sup> The court observed further that:

*"There is, however, evidence that there are five other commercial*

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*banks operating in Jamaica and they compete for business. There is also evidence that the Defendant is the second largest bank with assets of between 34% to 37% of total deposits and 30% to 34% of total loans. The largest bank and competitor to the Defendant is the Bank of Nova Scotia with over 40% of total deposits and loans. In my judgment there can be no serious issue that the Defendant firstly, occupies such a position of economic strength as will enable it to operate without effective constraints from its competitors in the market under the Fair Competition Act; and secondly, was abusing it in relation to the Claimant”<sup>8</sup>*

Here the court did not consider that the relevant market would have to be determined at trial and that given the market share of the Defendant together with the fact that there are other small players in the market, that a triable issue could therefore arise that the Defendant is dominant in the market.

By contrast, the Court of Appeal in the instant case, per Morrison JA, adopted an enlightened approach in its preliminary appraisal of a section 19-20 claim under the FCA. It opined that it could not conclusively hold that there is no serious issue to be tried, for the purposes of extending the injunction, given the Defendant’s market share in excess of 30%, with only one bank similarly circumstanced in a field of six banks, but also because section 19 of the FCA is not a legal term of art, but a provision that involves the intersection of law and economics for which expert evidence would have to be provided to make judgments on concepts such as ‘a position of economic strength’ and ‘effective constraints’.<sup>9</sup>

The decision was again subject to appeal and, like the decision of Mr. Justice Jones in the court below, the Privy Council paid short shrift to the appellant’s claim of abuse of dominance. Bearing in mind that this is the first statement of the Privy Council on section 19-20 of the FCA, it is worth quoting in full. The Privy Council held the following:

*The claims under the Fair Competition Act appear to their Lordships to be equally unpromising. First, it is said that by closing the account, the bank was abusing a dominant position in the market. There appears to have been no evidence to suggest that the bank occupied a dominant position – defined in section 19 as “such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors” – in the market for banking services in Jamaica. The bank is the second-largest in Jamaica, with 34-37% of total loans and 30-35% of total deposits, but the Bank of Nova Scotia is larger and there are four other commercial banks in Jamaica, to say nothing of foreign banks. They are all in competition with each other. It is not easy to acquire a dominant position in the banking market. However, even if the bank did occupy a dominant position, their Lordships cannot see how a refusal to be the company’s banker can be an abuse of that position. Abuse of a dominant position is normally with a view to securing some advantage in the market. Section 20 defines such*

*abuse as impeding the “maintenance or development of effective competition”. It does not appear to their Lordships that the bank’s action could have any effect on competition between banks. On the contrary, it enabled competitors to pick up another customer if they felt inclined to do so.*

On the basis of the foregoing, a bank’s closing of a customer’s account, in circumstances where there are many banks with none being dominant, does not affect competition if a competitor bank will pick up that account. This, however, amounts to an *a priori* position without any analysis as to what is the relevant market for purposes of determining if an enterprise is dominant in that market. The Privy Council engaged in no analysis of what the relevant market is or should be, and whether market share by itself can establish either (a) the relevant market, and/or (b) whether the claimant is being or likely to be excluded from that market as a circumstance of abuse. Rather, it assumed that the relevant benchmark for whether competition is affected is that of competition between banks, without an appreciation of the likelihood of the claimant being a part of the relevant market from which it could be excluded.

Importantly, the implication of the decision is that a claimant for an injunction claiming a breach of section 19-20 of the FCA must show evidence of dominance of the enterprise concerned at the stage of requesting the injunction. It is, therefore, not enough to allege dominance by reference to some benchmark of market share that could be taken into account in a preliminary assessment of whether a triable issue exists. This seems contrary to the guiding principles for the granting of an injunction, namely that the claimant must establish that there is a triable issue as against proving the elements of a claim.

If a successful claim for abuse of dominance under the FCA requires that the claimant shows (a) that an enterprise is dominant, and (b) that the enterprise has abused its dominance, evidence to prove the claim of dominance ought properly to be established at trial, unless there is a requirement that proof of abuse of dominance be established at the stage of requesting the injunction since both elements have to be proven at trial for a successful claim under section 19-20 of the FCA. There seems to be no sound reason for requiring one element to be established at the stage of granting the injunction and the other at the stage of the trial.

In addition, since a claim of dominance can be disputed at trial, as much as at the stage of the application for an injunction, it is unclear what threshold of evidence is required at the stage for the application for an injunction. Disputes may arise as to what is the relevant market, or, assuming the parties are agreed on the relevant market, what threshold of market share should establish a

presumption of dominance. These are questions that require economic analysis.

Therefore, as the decision stands, claimants for an injunction, for claims made with respect to section 19-20 of the FCA, require some economic analysis to be done to establish (a) the relevant market, and (b) that a particular enterprise is dominant in that market.

For this analysis guidance may be sought from the guidelines adopted by the FTC which represent best practices adopted by many competition authorities. In determining the relevant market under section 19-20 of the FCA, for example, market share and entry barriers are considered in determining whether a firm is dominant. A market share of at least 50 per cent establishes a presumption of dominance.<sup>10</sup> However, the FTC will also consider a market share of 40 per cent to establish presumptive dominance.<sup>11</sup> However, these threshold

figures are guidelines that the FTC follows. In some instances, the FTC may consider a market share of between 40 and 50 per cent as establishing a presumption of dominance.<sup>12</sup> The FTC also considers that circumstances may exist in which a market share of below 40 per cent could establish dominance<sup>13</sup>, or that a 50 per cent market share may not be sufficient to establish dominance.<sup>14</sup>

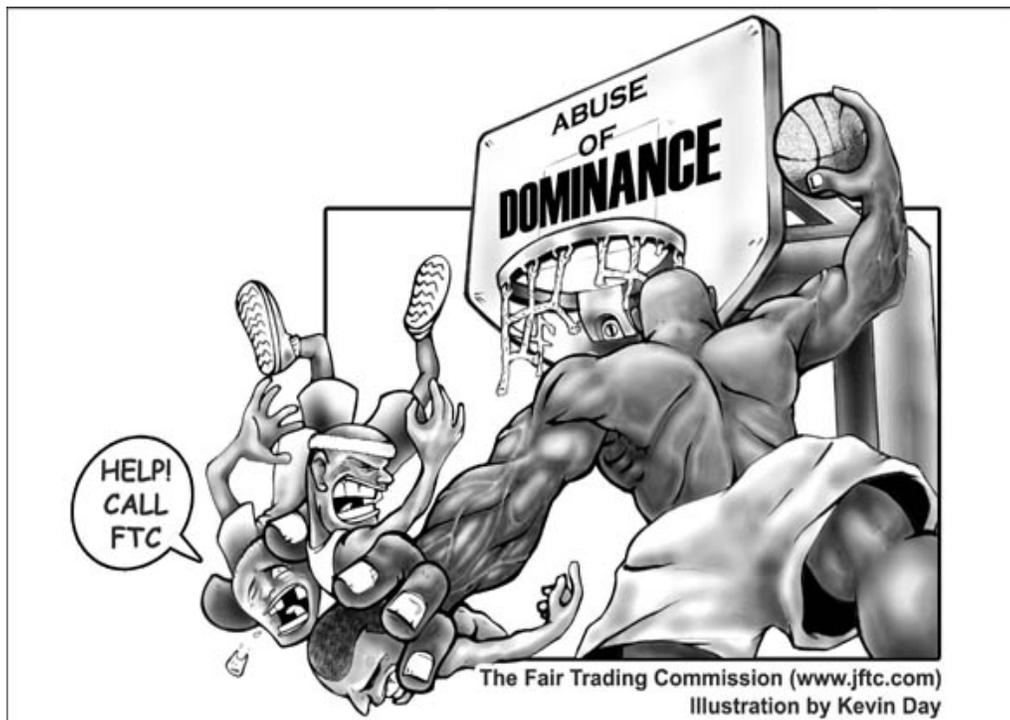
In the former case, this could arise when there is one major firm in a market that is shared by a number of relatively smaller firms<sup>15</sup>, while in the latter case, this could arise when a market is equally shared between two competitors such that neither is dominant over the other.<sup>16</sup>

Dominance is also established in terms of barriers to entry to a market. Typically, these barriers include licensing and regulatory requirements, patent rights, and sunk costs, that

is, the initial investment to be made before the production of a good or service.

It is doubtless desirable that these guidelines be adopted by the courts in resolving issues relating to abuse of dominance, but the relevance of these guidelines seems in doubt if a decision can be taken about the anti-competitive effect of conduct in a market without an appreciation of the relevant market and that an economic analysis of anti-competitive effect is warranted, as the Privy Council has done by upholding the decision of Mr. Justice Jones. ■

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#### ENDNOTES

<sup>1</sup> Privy Council Appeal, No. 61 of 2008, 2009 [UKPC] 16, April 28, 2009.

<sup>2</sup> Supreme Court Civil Appeal No. 92/97.

<sup>3</sup> The Court of Appeal held that the Fair Competition Act does not apply to the Jamaica Stock Exchange.

<sup>4</sup> The Appellant here being the Jamaica Stock Exchange.

<sup>5</sup> P. 66.

<sup>6</sup> *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd*, Claim No. 2008 HCV 00118, April, 2008.

<sup>7</sup> *Ibid.*, p.18.

<sup>8</sup> *Ibid.*, p.18.

<sup>9</sup> *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd*, Supreme Court Civil Appeal no. 40/2008, July 2008, p.34.

<sup>10</sup> See, Commission's Decision, case no. 3685, *Grace Kennedy Remittance Services (GKRJ)*, April 30, 2002, p.3.

<sup>11</sup> *Ibid.*, p.17.

<sup>12</sup> See, for example, Commission's Decision, case no. 3263, *Telstar Cable Limited on Predatory Behaviour*, August, 29, 2001, p.4.

<sup>13</sup> *Ibid.*, p.5.

<sup>14</sup> *Ibid.*, p. 5.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* See, also, Commission's Decision, Case no. 3794, *Super Plus Food Store on Predatory Behaviour*, August 13, 2001, p.5-6.

# Debating interest rates

By Peter-John Gordon

**R**ECENTLY THERE has been much public discussion about a high interest rate policy versus a low interest rate policy with some commentators declaring that the time is right to shift from a high interest rate policy to a policy of low interest rate. Unfortunately, this discussion is taking place with little appreciation of the principles of economics. Every first year economics student is taught that no buyer or seller, by himself, can choose both the price and the quantity traded at the same time, regardless of whether or not he is the sole buyer or seller. If either the buyer or the seller has the power to set price, and chooses to do so, then the market will determine the quantity sold. Alternatively, if the buyer or the seller is sufficiently powerful to determine the quantity sold, and choose to so determine, then the market will determine the price.

Interest rate is a price, like any other price. It is the price which the borrower must pay to the lender for the use of the lender's money for a specified period of time. Likewise, it is the reward which the lender receives for forgoing the use of her money for a specified time period. The interest rate is therefore, the price of money. The rules which apply to price formation of any other good or service; also apply to the price of money.

The government through the Ministry of Finance is a major player in the market for money, and therefore impacts the market conditions for money. We need to understand why the Ministry of Finance enters the money market in the first place. The answer is simply, it does not raise sufficient revenue from taxation to cover its expenditure and so must borrow to fill the gap, which is known as the budget deficit. The government therefore enters the market with the intent of borrowing a fixed quantity of money; it is therefore fixing the quantity to be traded. Having fixed the quantity to be traded, it cannot simultaneously fix the price (i.e. the interest rate). Once the government has indicated how much money it seeks to borrow, the market will then determine what interest rate will induce people to lend this quantum of money to the government.

People should not think that because the government announces an interest rate, the government is in fact setting the interest rate. An auctioneer announces prices, but is he really setting prices? The answer is no. The announcement only becomes a relevant price when both a buyer and a seller accept that price. It therefore matters little

who announces prices. If I declared a price of \$100 million for my house, and no one is willing to pay this price, can I truly say that the price of my house is \$100 million? If the government announces an interest rate which it is willing to pay, and people are not willing to lend it sufficient money at that rate to meet its target, what happens next? Either the government must decide to borrow less or it must raise the interest rate to induce more people to lend. Borrowing less means either collecting more taxes and/or reducing government expenditure.

What is it that influences people as to the interest rate which they should accept in lending their money to the government (or anyone else for that matter)? Before answering this question we need to establish three concepts: nominal interest rate; real interest rate and the rate of inflation. Nominal interest rate is simply the interest rate expressed in numeric form with little reference to anything else. Most of the times when the interest rate is spoken of, it is the nominal interest rate which is mentioned. Examples of a nominal interest rate would be 20% on government bonds or 18% for mortgages etc. The real interest rate is a measure of increase purchasing power which the lender obtains when he is repaid, compared to what he had at the time of making the loan. The rate of inflation measures the rate of increase in prices in general. The real interest rate is approximately equal to the nominal interest rate minus the inflation rate. If the nominal interest rate is 20% and the rate of inflation is 15% then the real interest rate is approximately 5% i.e. a lender who lent a sum of money a year ago at 20% and who is repaid today with inflation being 15%, could buy 5% more things with her money than when she lent it. If a lender lends money at less than the rate of inflation, when she is repaid, she will be able to buy less than she could have before lending the money. No lender would therefore want to lend money at a nominal rate of interest below the rate of inflation. The rate of inflation is therefore a floor for the nominal rate of interest that people would be willing to accept for lending their money. In fact most people would want to be positively compensated for the sacrifice of parting with their money for a time, therefore they want a nominal rate

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of interest above the inflation rate.

People in lending their money must make a guess as to what they think the rate of inflation will be. They use the past to inform their decision, but not only the past. If they have experienced inflation of 15% for 10 years and then the inflation rate drops to 10% what are they to think about the inflation rate going forward? Are they to say that from now on the inflation rate will be 10% or are they to think that the 10% was a fluke and the country will return to 15%? Obviously the more years that the country experiences 10% inflation the more confidence people will have in the next inflation rate being closer to 10% than to 15%. People also look at other economic fundamentals such as the size of the government's fiscal deficit in forming their expectations about what the future rate of inflation will be, and therefore what are the inherent risks in lending money to the government. Any man who has wooed a lady, knows that no single action is sufficient to convince her of his affection. Furthermore, even after he has convinced her of his past affection, he must continue to reassure her of his future affection. So it is with financial markets, the government has to constantly reassure lenders, not so much about the past (although this is important) but more so about the future, if they are to accept lower interest rates.

The Central Bank is also a player in the money market. Its role is however, very different from that of the treasury. The primary objective of the central bank is the protection of the value of the currency. An important part of that mandate is to protect the health of the banking sector. If the central bank deems that there is too much local currency chasing too few goods, it will seek to take some of this local currency out of circulation. It seeks to induce people not to spend their local currency but instead lend it to the central bank which they simply sit on. If this is not done, then this excess of local currency will cause inflation to rise, either directly by bidding up the prices of all goods and services available in Jamaica, or indirectly by causing the exchange rate to depreciate. The central bank is targeting a given quantity of money to be removed from the economy, and therefore has little control over the interest rate that will be required to achieve this task.

The Ministry of Finance is also concerned with the exchange rate. Approximately 45% of Jamaica's total public debt is external debt (i.e. denominated in foreign currency). A depreciation of the Jamaican dollar causes this portion of the debt to become more expensive in Jamaican dollar terms. At the end of September 2009, the external debt stock was US\$6.6 billion. At that time the exchange rate was US\$1 = J\$98.08. The last day of November 2009 started with an exchange rate of US\$1 = J\$89.64. This depreciation alone added J\$3.7 billion to the external debt stock. Foreign lenders are equally concerned

with the same issues as local lenders and more. They are concerned about the country's ability to repay in foreign currency; therefore, the balance of payments situation is of grave concern to them. Concessional loans i.e. loans below market rates, provide some reprieve, but the country needs to understand that these are only temporary and are possible only because of taxes of people in the developed world. I concede that debt servicing concerns are not the only consideration for the exchange rate, but it is a very important one. A deficit in the balance of trade is not unconnected to a deficit in the fiscal accounts of the government. An economy is like a balloon, apply pressure in one area, and expect to see a bulge in another.

History is filled with examples of political directorates being very reckless with money creation and monetary policy in general. Various countries have sought to use different institutional arrangements to curtail the power of the political directorate to misuse monetary policy. One extreme measure would be to dollarize i.e. to abandon the local currency and replace it with the US dollar. By so doing, the country would abandon any pretense to having control over monetary policy instead importing the monetary policy of the United State. Many countries in addressing this issue have sought to have an independent central bank. Many voices in Jamaica, for a long time, have joined the international trend by calling for an independent central bank. In fact the ruling Jamaica Labour Party included in its 2007 election manifesto the creation of an independent central bank. But what really does an independent central bank mean? An independent central bank means that the political directorate cedes control of monetary policy to the central bank. The central bank is given a single mandate – protect the value of the currency. This means that the central bank will not concern itself with economic growth, with employment levels or any other objective. If the central bank has more than one objective it will be forced from time to time to make trade-offs in the pursuit of these different objectives, a task which properly should be taken by elected officials. The reason why many countries have gone in the direction of an independent central bank is that they are of the view that the value of the currency and by extension the financial system is simply too important to be left to politicians and that society is best served by having experts control this sphere. Jamaica is yet to take a decision on establishing an independent central bank. If it however, makes this decision, it must stand by the decisions of the central bank on monetary policy even when such decisions are not to the liking of the government of the day. Some commentators have declared that the elected government should get what the elected government wants. If the society holds this view, then it should abandon any pretense of establishing independent institutions which seek to constrain the power of the government. ■

## FTC Statistics

Number of complaints received during the period  
November 1, 2006 - October 31, 2009

PRODUCTS AND SERVICES	Year 2006/2007	Year 2007/2008	Year 2008/2009
Automobiles	11	11	13
Banking/ Financial Services	5	12	13
Clothing & Accessories	2	1	2
Computers	2	3	2
Construction/Home Repair Supplies	0	5	5
Education	4	8	9
Food Items	1	0	4
Government Services	1	5	2
Household Appliances	3	7	11
Household Furnishings	3	6	3
Insurance <sup>1</sup>	3	6	2
Leisure & Recreation	7	5	5
Media	0	1	1
Petroleum Products & Accessories	3	1	4
Professional & Specialist Services	3	3	10
Real Estate	1	5	8
Telecommunications Equipment/Services	29	55	51
Transportation Systems	9	8	7
Utilities.	4	7	6
Other <sup>2</sup>	22	27	4
<b>TOTAL</b>	<b>113</b>	<b>176</b>	<b>162</b>

<sup>1</sup> Includes Auto, Health, Life and Peril.

<sup>2</sup> Includes product areas such as Agricultural Products, Funeral Services, Auto Repair Services and Industrial Machinery & Products

