



**ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT  
GLOBAL FORUM ON COMPETITION  
February 19 & 20, 2009**

**Submission of the Fair Trading Commission of Jamaica**

**QUESTIONNAIRE**

**CHALLENGES FACING YOUNG COMPETITION AUTHORITIES**

**I. Countries that have been actively enforcing a competition law for a relatively short time**

**A. Organising your agency and preparing for work**

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

*1. Describe how you conducted this organisational phase. What went well, and what didn't?*

Answer:

The allocation of an Agency's resources depends to a large extent on its stage of development, the priorities it sets for itself as well as its goals and objectives. As a new Agency the Jamaica Fair Trading Commission (FTC) faced several challenges such as (a) limited human resources and expertise in the area; (b) limited funding and/or capital resource capacity; (c) an untrained judiciary; (d) inconsistent or incoherent regulatory policies; and (e) a lack of a competition culture within our society and an understanding by the general public of the tenets of Competition Law & Policy. Over time, the FTC has faced all of these challenges in several ways and to various degrees and therefore in deciding on the manner in which resources were to be allocated, due consideration was given to each of these challenges in the early years.

In the beginning we placed high priority on (a) developing our legislation; (b) building our physical infrastructure, ie. furnishing our offices; (c) hiring competent 'trainable' personnel; and (d) using the media to sensitize the general public on its core function and role and building a relationship with consumers. The FTC sought and received a significant level of funding and support from the United States Government through the United States Agency for International Development (USAID) for the setting up of its

operations and channeled it towards these priorities. Staffing and other operational expenses were financed by the Government through its monthly Subvention.

Our first venture was a visit of the offices of the United States Federal Trade Commission (US FTC) and the United States Department of Justice (DOJ) where our Commissioners, Executive Director and Legal Consultant met with key personnel of these organizations. Meetings were held with a Commissioner, the Assistant Director for International Antitrust in the Bureau of Competition, the Director for Antitrust in the Bureau of Economics, the Director of Information Support Services Division, the staff of the Bureau of Consumer Protection and the EC Competition Law & Economics study group. This visit proved extremely useful as it assisted us in the development of our organizational goals and in the setting of our priorities.

In addition to the above, the funding from the USAID was used to (a) finance the cost of consulting services to assist us in developing our legislation; (b) execute a public awareness campaign to educate the public about the Act and our role and functions; (c) pay for a two year public information campaign specifically aimed at educating business enterprises on compliance with the Act and enforcement of its provisions; (d) provide technical assistance with consumer awareness issues, information technology issues, and administrative advice and support; (e) pay for short term consultancy services for administrative challenges such as the drafting of job descriptions, finalizing contracts and completing work on our Code of Conduct & Ethics and other internal procedures; (f) purchase library material, office equipment and furniture, computers and a case management and tracking system; (g) cover the cost of field missions to, and internships at other Competition Agencies; and (h) facilitate the training of Staff.

On the other hand the Government of Jamaica provided (a) remuneration for the Staff on an ongoing basis; (b) sufficient office space for the Commission; (c) financial support to cover the day to day operations; and (d) a commitment that the plans and programmes be created in a manner that would make them sustainable, and would be continued and/or repeated in the future.

Programmes targeted at executing activities to address each of the challenges and priorities, were organized. The visit to the US FTC was the first step, and the Staff and Commissioners, though new to the area, were charged with the responsibility of creating and managing the various activities, at the same time informing themselves sufficiently. Short term Consultants were hired to better facilitate the processes in areas such as public relations and media coverage, information technology and some administrative issues.

The Commission's approach to building a competition culture in the early years was to sell itself as a consumer advocate 'defending' consumers, in order to 'win' their support and to gain popularity. It was also convenient at the time to focus on consumer issues instead of competition matters as the Commission had neither the knowledge base nor the technical capacity to handle competition matters. The public education campaign was therefore geared at educating the general public, including business enterprises, on consumer protection matters with very little emphasis on true competition issues. This

had debilitating effects on the Commission before its tenth year of existence as locally based firms had developed a very limited understanding of what Competition Law & Policy is about; and it became necessary for the Commission to expend significant resources on sensitizing firms on the area through ongoing activities.

Training of Staff and the Commissioners in those early years, while good at the time it was done, was not executed in a manner which made it sustainable, in that there was little information sharing and the structure to facilitate institutional memory was almost non-existent. In addition, similar to the public education campaign, training efforts such as field missions and internships were geared primarily at the handling of consumer protection matters. Exposure in the handling of competition matters and investigation techniques was provided, but it is considered by many that this training was provided at too early a stage in the Staff's development; and that it would have been more beneficial for the Staff were they to acquire a higher level of understanding of the area before embarking on such field missions and internships.

Attendance at international workshops and conferences proved very useful in the early days, where absorptive capacity was somewhat limited and there was a need to acquire the fundamentals of Competition enforcement.

With the assistance of the Inter-American Development Bank (IADB) the FTC, in its eleventh year, was able to hire two Consultants to provide us with intense training in investigative and advocacy techniques, and the practical application of many of the concepts which we had learnt over the years. It is after completing these training programmes that we now feel that the field missions and internships would have been more beneficial to us.

Further, removing key Staff from the essential tasks necessary to develop the Agency created somewhat of an information overload and the structure which was being developed could not properly channel the information. With a small Staff, the removal of senior management and technical staff from the organization within the first year of the organization, albeit at different times, before having a firm structure proved disadvantageous in the early years as far as building technical expertise was concerned. However, the opportunity to attend conferences and workshops, to embark on field missions and internships resulted in our meeting representatives of other Agencies and establishing relationships with them. This proved very useful, particularly in terms of building links with those Agencies and being able to use them as information resources.

Developing technical capacity is very important and has been found to be more useful and beneficial if done on an ongoing sustained basis. Technical capacity takes many forms and the form(s) that should be used is a function of an Agency's stage of development, Staff complement and Staff's knowledge base. For example, it has been found that Competition Agencies with longer track records, more experienced and professional Staff, and an established senior leadership tend to benefit more from long-term advisors and study missions to more experienced agencies.

Activities relating to the creation of the organizational and physical structural of the Commission went very well, and the foundation that was built is, to this day, considered firm. Of course, with changes in our economy, a shift in our focus away from consumer protection, to the handling of Competition matters, changes in the composition of several key markets, a 2001 judgement by the Courts which spoke to issues of a breach of natural justice in the construct of our legislation, information technology developments, and our thrust towards Competition advocacy, we have had to adjust aspects of our structure and our operational modalities.

## **B. Competition culture and competition advocacy**

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

*2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?*

Answer:

One dimension of building a competition culture is from the angle that invariably, there exists opposition from business enterprises who see Competition Law & Policy as Government interference into their operations. At the same time it is important that consumers are made aware of Competition issues in order that they may be able to challenge business practices existing in the various markets. Public education and increasing public understanding was in our early years, and continues to be, one of the FTCs' most challenging and important functions.

As previously stated the Commission's approach to building a competition culture in the early years was to sell itself as a consumer advocate 'defending' consumers, in order to 'win' their support and to gain popularity. The focus was therefore on consumer issues instead of competition matters, and it was convenient because the Commission had neither the knowledge base nor the technical capacity to handle competition matters.

In the first two years extensive efforts were made through the media. Appearances by senior Staff on radio and television talk shows, the airing of notices and advertisements on the radio and television, and the publication of articles in the press were frequent. It is fair to say that consumers 'caught' the messages as they viewed us as a 'protector' of their rights and interests; and over time we developed a reputation of being a watchdog for consumers.

However, as we shifted our focus away from consumer protection matters to the handling of true competition matters we were met with challenges. Our advocacy efforts were met with little interest – businesses did not attend workshops and seminars as we would have

liked and were quick to criticize the FTC for not properly educating the public in general. Likewise, the media had a very limited understanding of the area and were not keen on attending workshops and seminars; instead choosing to criticize our work without having a clear understanding and to 'couch' our work in terms of consumerism.

Again, budgetary constraints exist; our budget did not allow for media campaigns which would assist in enhancing the profile of the Commission. Associated with the development of a Competition culture is the development of respect and trust for the Competition authority and its mandate. This will enable the agency to be more effective and influential in being able to achieve its goals of public awareness. The initial activities of an agency are therefore important to the agency's future actions and development, as this constitutes a signal to the public as to whether or not it is able to handle its several responsibilities. The Commission has continued to disseminate information through the media, seminars, workshops, press releases, fliers, and websites within the constraints of its budget. Again, the IADB, over the last three years, has assisted immensely in the execution of these activities.

'Successes' were not realized until a few years into our existence when our Staff had developed its expertise sufficiently. Several matters related to the telecommunications, motor vehicle, furniture and appliances, and entertainment sectors are considered successes as far as competition advocacy. Details of some of these matters are available on our website, located at [www.jftc.com](http://www.jftc.com).

### **C. Conduct cases and investigations – abuse of dominance and restrictive agreements**

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

*3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?*

Answer:

#### ***The Problems***

The Fair Competition Act (FCA) prescribes that its Commissioners should investigate and hear matters in a quasi-judicial capacity. However, in 2001 (eight years after the Commission was established) the Court of Appeal found that the institutional structure of

the FTC lends itself to a breach of the principles of natural justice. This ruling has limited the FTC's ability to hear Competition matters.

Of note too, are the many 'conflicts' and gaps which exist within the FCA, where for example, breaches are treated under different standards whether it be rule of reason or per se. These issues have resulted in an extensive overall of the FCA itself. It is therefore important that the legislation is created as 'correct' as possible from the beginning as this will reduce the likelihood of successful challenges.

We are of the opinion that another major problem with curtailing anticompetitive conduct is that the penalty for breaching the competition legislation does not serve as an effective deterrence. Currently, any person found guilty of breaching the Act can be fined up to a maximum of J\$1M (equivalent to US\$13,333) whilst a business could be fined a maximum of J\$5M (equivalent to US\$ 66,667). It must be noted also that the FTC does not have the power to impose fines; it is the Court which is vested with this power. The highest fine that a Jamaican Court has ever issued for any breach of the FCA is J\$750,000 or approximately US\$10,000. The benefit of having a cartel for example, may easily exceed the maximum fine under the FCA, hence individuals and businesses that are aware of cartel activity do not have any 'incentive' to come forward. It must be noted that for the Year 2004, the average annual Turnover of the thirty-four (34) companies which are listed on Jamaica's Stock Exchange is US\$111,643,313; and the average annual Profit before taxes is US\$15,275,002.

Section 10 of the FCA gives the FTC powers of entry and search. While the provisions contained in this Section appear sufficient, the Section does not give the FTC the power to seal off premises; it does not define "premises"; and it fails to address the question of search of persons.

### ***Addressing the Problems***

We believe that the best remedy to address the problems above would be to amend the current competition legislation so as to make the Act conform to the concerns expressed by the Court of Appeal. The amendment would address the structure of the Act as well as increased fines for breaching the Act. Fines ought to exceed the amount gained by the unlawful activity. In other words, the fines must be so high that perpetrators 'feel it' in their pockets. This would import the need for administrative fines; or the need to remove the restrictions set out in Section 47 of the FCA.

Amendments would also be necessary to (a) authorize the sealing off of premises, documents, computers, equipment, etc., during the conduct of investigations; (b) extend the power of search under Section 10 to individuals and to personal property, for example motor vehicles. Currently the Section refers to "premises", but perhaps a stipulation should be made regarding residences; and (c) extend the powers of interviewing/examining persons/witnesses to the Staff who conducts the relevant investigations. At present, this power is restricted to Commissioners.

Until such amendments have been enacted, the Commission has taken the decision to take (rule of reason) matters directly to Court. We are unable to measure how successful this position will be as we have not investigated any complaint which would warrant such an action.

*4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?*

Answer:

We do not have a formal anti-cartel program. We have only recently (September 2008) adopted the ICN's 'Best Practices' for conducting cartel investigation.

The Staff has never conducted an investigation into cartel activity. Some of the reasons relate to: (a) Legal Framework; (b) Peculiarities of a Small Economy; (c) Staffing of the Commission; (d) Investigative Tools; and (e) Level of Awareness of the Harm Caused by Cartel Activity.

A more detailed description of the reasons for not having a formal anti-cartel programme and the challenges faced by the FTC is contained in a paper entitled "Fighting Hard Core Cartels" which was presented at the Third Meeting of the Latin American Competition Forum, Madrid, Spain, on July 19 to 20, 2005. It is available on our website, located at [www.jftc.com](http://www.jftc.com) under News & Publications/Speeches & Presentations.

## **D. Mergers**

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

*5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?*

Answer:

Our competition legislation does not authorize the Commission to review proposed mergers. It is the view of the Staff that not having such authority is threatening to undermine advancements which we have been making in other aspects of competition law enforcement. *One immediate concern for us at this moment is that our inability to*

*review mergers will undermine the public's confidence in the Commission as an agent for safeguarding its welfare.* We make specific reference to recent developments in the subscriber television (cable) market in Jamaica whereby a single recent entrant has been expanding its customer base through a series of acquisitions of incumbent service providers. In some instances, the acquisitions resulted in monopolized markets; with higher subscription fees for consumers within these markets. In March 2008, public outcry against the effects of the acquisitions reached a crescendo. Since the entrant was not prevented from acquiring rivals in some of the regions in which it operated, the Commission's non-intervention was misconstrued by the public as evidence of our unwillingness, rather than our inability, to intervene in the interest of competition and consumer welfare. This concern extends to other industries where mergers have been consummated without the benefit of review by the Commission. These industries include health insurance and commercial banking.

The primary benefit from having merger review authority is the opportunity for the Competition Agency to prevent mergers which otherwise would increase the likelihood for anti-competitive conduct in the relevant market.

A secondary benefit is the detailed industry information generated by the review process. As it stands now, whenever we are investigating allegations of anti-competitive conduct, a significant portion of early stages of the investigation (a crucial part of the investigation process) is spent collecting background information about the industry so as to properly contextualize the alleged conduct. Accordingly, the information collected by the Commission in the post merger-review period, would assist us considerably (at least in the short-term) if we were to investigate conduct within that industry regardless of whether the Commission successfully challenged the merger.

In concluding we do not think that we have gained any benefit from not having merger review authority.

*6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?*

Answer:

Not applicable.

*7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?*

Answer:

Not applicable.



## **E. Judicial appeals**

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

*8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?*

Answer:

### ***Appealing to the Courts***

Decisions of the FTC can be appealed to the Supreme Court of Jamaica; which is a Court of general jurisdiction. Under the Jamaican statute, the Fair Competition Act, the FTC makes ‘decisions’ only in the exercise of its quasi-judicial capacity. The exercise of its quasi-judicial capacity is in relation to determining whether benefits outweigh detriments in respect of particular conduct that has been alleged to be anti-competitive; such as the abuse of dominance, agreements that substantially lessen or are likely to lessen competition, exclusive dealing and market restriction.

We believe that these provisions, however, do not oust the jurisdiction of the Courts to make the decisions instead of the FTC. The FTC may proceed either by exercising its adjudicatory role or allowing the Supreme Court to exercise it. This point is important to the extent that the procedure for appeal depends on which option the agency exercises. If it exercises its adjudicatory function, then an appeal lies to the Supreme Court (to a Judge in Chambers). If, however, the adjudicatory process (decision-making) is handed over to the Supreme Court, then appeals would be made to the Court of Appeal.

### ***Rate of Success***

The FTC has enjoyed a fairly high level of success in respect of the matters pursued in Court. Since its inception in February 1994, the Agency has enjoyed a success level of at least 75%. Within the past five years, we have had a 100% rate of success level for matters pursued in the Courts. The matters have spanned a wide and diverse range of industries including the transport sector, real estate, entertainment, automobile, education and the legal profession. The type of alleged conduct has also been varied; these include

misleading advertising (which accounts for the majority of the cases pursued), abuse of dominance, exclusive dealing and collusion/conspiracy.

### ***Time for receiving Final Decisions***

Shortly after establishment, the FTC struggled to obtain decisions in Court matters as they took an inordinately long time. From the commencement of a suit, a matter would take, on average, at least three years to be heard and another year or two for a final judgement at first instance. The appeal process would take at least the same length of time. These problems were due to a huge backlog of cases in the Court system as well as inadequate staffing; and ultimately prevented the timely resolution of competition cases.

In an attempt to address the backlog, among other problems, the Court issued new Civil Procedure rules which came into effect in January 2003. This engendered a new approach to litigation. The rules provide the Supreme Court with more power to dictate the pace at which a case is concluded. They are designed to reduce costs, to ensure that matters are dealt with expeditiously and that the justice system accommodates and remains on par with modern technology. This has been achieved largely and specifically by the introduction of the concept of 'Case Management,' which allows the Court to exercise powers enabling it, rather than the parties, to dictate the progress of litigation at the pre-trial stage.

The new Court rules have greatly reduced the time for Court cases to be decided. On average, matters filed within the last five years have been concluded in a little more than one year. In addition to implementing the new Court rules, the Supreme Court also established a Commercial division in January 2003 as part of its modernization programme; and the FTC has opted to file its matters in this division. The advantage of proceeding in this way is that the time period from the commencement of a suit to the making of a decision has been reduced considerably. In fact, a date for the first hearing of the matter is usually within three months of filing suit and the case can be concluded within one year.

The filing of matters within the Commercial division of the Supreme Court has resulted in three major benefits which each have translated to the timely disposal of cases.

Firstly, the Division is specialized and houses a cadre of judges who should be experienced and particularly skilled in commercial type matters. This should result in sound decisions and good precedent for competition law matters. It is also expected that, after repeatedly hearing competition matters, these judges will develop expertise in the area.

Secondly, matters filed in this Division of the Court bypass the backlog of other cases in the civil and common law divisions and move very quickly through the Court. This has translated to early hearings and timely disposal of cases.

Finally, the Division is highly organized and has its own staff and resources. This has resulted in relatively smooth and cost effective Court preparation and proceedings.

### ***Problems Encountered***

There has been much overall improvement in the length of time taken to dispose of cases in the Courts. There is, however, still more room for improvement. The FTC has chosen to utilize the Commercial division which has served as a fast track for matters commenced in the Civil Court. Within other divisions, however, and depending on the procedure taken, matters may still take at least 3 years for a trial date and longer for a decision to be reached. A considerable backlog of cases remains in the Court system and, due to financial constraints, the technological advancements have not been as rapid as had been projected. Limited availability and accessibility of equipment that would expedite procedures considerably, such as computers, printers and fax machines, have affected the time in which these matters are disposed of. Inadequate staffing in the Courts has also continued to pose a major problem

One problem which emerged with the issue of the new Civil Procedure rules was the increase in the costs of filing cases in Court. As an adjunct to the rules, the ***Rules of Supreme Court (fees) 2002*** were issued in January 2003. By virtue of those rules, the previous Court fee of J\$150.00 (US equivalent approximately \$2.00) per suit was increased to a basic sum of \$2,000.00 (US equivalent approx. \$27.00) per suit for all non-monetary claims. The cost of filing in the Commercial division, depending on the sum claimed, goes up incrementally to as much as J\$30,000.00 (US\$400.00).

These fees created a financial hurdle for the FTC. In an effort to overcome this, an application was made to the Supreme Court on July 17, 2003 for a waiver of the Court fees in one particular case, on the grounds of 'hardship' being experienced by the FTC. The application was successful but the legal team recognized that such individual applications for a waiver in each Court matter would be difficult due to the time and expense involved. In an effort to circumvent this problem, the legal team made an application to the Court for a general waiver of Court fees on all matters filed by the FTC. The Court was not willing to grant such a general waiver and the FTC therefore continues to grapple with the issue of cost.

Another problem posed by the new Civil Procedure rules is that the Court's main and overriding objective is to achieve settlement of disputes and resolve matters to reduce the number of cases that may go to trial. We have discovered that this objective may sometimes be in general conflict with the objectives of competition. In support of this overriding objective, the Court has formalized the mediation process. The issue became apparent when the FTC pursued a case involving misleading advertising (involving defective goods) which had affected at least 37 persons. The Respondent refused to respond to the FTC's directives and we filed suit. Shortly before the trial date, however, the Respondent provided replacements and then advised the Court that the matter had been adequately settled. The FTC attempted to explain to the Court that there were deeper issues to be addressed other than compensation, as there was damage to the

market. The Court did not, however, accept these arguments and ordered that the ‘other issues’ be dealt with by mediation. It held the view that the relevant issues had already been settled.

The absence of a strong competition culture (and/or positive environment for it) has meant that competition cases are generally viewed as being of low priority and as less serious in nature than other cases. This attitude became apparent when, in respect of a suit filed by the FTC which had come up for trial, the Judge commented that the Court’s time should not be wasted with such trivial matters which would be better suited for arbitration and/or Dispute Resolution. In support of this view, the Judge awarded a nominal sum as a penalty.

Decisions handed down in other cases have revealed that the area of competition law is still new and the principles somewhat obscure to some judges. For instance, the Court of Appeal case of *Jamaica Stock Exchange* (Supreme Court Civil Appeal No. 92/97) illustrates some of the difficulties raised by the failure to apply sound principles of competition. In that case the judge, in considering whether there was lessening of competition, expressed the view that the FTC could not maintain an argument for limiting competition when the evidence showed that there was only one Stock exchange in Jamaica. He further stated that ‘...competition can only arise if there is another entity, real, or potential, that can offer competition’.

### ***Factors Contributing to Success***

Below are some of the factors that have contributed to the FTC’s high level of success within the past five years.

1. We have been able to develop a high level of expertise over time. Although there has been a relatively high rate of Staff turnover generally, the FTC has been able to retain some of its more experienced legal and economic experts. These persons have developed a high level of skill and knowledge in the area and have been involved in most of the FTC’s cases over time. This is possible only with a structured training programme and adequate library facilities.
2. As previously stated, we have been somewhat successful in sourcing external funding which has been heavily invested in the training of Staff. The training has involved competition law and policy, economics and has also been practically geared to sharpening litigation and advocacy skills.
3. We have attracted bright, highly skilled attorneys, economists and research officers in instances when more experienced ones have left. There is therefore a pool of skills, experience and knowledge to pull from in the preparation and presentation of cases. Of note is our need to maintain this pool of skills and this requires the aforementioned structured training programme and other facilities.

4. Our ability to continue facilitating Workshops for the Judiciary, to sensitize judges to competition issues. We believe that these have enabled the Judges to improve their understanding of the area; and this is reflected in the quality of the Court decisions over the past four years. Coupled with this, the decision to file matters in the Commercial division has been resulting in minimal delay and greater familiarity with the issues on the part of both judges and attorneys.
5. Through extensive training the Staff has developed expertise in choosing its battles, and in preparing and presenting its cases.

*9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.*

Answer:

Yes, the Fair Trading Commission has facilitated “Workshops for members of the Judiciary” financed with funds provided from international bodies such as the IADB and the USAID. The Commission’s decisions may be appealed in the Supreme Court. Further, the FCA provides for Private Right of Action by any enterprise or individual who has suffered loss, arising out of an anti-competitive practice. The purpose of the workshops is to sensitize participants (members of the Judiciary) to some of the issues they are likely to grapple with when presiding over competition related cases. In recognition of the vital role of the judiciary in the enforcement of Competition Law, the Commission developed and implemented a sustained training program for the Judiciary; and is geared at facilitating at least one Workshop every eighteen months.

It is important to note that the Staff of the Commission do not participate in the workshops. Rather, we secure the services of persons with the requisite experience in the practice of Competition Law to conduct the sessions and interact with participants.

To date, we have conducted five (5) workshops. In September 2000, the Commission hosted its first seminar. Conducted by Professor Patrick McNutt, it discussed the topic of Abuse of Dominance in Markets. In January 2003, we hosted our second seminar, highlighting Competition Issues in Telecommunications. The presentation proved an eye-opener for the twenty (20) Judges in attendance. In September 2004, the Commission hosted another workshop for the Judiciary, which was a more comprehensive training programme, which introduced the area and focused on The Judge’s role in Competition Cases. It covered topics such as Cartels and Bid-rigging and Agreements between Competitors. Six (6) of the Judges who are ‘assigned’ to hearing Commercial matters attended this training session. It was conducted by Diane P Wood, Circuit Judge, U.S. Court of Appeals for the 7<sup>th</sup> Circuit.

A total of thirteen (13) individuals attended the fourth Workshop which was held in September 2006. On this occasion we extended invitations to our colleagues in Barbados and participants comprised nine (9) members of the Jamaican Judiciary; two members of the Judiciary from Barbados; and two members from the Office of the Director of Public

Prosecutions in Jamaica. The Workshop was conducted by Mr. William Kovacic, then Commissioner of the United States Federal Trade Commission (US FTC). The Workshop focused on Market Definition & Market Power, Abuse of Dominance, Horizontal & Vertical Restraints, Mergers & Acquisitions, and Expert Testimony and the Evaluation of Economic Evidence.

For our fifth Workshop, held in March 2008 we sought to make it more of a regional workshop with participants from other Caribbean states; and therefore our attendance increased to nineteen (19). Participants comprised eleven (11) members of the Jamaican judiciary; two (2) members of the Barbadian judiciary; one (1) member of the judiciary of Trinidad & Tobago; three (3) Judges from the Caribbean Court of Justice (CCJ); and two (2) members of the local Telecommunications Appeals Tribunal. Presentations were made by Dr. John Hilke, economics consultant, formerly with the US FTC; Mr. Curtis Robinson, Chief, Numbering Administration & Technical Support of the Office of Utilities Regulations (the local sector regulator); and Mr. Geoffrey Myers, Director of Competition Economics of the Office of Communication, United Kingdom. The theme of the Workshop was “Competition Issues in the Telecommunications Sector”, included simulation exercises of Court cases and the personal experiences of Dr. Hilke and Mr. Myers as expert witnesses.

## **F. Resources**

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency’s mission.

*10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?*

Answer:

In Jamaica’s situation budgetary support from the Government was, and is still, limited. The FTC does not have the power to impose fines. Only the Court can impose fines, and all fines are payable to the Crown. Further, the Commission has no authority to charge fees. It was noted in the UNCTAD Peer Review Report of Jamaica that a survey of the budgets of Competition authorities in developing countries indicates that their average budget varies from 0.06% to 0.08% of the Government’s non-military expenditures. Were that to apply to Jamaica, the FTC’s annual budget would move from its current J\$50M to between J\$90M and J\$120M. While the Government has increased our budgetary allocation in nominal terms over the years, in real terms it remains much the same; and the FTC is called upon to use creative methods in the running of its operations to achieve its goals. In addition, we repeatedly make requests to developmental funding agencies, and this has yielded some success.

The absence of costly resource material, a training budget and funding to access expertise/consultants results in the Staff having to work without proper/complete tools and to focus its attention on areas, such as consumer redress, that are traditionally relatively easier to handle. But with our shift in focus to the handling of competition matters it has become necessary for us to properly provide the tools and resources that are necessary. This has become one of our priorities, and this has been communicated to policy makers urging them to provide us with the relevant funding and facilities. On occasions, financial assistance from international funding and developmental agencies assist in ‘filling the gap’.

The measures adopted to address the challenge of limited financial resources include reducing operating costs through streamlining enforcement processes; prioritizing of cases based on fixed, transparent criteria; and reorganizing of the agencies operations in line with its priorities at a given time. Of note is that these measures were determined over time through the development and growth of the FTC, while building its knowledge base, technical capacity and expertise through various experiences. It was very difficult in the early stages to determine the specific appropriate measures that were necessary and useful and in hindsight, this has proven to be very true. It is our experiences over the years that have assisted us in determining these measures.

For example, in looking at our work load we are able to prioritize our cases vis-à-vis our available resources by assessing them with the following criteria:

1. Extent of Detriment and Seriousness of Conduct
2. Deterrent value of pursuing
3. Level of Public Interest
4. Jurisprudential value
5. The FTC’s capacity to investigate ie. Resources, availability of evidence

In considering the optimal allocation of resources it is useful for us to look at our experiences with facing each of the challenges listed above and then, to make a determination as to when would be the best time in the Agency’s development to deal with each and how best to deal with them.

## **G. Independence**

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

*11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?*

Answer:

Fortunately, we have always enjoyed sufficient independence from other Government agencies and from special interest groups; and neither have we felt ‘pressured’ nor been in a position where undue influence was being leveled upon us by any Government Ministry or Agency, in the conduct of our work.

## Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

Answer:

Our recommendations of the most important actions are:

- Develop Technical Capacity. The labour pool from which competition agencies in developing countries recruit their Staff is unlikely to include individuals with all the skills required to undertake technical competition analyses. Most agencies will therefore have little choice but to develop the requisite skills during the post recruitment period. The first step to be mindful of, therefore, is that *recruits must possess a minimum level of training in order to be trainable*. For instance, it is our experience that whilst a first degree (Ll.b) is sufficient for newly recruited competition lawyers, newly recruited economists must have at least a Master's degree in Economics. Once the personnel has been recruited continued on-the-job training is crucial to filling the deficiency. A successful training programme would, among other things, (i) provide Staff with access to international consultants/experts to guide them through investigation processes; (ii) allow Staff to attend overseas conferences, workshops and seminars; and (iii) establish and maintaining links with other Competition agencies. Many of these have been achieved over time through several technical assistance programmes from international funding/donor and developmental agencies such as the USAID, IADB, EU, UNCTAD and the OECD. It has been found in many jurisdictions that the optimal Staff complement is directly related to the size of a country's population, the level of acceptance or non-acceptance of Competition Law & Policy within that jurisdiction, and the level of commerce that may be affected by competition considerations. For example, given these factors, the Technical Staff complement of the FTC ought to be at least twice its current size in order to operate at its optimum level of effectiveness.
- Develop a Competition Culture. The public (consumers, suppliers, policy-makers and judiciary) must be convinced of the benefits of competition as a means of organizing economic activity if the competition agency is to be effective. The first step in competition law enforcement is detecting potentially anticompetitive conduct. It is important to note that most instances of anticompetitive conducts are brought to the attention of the Commission by individuals outside of the agency. The next step would be collecting information which is necessary for the agency to conduct its investigation in order to confirm or refute an allegation of anticompetitive conduct. Further, any individual or business found guilty of contravening the competition legislation could appeal the decision in a Court of law; this means that the Judiciary is also crucial to the process of deterring anticompetitive conduct. *Ensuring that the public is well informed about the types of conducts which are prohibited, and appreciates the potential harm from*



*these conduct, will help the agency to position the public as a key ally in detecting, investigating, prosecuting and therefore deterring anticompetitive conduct.* Developing this culture is especially important if the country does not have a long history of using markets as the primary means of organizing economic activity. It requires the agency to, among other things, establish and promote guidelines on specific sections of the competition legislation as well as make specialized presentations to consumer groups, special interest groups and students at various levels of the education chain. It also requires us to design a competition advocacy program with the objective of informing policy-makers when their initiatives are likely to impede or hinder competition.

- Establish and maintain relationships with other government agencies, universities, international agencies, the business community, media, etc. It is with the assistance of these entities that much of the Agency's work will be channeled and the success of many programmes and initiatives will depend on the support of these entities. The FTC has had its challenges with many of these entities in getting them 'onboard' and to understand what competition law and policy is about and their role with respect to competition concerns.
- Address the challenge of limited financial resources and prioritize your goals giving due consideration to available resources. It is important that resources are allocated in such a manner that is appropriate for the agency's age and capacity, taking local conditions and culture into consideration. Activities that may be appropriate for a newer agency may be of less value to a more experienced one, and vice versa; and therefore the selected activities should be clearly linked to the goals and objectives of the Agency in its early stage of development.
- Ensure that the Competition legislation is sound. It is important that the legislation is created as 'correct' as possible from the beginning as this will reduce the likelihood of successful challenges. We have experienced several challenges because of weaknesses in our legislation which have resulted in amendments and an extensive overhaul of the FCA itself, both of which require a long period of time to have the weaknesses addressed. For example, the many 'conflicts' and gaps which exist within the FCA, where for example, breaches are treated under different standards whether it be rule of reason or per se.

At the same time it is very useful to ensure that the legislation is consistent or coherent with established Government Policies. In our situation there are just one or two statutes that recognize the FTC or the FCA. Regulations and/or Government policy were enacted without knowledge of Competition considerations, and generally, business is conducted on behalf of the Government without due regard for the requirements of the FCA. Intensive Competition advocacy is therefore necessary to educate the policy makers with a view of having them recognize the importance of Competition in many of its considerations.

#### Pitfalls to Avoid

- Underestimating the importance and defining the role of a Public Relations (PR) Department and a communication strategy;
- Not getting the mass media as a strategic partner sooner than later;
- Not developing from the outset, a means of screening/prioritizing investigations;
- Not designing from the outset, a system of quantifying interventions of the Agency;
- Not utilizing the expertise and experiences of other Competition Agencies and experts in the field.