



## **Comments on the Draft Information and Communications Technology Policy dated September 2009**

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### **1. Introduction**

This document has been prepared in response to a request from the Office of the Prime Minister for the Fair Trading Commission's (FTC) comments on the September 2009 Draft Information and Communications Technology (ICT) Policy. The FTC has commented on several versions of this Policy and as such our comments on this version will focus on the role and relationship of the ICT regulator and the FTC within the ICT ex-post enforcement regime. The FTC welcomes the Draft ICT Policy and fully supports the creation of a single regulator for the converged ICT sector. It must be noted however, that while there may be a global understanding of the acronym ICT given that it has become a buzz term in the information age, there is no universally accepted definition of ICT. The Policy therefore needs to establish the scope of the ICT sector in which it is to be implemented. A failure to properly clarify the scope of the sector could lead to jurisdictional problems at a later date.

### **2. Comments on Specific Policy Elements**

#### **Policy Element 3.2**

According to policy statement (ii) in this section, the competition regulator for the ICT sector will remain separate from the ICT Regulator in the converged ICT framework. However, this position is in conflict with the policy statements under Policy Element 5.1 which effectively oust FTC's jurisdiction in the sector.

#### **Policy Element 5.1**

**The Roles of the ICT Regulator and the FTC:** According to policy statement (ii) in this section the sector regulator will have jurisdiction over both access and non-access ex-post competition matters. The statement also goes on to say that "*the competition regulator will retain jurisdiction for other matters which affect competition in the sector*". However, the FTC is unsure what the Policy means by "other matters" and is of the opinion that the statement effectively ousts its jurisdiction in the ICT sector. In its responses to the previous versions of this Draft Policy, the FTC has maintained the position (and still does) that it should retain jurisdiction

over all non-access ex-post competition matters in the sector, while the sector specific regulator should have primary jurisdiction over all access-related (ex-ante and ex-post) matters. This delineation of roles takes account of the skills set of each agency. In the case of the ICT regulator's jurisdiction over ex-post access-related matters, the main advantage is that it enables the utilization of the large body of infrastructural knowledge the regulator would have acquired in its handling of ex-ante interconnection matters. Further, given that the remedies for access-related matters often require some form of "price-setting/regulation" and subsequent periodic re-assessment there are benefits from making the agency with day-to-day oversight of the sector, responsible for these matters. The FTC has a comparative advantage over the sector regulator in non-access competition regulation based on its accumulated expertise and experience as well as due to institutional characteristics. This is particularly true in terms of the non-access vertical agreements and the investigation and prosecution of cartel behaviour.

The approval of mergers and acquisitions, i.e. changes in ownership should require an assessment of the competition effect of the proposed transactions on the relevant market(s). Here again, the FTC has a comparative advantage in the assessment of such matters. However, given the absence of such provisions in the generic competition law, there should be an explicit requirement in the sector-specific legislation for the regulator to consult with the FTC and take account of any recommendations made by the Commission prior to making a ruling on the matter. Similarly it is expected that the FTC would be extensively involved in dominance determinations as well as periodic reviews of whether ex-ante regulation in a particular market is justified by the present market structure.

**The Need for Concurrence:** The rule of law requires consistency in the application of law, i.e. similar cases should lead to similar results. The investigation by the sector regulator of ex-post anti-competitive conduct in the ICT sector should be conducted based on the same principles which the FTC uses to investigate ex-post conduct in the ICT or any other sector under the generic competition law (FCA). In keeping with the principles of consistency, it is therefore proposed that the sector regulator be empowered to apply the substantive provisions of the FCA when investigating ex-post matters. This concurrence will require formal cooperation and coordination between the sector regulator and the FTC.

**The Need for Ex-Post Enforcement Tools:** If the sector regulator is to be empowered to investigate ex-post competition matters the policy makers must be cognizant that there are some differences in the enforcement tools required for an ex-post regime and those which are required for an ex-ante regime. One important difference is the scope of remedies. Ex-post remedies are generally designed to deter most enterprises from breaching the law and to adequately punish those who do. The remedies available to the ICT regulator will therefore have to be wider in scope than those available to an ex-ante regulator. The remedies should include the imposition of behaviour modification obligations as well as monetary sanctions and should seek to attain one or more of the following objectives:

1. The prohibition of the anticompetitive activity that constituted the infringement;
2. The restoration of the competitive process in the relevant market(s);
3. The deterrence of future infringements; and
4. The compensation of the victims of the infringement.

### **3. Conclusion**

The FTC implores policy-makers to take the necessary steps to ensure that the promulgation of the new legislation establishes an efficient and effective access regime which fully supports the on-going development of the ICT sector. While some markets in the Jamaican ICT sector have achieved “effective competition”, there are other markets in which bottleneck facilities makes regulatory intervention necessary. At the start of the global liberalization trend the dominant view was that ex-ante access regulation would be a short to medium term undertaking which would give way to an ex-post enforcement regime. Global experience has revealed however, that given the peculiarities of some markets in the sector, ex-ante access regulation may have to be retained for the long term. This realization has led to the re-regulation of some ICT markets in the member countries of the European Union. It is therefore important that the policies and legislations governing the sector reflect this reality.