

## Evolution of the FTC and Competition Law Enforcement in Jamaica<sup>1</sup>

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Senator the Honorable Aubyn Hill, Current and Past Chairpersons, Commissioners, and Executive Director; Colleagues; Ladies and Gentlemen, Good Afternoon.

My task for today is to take you through the FTC's journey, highlighting those events that have impacted the growth of competition law enforcement in Jamaica.

Like other competition laws, the Fair Competition Act (FCA) sets out provisions to control the exercise of market power, which is the ability of firms to raise prices above competitive levels, reduce output, and create artificial scarcity of goods and services.

### Scope of Intervention

Since 1993, the FTC has significantly and positively impacted Jamaica's economic landscape through enforcing the FCA, advocating for competition principles as the basis for Government policies, through educating the public on competition matters.

The FTC has intervened in some important sectors of the economy. These include financial services, petroleum, telecoms, construction, real estate, and airport operations. In each instance, the objective was to mitigate threats to competition.

We have been particularly active in the telecoms sector— and for good reason. Jamaica's prospect for accelerated and consistent growth is linked, inseparably, to the performance of the telecoms sector. The world is now in the 4<sup>th</sup> industrial revolution. To be more efficient and to meet the demand for better service delivery, businesses and Governments are, increasingly, integrating technology into their operations.

Today's telecoms sector differs vastly from the sector that operated before 2000 when Telecommunications of Jamaica (TOJ) was the monopoly provider. It is not common knowledge that in 1994, the FTC toppled the first domino that caused a ripple effect that eventually led to the revocation of the monopoly license. The FTC had determined that TOJ's action in charging excessively high internet rates constituted an abuse of dominance.

Five years later, in 1999, the FTC entered into a consent agreement with Cable & Wireless Jamaica Limited (C&WJ) after determining that the company's conduct in the answering service market could amount to an abuse of dominance.

As competition in the telecoms sector increased with the entry of new players including Digicel, complaints from consumers and rival players increased significantly. The competition was intense. Innovations in product offerings to consumers were plentiful, and the level of advertising skyrocketed. We were kept busy handling numerous consumer claims of misleading advertising, and market players' claims, against each other, about abuse of dominance.

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<sup>1</sup> This presentation was prepared for delivery at the FTC 30<sup>th</sup> Anniversary Luncheon and Long Service Awards Ceremony, held on September 14, 2023, at the Jamaica Pegasus Hotel, Kingston, Jamaica. It was presented by Ms. Ann-Marie Grant, General Manager at the Fair Trading Commission.

For subscribers to benefit more from the increased number of players in the market, the FTC advocated for the Office of Utilities Regulation (OUR) to regulate lower and reciprocal mobile termination rates. A few years later, the OUR implemented a framework for regulating telecom providers' mobile termination rates. As correctly anticipated by the FTC, mobile operators instantly reduced their calling rates.

The market then took a turn in 2011 when Digicel acquired Oceanic Digital Jamaica Limited, which traded as Claro. For the first time, we investigated a merger and acquisition case.

This matter led to four court judgments, significant precedents, and implications for the operation of the FTC and enforcement of the FCA. During the investigation of the competitive effect of the acquisition, C&WJ sought from the court leave for judicial review, claiming that the FTC was not using its power under the FCA to scrutinize the transaction between Claro and Digicel. C&WJ essentially sought leave to have the court issue an order to compel the FTC to complete its investigation under specified sections of the FCA and to take specified actions. The application for leave was dismissed.

The result of this matter raised two critical points. Firstly, while the FTC lacks the discretion to not investigate complaints received, it does have the discretion of how and under what sections of the FCA to investigate complaints. And secondly, the FTC has sole discretion in prioritizing its workload.

Regarding the Digicel/Claro acquisition, the FTC filed suit asking the courts to determine whether the FTC had jurisdiction given that the Telecommunications Act regulates the sector and whether the FCA applied to mergers and acquisitions. Digicel had raised these issues. The court found in the FTC's favour. Digicel appealed, and the resulting decision dashed the FTC's hope. The Court of Appeal found that the FCA did not have concurrent jurisdiction with the Telecommunications Act, and worse, the acquisition transaction did not fall within the purview of the FCA.

The FTC successfully appealed to the Judicial Committee of the Privy Council. The ruling clarified that the FCA (section 17) applies to all agreements, including those concerning mergers and acquisitions. This finding has solidified the FTC's authority to investigate such transactions and gave strength to its call for implementing a system to review and control mergers.

In 2015, through a Cabinet Decision, the journey to create that system started. And since 2017, the FTC has assessed mergers and acquisitions in airport management, media, energy, fleet management, food, gaming, insurance brokerage, and packaged ice. Those investigations were done under section 17 of the FCA and per the FTC's Merger Review Guidelines.

In its enforcement of the FCA, the FTC has had 15 court matters, with 11 judgements in its favor, and the Staff has successfully negotiated 26 consent agreements.

It should be noted that Digicel was not the first to challenge the FTC's jurisdiction. In 1994 the General Legal Council did, and in 2001 the Jamaica Stock Exchange. The FTC was not successful in those cases, and we did not appeal the decisions. Those cases, however, have built the resilience of the Commission.

### **FTC's non-enforcement activities**

In promoting competitive markets, competition authorities typically employ non-enforcement activities. We have carried out several such activities. These include hosting a public lecture annually, publishing a magazine, and collaborating with other key stakeholders. We have also hosted workshops for merchants and facilitated workshops for Judges.

In 2015, Jamaica was the host country for the 13<sup>th</sup> Annual Meeting of the Latin American Competition Forum. Over 60 participants from 27 countries and organizations were in attendance. The FTC is the only Caribbean competition authority to have hosted this event.

Critical to the successful functioning of competitive markets is a knowledgeable private sector about the role and function of the competition agency and the scope of the legislation, as well as aware and vigilant consumers. Over the years, we have embarked on several initiatives to build that knowledge base within the business community. A primary goal of the FTC is for all stakeholders to understand competition law and its benefits to businesses, consumers, and the Jamaican economy.

#### *FTC's premier public education activities*

We have always had an inclusive approach to promoting competitive markets, and in 2009, we hosted a special symposium to engage the business community and policymakers to determine the most efficient adjudicative process for the FTC. This was in light of the 2001 Jamaica Stock Exchange judgement which exposed certain weaknesses in the FCA. Several recommendations for amendments to the Act came out of that event.

We have also hosted 20 public lectures covering topics on sectors such as banking, insurance, electricity generation, manufacturing, logistics, and transshipment. And with our inclusive approach, we have had speakers from academia, the business community, and Government including industry leaders, and policymakers at the highest level. The audience has been equally diverse and representative of various sectors in Jamaica.

Of note is that in 2005, the annual lecture discussed competition as a tool for economic development, and Minister Hill was one of the speakers, among speakers from the United States Department of Justice, South Africa Competition Commission, and UNCTAD (United Nations Conference on Trade and Development).

The issue of regulation and competition has been a recurring one for the FTC over the years and has resulted in numerous collaborations and consultations between the FTC and sector regulators – the OUR, Broadcasting Commission, Betting, Gaming and Lotteries Commission, and the Spectrum Management Authority and the Ministry with responsibility for energy.

Additionally, the FTC played a notable part in advocating for the Consumer Protection Act (CPA) and was active in the consultation process for the drafting of the legislation. Just prior to the passing of that Act in 2005, the FTC began shifting its focus from handling individual consumer protection matters to focusing more on competition matters and market reform.

At the regional level, the FTC completed two consultancies with the Organization of Eastern Caribbean States (OECS), on the appropriate competition law regime for the member states and a consumer protection landscape for the OECS.

Through its market studies and consultation process, the FTC has and continues to work with other public bodies to promote competition.

### **Strengthening Jamaica's technical capability in competition law enforcement**

A review of the work of the FTC would not be complete without highlighting the many efforts of the FTC to build the technical capacity of the Staff and to bring awareness of the complexities of competition assessments to policymakers in the public sector and to business leaders in the private sector.

Over the 30 years, the technical Staff, comprising attorneys-at-law, economists, and researchers, benefitted from various training opportunities. Staff members have received intensive training in a train-the-trainer programme, and a postgraduate course in the economics of competition law. The participants of that programme are now certified to conduct training sessions within CARIFORUM countries as part of a capacity-building initiative under a project funded by the 10<sup>th</sup> European Development Fund.

The FTC was instrumental also in developing the first competition law course in the Caribbean. The Staff has also conducted several competition law courses in Jamaica, accredited by the General Legal Council.

Unlike advanced competition law regimes, there are very few instances where a matter falling within the purview of the FCA is decided on by the courts. Consequently, different initiatives have been used to involve all stakeholders in maintaining an interest in competition law enforcement in Jamaica to keep the area alive.

Through external funding, the FTC has facilitated four workshops for members of the judiciary and one jointly with the OUR. In attendance were Judges from Jamaica, Barbados, Trinidad and Tobago, the Caribbean Court of Justice, and members of the Jamaica Telecommunications Tribunal.

### **Institutional development**

The Commissioners recognized very early on the need to build the institution. And through agencies such as the United States Agency for International Development (USAID), the Inter-American Development Bank (IDB), and the World Bank the FTC received funding and support to assist in its transformation and growth.

With funding from the USAID, the FTC developed its first customized case management system in 2002. And with funding from IDB, the FTC was able to further develop that system and its internal processes. We have also benefited from the World Bank's Jamaica Foundation for Competitiveness and Growth project, to engage consultants to improve our competition advocacy role and to create the merger review framework for Jamaica.

### **The Way Forward**

As we reflect on our work over the 30 years, we remain mindful of future challenges and anticipates even more rapid development and effectiveness of competition law administration in Jamaica.

Ladies and Gentlemen, Thank you.