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VOLUNTARY PEER REVIEW ON COMPETITION POLICY: JAMAICA

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CONTENTS

ACRONYMS

BOJ	Bank of Jamaica
CAC	Consumer Affairs Commission
CARICOM	Caribbean Community and Common Market
CSME	Caricom Single Market and Economy
DB&G	Dehring, Bunting & Golding Securities Limited
FCA	Fair Competition Act
FSC	Financial Services Commission
FTAA	Free Trade Area of the Americas
FTC	Fair Trading Commission
GDP	Gross Domestic Product
HDI	Human Development Index
IO	Industrial Organization
IP	Intellectual Property
JPS	Jamaica Public Service Company Limited
JSE	Jamaica Stock Exchange
MCST	Ministry of Commerce Science and Technology
OUR	Office of Utilities Regulation
SLC	Substantial lessening of competition
TWM	Tank-Weld Metals Limited
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

FOREWORD

The Fifth United Nations Conference to Review All Aspect of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices will conduct a voluntary peer reviews as part of its programme of work.

In order to facilitate the work of the Review Panel, a Peer Review Assessment Report was prepared for each of the participating countries. The Report is based on information obtained from broad-based consultations with a cross-section of stakeholders during fact-finding visits to each country and review of existing literature. It is also guided by the United Nations Set of Principles on Competition and The UNCTAD Model Law.

SUMMARY

1. Foundations and History of Competition Policy

Jamaica is an island in the Caribbean Sea with a population of 2.7 million inhabitants. The country obtained its independence from the U.K in 1962 at which time it joined the Commonwealth. From a typical colonial economy based on the production of sugar cane, bananas and coffee, Jamaica's economy has evolved to a relatively large and diversified economy benefiting its population.

The GDP *per capita* is close to $4,000 and Jamaica ranks 79 out of a total of 177 countries in the Human Development Index. The Jamaican economy is mostly a services-based economy. At present, the services sector accounts for over 60 per cent of GDP and labour force. However, productivity is the highest in the manufacturing sector where 16 per cent of the labour force accounts for 32 per cent of GDP. Agriculture, the least productive sector, represents only 6 per cent of GDP but 20 per cent of the labour force. The economy can also be characterized as an open economy with trade representing about 50 per cent of GDP. Alumina and bauxite are the main products exported followed by sugar, bananas and rum. Imports include food and other consumer goods, industrial supplies, fuel, parts and capital goods. Jamaica is also well known for its tourist industry. Because of its openness, the Jamaican economy is very vulnerable to changes in international markets.

It was in the second half of the 1980s that the government adopted structural adjustment measures and market-oriented policy reforms. This set of economic liberalization measures included: a) tariff reform which eliminated quantitative restrictions, removed the requirements for excessive import licensing and significantly reduced tariff levels; b) removal of price controls and deregulation of certain industries; c) privatization of parastatal agencies and d) subjecting state enterprises to greater commercial pressures.

As part of the package, the enactment of competition law was viewed as central to the shift from a regime of regulations and state ownership of enterprises to an economy relying on free markets and private enterprises. In 1991, the government made public a competition law proposal to ensure that the benefits of deregulation are shared throughout the economy, unconstrained by private market restrictions. Two sets of provisions were particularly and vehemently opposed by the business community: the merger provisions and the interlocking directorate's provisions. A modified legislative proposal, the Fair Competition Act (FCA), which did not contain these provisions was later introduced in Parliament, and enacted in March 1993. The legislation was further amended in August 2001 and is the applicable statute at present.

There are two widely accepted goals of competition legislation, namely increasing economic efficiency and consumer welfare. There are three objectives of the Fair Competition Act, which are not found in the law itself but

are found instead in explanatory material of the Fair Trading Commission (FTC):

> "- Encourage competition in the conduct of trade and business in Jamaica;
> - Ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy;
> - Provide consumers with better products and services, a wide range of choices at the best possible prices."

When other goals are stipulated that are not directly related to the promotion of economic efficiency, such as ensuring an equal opportunity to participate in the economy, the interpretation of the legislation may be such that it will prohibit conduct that will result in a less efficient economy. It is important that the law itself clearly states its purposes.

The shift to a market economy is a long process which necessitates cultural change. Although the goals sought seem to be generally understood by the public, there remains a high degree of scepticism about the actual effectiveness of competition law and whether the goals are attained.

Although a number of proposals for amending the FTC have been made to the Ministry of Commerce Science and Technology (MCST), there are no formal legislative proposals that are before Parliament or publicly under review at present in Jamaica. However, the constitutional validity of the Fair Trading Commission has been successfully contested before the Court of Appeal, rendering the FTC practically inoperative and many core provisions of the FCA unenforceable. For instance, the FTC has not had any formal hearings or prosecutions under the anti-competitive provisions. The fundamental issue is the lack of separation of the adjudicative functions from the investigative functions under the FCA. Various alternatives are available to remedy the situation.

2. Scope of Application of Competition Policy

The Fair Competition Act is a general law of general application. The FCA binds the Crown and its substantive provisions apply to either a person or an enterprise. The definition of the word "goods" as "... all kind of property other than real property, money, securities or chooses in action" creates a problem as it may mean that the entire financial service sector is exempt from the FCA.

The FCA specifically exempts a list of activities from its application including collective bargaining activities of employees and employers, activities of professional associations for the protection of the public and activities in relation to treaties to which Jamaica is a party. Moreover, the list of exemptions applies to agreements "... in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark ... and ... any act done to give effect ... to such a provision." A literal reading of this provision could mean that any agreement, price fixing or otherwise, as long as it contains a provision relating to the use of intellectual property rights, would be excluded. However the FTC has made proposals for addressing the limitation in the definition of "good" and removing the strictures regarding intellectual property rights.

The Minister of Commerce, Science and Technology is given a blanket power to exempt "...such other business or activity declared by the Minister by order subject to affirmative resolution." The Minister has exercised this power in a couple of instances, notably he has exempted the light and power company itself rather than some of its specific activities. The section does not provide any guidance as to what factors the Minister should consider in granting this exemption nor the process that he should follow to arrive at his decision.

While the FCA does not contain sector-specific rules or exemptions, a regulated "industry" defence has emerged from the jurisprudence developed so far. The Appeal Court has found in two cases that the sector-specific legislation had precedence over the more general competition law which is the FCA. It is noteworthy that the Court has exempted the whole sector as opposed to some specific conducts which were specifically regulated under the sector legislation. Exempted bodies include the General Legal Council, the regulating body for the legal profession which is governed by the Legal Profession Act, and the Jamaica Stock Exchange which is governed by the Securities Act. In a transition economy such as Jamaica, regulated activities in sectors such as transport, energy, banking, financial services, professional services and others would account for a large share of the economy and, under this jurisprudence, risk being completely exempted.

3. Substantive Provisions of the Fair Competition Act

The Fair Competition Act is a general law of general application which contains all the traditional provisions found in competition laws with the exception of merger provisions. All the provisions are enforceable under a civil law standard of proof. All infractions are amenable before the Supreme Court for adjudication. The FTC also has concurrent adjudicative powers for selected provisions. It is also empowered to grant authorizations for an agreement or a practice when it is likely "to promote the public benefit." To date, one authorization has been granted for a practice that was deemed in the national interest. As there is no jurisprudence before the courts on the anti-competitive practices provisions, the public has to refer to information bulletins and guidelines issued by the FTC for explanations.

3.1 Merger

A first striking observation is that the FCA does not contain any provisions dealing with mergers and acquisitions. It is generally accepted that there are three essential elements of competition law: merger provisions, conspiracy provisions and abuse of dominance provisions. It is through the interaction of these three provisions that governments can ensure that markets will function properly in a competitive manner. The reason why merger law is necessary is twofold: mergers can reduce the number of competitors in a market and can therefore give rise to the creation or enhancement of market power (or at the extreme, the creation of monopolies), and they can increase the risks of collusion amongst the players. There is also a presumption that it is easier to deal with mergers than it is,

post facto, to control market power and collusions.

International experience shows that very few mergers are prohibited by merger law. Nevertheless, the law is still necessary to allow the government to intervene effectively with the appropriate tools to review mergers and take appropriate action. Some have argued that in an open economy, there is no need for merger law because international markets are competitive. The reality is that not all markets are international, such as in local banking, insurance or transport. Moreover the economy may be too small to attract international competition. Nevertheless, it is hard to justify that, under the FCA, competing companies are prohibited from agreeing on prices or allocating markets or engaging in profit sharing, but if these companies all merged into one entity, these agreements would become internal decisions and would thus be allowed. This is even more so considering that mergers change the industry structure and are much more long-lasting than conspiracies which can break apart. In essence, competition law should be neutral as to the form that behaviour takes.

Consideration should be given to the fact that the draft competition legislation of the Caribbean Community and Common Market (CARICOM) does not contain any merger review provisions either. Barbados, another CARICOM country, is a case in point as it also has a competition law with merger provisions. With the advent of the Caricom Single Market and Economy (CSME), the likelihood of mergers would be increased and it is important that the Jamaican government have the necessary tool to handle the situation.

3.2 Abuse of dominance

The Jamaican law does not prohibit monopolies but addresses abuses of dominant positions. The FCA does not apply to joint dominance cases. It is always a challenge for antitrust authorities to distinguish conduct that is anti-competitive from conduct that is pro-competitive. In this regard, the FCA sets out three tests that must be met for an order to be issued: First, a firm must be in a dominant position in a market. A firm is in a dominant position if it is able "... to operate in a market without effective constraints from its competitors or potential competitors". The FTC equates this test to whether a firm has market power. A market share of 50 per cent is given as a threshold for a firm to be considered dominant, but this may vary depending on the particular facts. Second, it must be proven that a firm abuses its dominant position, i.e. it "... impedes the maintenance or development of effective competition in a market ...". Third, it must be proven that the abusive conduct, "... has had, is having or is likely to have the effect of substantially lessening competition in a market." It is noteworthy that intent is not a factor that is taken into consideration when assessing the impact on competition.

The remedy is very general and provides that the FTC orders the firm to take steps that are necessary and reasonable to overcome the effects of the abuse in the market. In principle, behavioural and structural remedies are available. As the FCA does not contain provisions, which will allow for structural remedies, the FTC takes the position that only behavioural orders are available.

The abuse of dominant position provision gives a non-exhaustive list of conducts that are abusive, such as:

(a.) restricting the entry of any person into that or any other market;
(b.) preventing or deterring any person from engaging in competitive conduct in that or any other market;
(c.) eliminating or removing any person from that or any other market;
(d.) directly or indirectly imposing unfair purchase or selling prices or other anti-competitive practices;
(e.) limiting production of goods or services to the prejudice of consumers;
(f.) making the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

Paragraphs (d) and (e) of Section 20 should be read in the context of Section 21 of the CFA. The offences described are to apply in situations where the dominant firm's terms of sales act as a competitive restraint in a market; and not to any company's terms of sale in respect of the ultimate consumer. For the conduct to be in breach of the FCA it must lessen or have the potential to lessen competition substantially.

The exercise of rights derived from intellectual or industrial property (IP) is not an abusive conduct. Nor is the behaviour exclusively directed to improve distribution or production of goods or to promote technical or economic progress when the consumer receive a fair share of the benefits. The guidelines rightly specify that "... the agreement (presumably the practice) should contain the least restrictive means of achieving the benefits."

The FCA is guided in determining whether a practice has the effect of lessening competition substantially to consider "... whether the practice is the result of superior competitive performance." This wording is used also in the Canadian Competition Act, but it is still in need of a satisfactory explanation.

The FCA contains specific provisions for tied sale (a *per se* prohibition), market restrictions and exclusive dealings. The provisions on general abuse of dominance apply to these practices as well; it is thus unclear which provision will apply to a given set of circumstances. A proposal has been made by the FTC to apply a simple test of rule of reason to tied selling.

3.3 Horizontal agreements

Provisions dealing with horizontal agreement are one of the cornerstones of competition law. There is no jurisprudence dealing with horizontal agreements and no specific guidelines of the FTC. The FCA contains no less than six sections addressing horizontal agreements creating duplication and contradictions rendering the law unclear.

Section 17 applies to all types of agreements without distinction as to whether they are horizontal, vertical or conglomerate. As all economic transactions involve an agreement, the provision is wide-ranging in its application. However, it applies only to agreements that have as their purpose or that have or are likely to have the effect of substantially lessening competition in a market. The FCA specifies the following

agreements as agreements that have, or are likely to have, the effect of substantially lessening competition in a market when they contain provisions which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- affect tenders to be submitted in response to a request for bids;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Some agreements are exempt, such as those for which an authorization has been issued on public benefit grounds and agreements that improve the production or distribution of goods and services or technical or economic progress, as long as consumers obtain a fair share of the benefit. The agreements must be least restrictive of competition or it should not eliminate competition in respect of a substantial part of the product market.

Under section 18, agreements among competitors, potential or actual, that have the effect to prevent, restrict or limit the supply of goods or services or their acquisition are prohibited *per se*.

Section 22 prohibits *per se* suppliers to engage in collective resale price maintenance. Similarly, section 23 prohibits *per se* dealers to engage in collective resale price maintenance.

Section 35 prohibits all types of agreements or arrangements to:

(a.) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
(b.) prevent, limit or lessen unduly, the manufacture or production of any goods or to enhance unreasonably the price thereof;
(c.) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any goods or in the price of insurance on persons or property;
(d.) otherwise restrain or injure competition unduly.

Not all agreements are prohibited: agreements which relate only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public are exempt.

Section 36 makes it a *per se* offence to agree to submit a bid or to agree to refrain from making a bid. This prohibition may prevent small firms from participating in large projects as there are no provisions allowing the submission of a joint bid.

Horizontal agreements are subject to so many prohibitions that the law becomes unclear. For instance, there is considerable amount of duplication between section 17, which requires a proof of a substantial lessening of competition (SLC), and section 35, which requires a proof of an undue lessening of competition. The test that will be applied to a particular set of facts is unknown.

3.4 Vertical restraints

Some countries have separate provisions for vertical restraints in their competition law. This introduces the clarity needed to distinguish between conduct that is permitted from conduct that is offensive. In Jamaica, a multitude of FCA sections deal with vertical restraints. Some are general provisions that have application to vertical restraints, such as the general provisions of section 17 on agreements and section 20 on abuse of dominance, while others are specific vertical restraints provisions. For instance, re-sale price maintenance through collective or individual action is prohibited *per se* in sections 22, 23, 25, 27 and 34. Under section 33, tied sale is prohibited *per se* whereas market restriction and exclusive dealing are subject to a substantial lessening of competition test.

Section 17 prohibits agreements that: "... directly or indirectly fix purchase or selling prices or any other trading conditions... being provisions which have, or are likely to have, the effect referred to in subsection (1)." When read in the context of a vertical agreement, this provision would outlaw normal market transactions between a buyer and a seller. However, in the view of the FTC when subsection 17 (2) is read in the context of subsection 17 (1), it becomes clear that such agreement is prohibited only if it substantially lessens competition. Surely better wording could be used to restrict the prohibition to agreements among competing sellers, actual or potential.

3.5 Unfair competition

The FCA does not have a heading specifically referring to unfair competition and it is the practice at the FTC to refer to the unfair competition practices as consumer protection measures. The FCA deals with misleading advertising, representations as to reasonable test and publication of testimonials, double ticketing, bait and switch and sale above advertised price. In Jamaica as in other countries, misleading advertising cases comprise the vast majority of unfair competition cases handled by the FTC.

With the advent of new technology and cheap telecommunication fees, deceptive telemarketing, either targeted at the domestic market or offshore, has flourished in some countries. So far, deceptive telemarketing is not a problem in Jamaica and is not specifically dealt with in the FCA. However, there is nothing in the FCA that could prevent the Commission from dealing with such conduct. Although unfair practices such as fraudulent use of someone else's name, trademark or product labelling, etc. are covered in the appropriate intellectual or individual property legislation, specific measures would be needed if such practices become a problem in Jamaica.

4. Institutional Arrangement: Enforcement Structure and Practices

4.1 Competition policy institutions

The Fair Competition Act provides that three bodies are responsible for its administration and enforcement: the Fair Trading Commission, the Minister of Commerce, Science and Technology and the Courts.

The FTC is the main body responsible for the administration and enforcement of the FCA. It is composed of a minimum of three commissioners and maximum of five commissioners appointed by the Minister of Commerce,

Science and Technology, and the staff of the Commission headed by an Executive Director. The Executive Director is a member *ex-officio* of the Commission. The Minister also appoints one of the members as Chairman of the Commission; tenure is for a maximum period of three years with a possibility of reappointment. The Executive Director is appointed by the Commission for a seven-year period with the possibility of renewal every five years.

The Commission mandate consists of carrying out investigations at the request of the Minister, of any person organization, or on its own initiative; to advise the Minister, at his request or on its own initiative, on matters relating to the operation of the FCA; and issue remedial orders with regard to abuse of dominant positions, exclusive dealing, market restrictions and tied selling. The Commission may also authorize agreements under subsection 17(4) and issue under section 29 other authorizations for agreements or practices that may be contrary to any provisions of the FCA if it is likely to promote the "public benefit". The Commission may apply to the Supreme Court for orders and penalties in relation to breaches of any of the substantive provisions of the FCA.

The Minister of Commerce, Science and Technology plays a substantial role in the enforcement of the FCA. He can exempt businesses or activities from the application of the FCA by order, subject to affirmative resolution. He appoints Commission members, designates one as its president and fixes the level of their remuneration. He has the power to terminate the appointment of a member, other than the Executive Director, but only for good reasons and also has the power to grant leave of absence.

The Minister can give directions of a general nature as to the policy to be followed by the Commission. He can also request investigations to be made and request advice from the Commission on any matter relating to the operation of the FCA. The Commission is obliged to prepare a report to the Minister upon discontinuing an inquiry, but the Act does not specify what the Minister should do with this report. Each year the Commission submits to the Minister its statement of accounts and its estimates of revenues and expenses for the following year. The Minister approves the estimates or the budget of the Commission. The Commission is also required to submit to the Minister an annual activity report and it may submit a report on a matter investigated or under investigation for the special attention of the Minister. The Minister is required to submit to Parliament the reports he receives from the Commission.

Finally, the courts play a role in enforcing the FCA. The Commission may apply to the Supreme Court, under a civil standard of proof, for the issuance of orders, penalties and injunction relief regarding any obligations or prohibitions under the substantive provisions of the FCA, or the failure to comply with a Commission directive. Any person who is aggrieved by a finding of the Commission may bring an appeal to the Supreme Court. Finally, the FCA provides for the recovery of damages for conduct contrary to the Act.

With respect to procedural matters, the Resident Magistrate's Courts can impose fines or penalties up to a

maximum of $500,000 with the possibility of imprisonment for a period of one year, for conduct such as obstructing an investigation of the Commission, refusing to supply information, destroying or altering information, giving false and misleading information to the Commission and failing to attend a hearing or giving evidence before the Commission.

4.2 Competition law enforcement

The FTC considers separately its competition enforcement from its consumer protection enforcement. From a compilation of the total work hours and budget (see Table 1) for these separate functions and administration/management over the last six years, it is clear that fewer resources are assigned to competition than to consumer protection.

Table 1. FTC budget and working hours spent on different issues between 1999 and 2004 (in per cent)

	Competition enforcement	Consumer protection	Administration management
Work hours:	29.58	44.58	25.84
Budget:	34	39	27

The number of completed cases in the four recent fiscal years (see Table 2) also shows the large number of misleading advertising cases handled by the FTC. The total number of cases closed varies considerably in the last five years, and the number of complaints received, which dealt with issues not subject to the FTA, has diminished considerably during the same period.

Table 2. Cases completed in selected fiscal years

Breach/investigation	**2003-2004**	**2002-2003**	**2001-2002**	**1999-2000**
Abuse of dominant position	1	11	6	11
Market restriction				3
Tied selling				1
Other offences against competition	7	16	12	7
Double ticketing	1		1	
Misleading advertising	205	464	131	145
Sale above advertised price		7	5	2
Application for authorization		4		1
Investigation initiated by the FTC		2		3
Requests for information or opinions	14	22	32	28
Breaches not covered by the Act	16	63	86	147
Total	**244**	**589**	**273**	**348**

There are two distinct procedures for handling cases at the FTC which reflect their degree of complexity. Following the receipt of a complaint and its acknowledgement within 21 days, a decision is made as to whether the matter falls within the purview of the FCA. If it does, the procedures thereafter are slightly different for anti-competitive practices and consumer protection. The procedure for consumer affairs recognizes that in straightforward cases where there is sufficient evidence, there is no need to conduct a full investigation. What is important is that both procedures allow an opportunity for the target company to be informed of its breach of the Act and to negotiate a settlement. This definitely is the most efficient way to enforce the law, especially in a civil law context.

4.3 Other enforcement methods

It is the *modus operandi* of the Commission to favour negotiated settlements over adversarial prosecutions which are considered an act of last resort. In the area of anti-competitive practices, as a result of the Jamaica Stock Exchange (JSE) decision, the only available remedial tool is moral suasion which may result in the signing of consent agreements. Generally, the Commission also favours voluntary compliance by issuing advisory opinions to businesses who want to obtain the views of the Commission before adopting a particular business conduct. These advisory opinions are free. The Commission also has recourse to industry codes of conduct which it develops for application to specific sectors. Private parties can recover damages for any loss they suffer because of illegal practices. However, this provision was used only once and the court decision is being awaited.

4.4 Investigative tools

The FTC has broad powers to obtain evidence in order to carry out its investigative function. It can summon and examine witnesses, request and examine documents, conduct hearings and require the production of statements of facts. It may require an authorized FTC official to enter and search premises, and seize documents under a warrant issued by a Justice of the Peace. These are broad powers but, in the context of a modern economy, they are not sufficient. For example, there are no provisions for searching computers, for wiretapping to obtain oral evidence to be used in conspiracy cases, or whistleblower provisions to protect informants, and leniency provisions to provide an incentive for informants to divulge practices prohibited by the FCA. Although Jamaica is a very open economy, there are no provisions allowing the FTC to exchange information with foreign competition agencies or with enforcement agencies under other domestic laws.

4.5 International issues in competition law enforcement

The FCA does not contain any provision addressing extra-territoriality as such. The Act states that the term "market" refers the Jamaican market. However, "business" is defined as including the export of goods from Jamaica, and the effect on competition includes "... competition from goods or services supplied or likely to be supplied by persons not resident or carrying on business in Jamaica."

With the exception of the Revised Treaty establishing the CARICOM Single Market, Jamaica is not a signatory to any bilateral or multilateral treaty on the application of competition law. Jamaica is participates in the work of numerous international organizations including the UN, UNCTAD and WTO. It is also a major player in the FTAA negotiations where the Executive Director of the FTC represents CARICOM on the Negotiating Group on Competition Policy. Jamaica is a member of the Caribbean Community and Common Market (CARICOM) Treaty. The Caricom Single Market and Economy (CSME) is planned to take full effect in a limited number of countries in January 2006. This initiative raises questions on the necessity of harmonizing competition legislations and regulations among participating countries, but also of enacting competition legislation at the regional level. In this connection, the CARICOM Secretariat has prepared a draft CARICOM Competition Law based on chapter IX of the Chagnaramas Treaty.

4.6 Agency resources, caseload, priorities and management

The FTC is a relatively small organization and resources, expertise and funds are not always readily available. At present, there are two economists, two lawyers, three complaints officers and one research officer whose job is to carry out investigations and enforce the Act. The economists and the research officer almost exclusively deal with anti-competitive practices, while the other members of the staff are responsible for the consumer's protection measures.

The Commission's budget is also limited; it ranged from $499,973 in 2001 to $568,976 in 2004. About 80 per cent of expenses are for salaries and 10-15 per cent for rental of building, equipment and machinery and public utility services. A survey of budgets of competition authorities in developing countries indicates that their average budget varies from 0.06 to 0.08 per cent of their government's non-military expenditures. Such a ratio applied to Jamaica for the fiscal year 2004-2005 would represent an amount of $1,871,211 and $2,494,948.[1]

It is noteworthy that the Executive Director of the FTC has introduced the "FTC Case Selection Criteria" system which provides an effective screening mechanism of cases. Nevertheless, this does not replace the need for decisions to be made on a case-by-case basis, taking into account all considerations outside the reach of a straight mathematical case selection system.

The public has expressed mixed views on the FTC. Some say that, given its limited resources and the constitutional challenge, it is doing the best it can. The comment that more emphasis and resources should be put on the enforcement of anti-competitive practices' provisions was also expressed during the fact-finding mission. The question of the FTC's lack of expertise was raised but it was also recognized that it played a very useful role, particularly in correcting misleading advertising. Its impartiality was praised. One public representative concluded that the FTC is not a very effective agency as it is not well organized, it does not

[1] See Debates, *http:www.mct.gov.jm*.

provide for informal discussions of cases and its public communications capacity leaves much to be desired. However, a new entrant praised the FTC for assisting in preventing misleading advertising. A law professor raised the question of how the duplication of agencies, whose roles are all to protect the public, such as the FTC, the FSC, the CAC, etc. was leading to inefficiencies. This exercise is not a scientific survey but a collection of miscellaneous public comments. No hard conclusions can thus be drawn from these comments other that, at least, the FTC should work on its public image and improve the way it communicates with the public.

5. Competition advocacy

The FTC fully understands its advocacy mandate and allocates resources to it. Public sector advocacy was certainly one of Parliament's intentions when it passed the legislation. But unlike the laws in Canada, Korea or Italy, the Jamaican law does not give a specific mandate to the FTC to engage in competition advocacy. There is no comprehensive approach to deal with the interface of competition law and other laws and regulations which is a major flaw that needs to be attended to.

The relationships of the FTC with some regulatory bodies appear to be working well. The Intellectual Property Office does not hesitate to refer complaints it receives which fall under responsibility of the FTC. Similarly, the Office of Utilities Regulation (OUR), which deals with telecommunications, water and sewage, electricity and public transportation, also refers competition matters to the FTC. The relationship with the Financial Services Commission (FSC) aims at resolving the interface between the FCA and the legislation under the authority of the FSC. Both agencies understand that it is preferable to find a mutually-agreeable coordination mechanism rather than wait until a challenge is brought before the courts.

Privatization is another traditional area of interest for competition agencies. Liberalization of government-owned enterprises or assets is nearing completion in Jamaica. Companies remaining in the public sector after the government has sold off its more desirable assets to the private sector are considered as "unwanted leftovers."

Although the FTC believes that it is devoting considerable effort in informing the public, a recurrent complaint from a variety of sectors is that there is not enough information available on the FTC, on the FCA and on competition policy in general. A quick review of the Commission's website reveals that there is an abundance of information for businesses and consumers. There is a need, however, to ensure the harmonization and accuracy of this information material. For example, thresholds for the application of the law are sometimes not consistent throughout the publications. Also, because of the duplication and contradictions in the law, information material is often too general, or does not reflect the spirit and content of the law. At the end of the exercise, the public is uncertain as to what the law was intended for.

The FTC is the seat of knowledge in Jamaica with respect to

antitrust economics and law. In this capacity, it has taken measures to inform and educate the public on competition law. For instance, it has organized training sessions for judges, and members of the FTC have made presentations to groups of business people, lawyers and others. The FTC uses annual consumer days to disseminate information in public places by means of Q&A sessions with FTC staff and handing out bulletins. In 2000, the FTC instituted the annual Shirley Playfair Lecture Series in memory of a former chairman of the Commission and it launched an annual newsletter on developments in competition law. Finally, the FTC issues press releases when appropriate. In a nutshell, considerable efforts are placed in educating and informing the public, but it does not seem to be enough.

6. Findings and possible policy options

The report analyses in detail Jamaican competition policy and law, the institutions responsible for their application and the enforcement methods and priorities. Numerous recommendations have been made with a view to enhancing competition in Jamaica. At the conclusion of this exercise and following the review by peer countries, the Jamaicans will have to develop a strategy establishing priorities, and turning these recommendations into an action plan.

There are four axes of reform, on which the recommendations are based, and which could form the basis of an action plan. The first axe is a legislative review. After more than a decade of its enactment, the Fair Competition Act has revealed serious flaws in its design and it is in need of a major policy review and legislative overhaul. The second axe of reform has to do with an important shift in the enforcement priorities of the FTC towards an increased enforcement of the anti-competitive practices provisions of the Act. Third, the transition from an economy based on state-owned enterprises and regulation, to a free market economy and private enterprise was a brutal shift and was accompanied with a cultural change. This process is still in progress and there are considerable doubts as to the benefits of that transition. Conducting studies and disseminating information is the third axe of the recommended reform. The fourth axe is the need to build capacity in the FTC, the judiciary, academia, the legal community and other sectors of the public in the area of antitrust law and economics.

6.1 Legislative review:

The most important challenge the FTC faces is certainly its own structure, which was found by the Appeal Court in 2001 to be contrary to the principles of natural justice. This judgement has had dire consequences on the FTC's ability to enforce the anti-competitive practices' provisions of the Act. The FTC did not have a choice but to revert to moral suasion and voluntary compliance to fulfil its mandate. Five alternatives are considered:

(a.) Establishing a competition tribunal;
(b.) Adding firewalls in the current legislation;
(c.) Establishing voluntary firewalls without legislative review;
(d.) Bringing all cases to the Supreme Court;

(e.) Creating a "super tribunal" to hear competition and other commercial cases.

The experience of Commonwealth countries confronted with similar challenges could provide the Jamaicans with a reference to help decide which option is best suited for them. What is important is that the problem is resolved in the very near future so that the FCA is rendered effective once again.

Another important legislative issue that needs to be addressed is the lack of merger and acquisition provisions in the FCA. Contemplated in the 1991 proposal, these provisions were never enacted. As a consequence, Jamaica does not have any legislative provisions setting up a framework to review and make decisions on whether a proposed merger, domestic or foreign, is against the public interest. *Ipso facto*, Jamaica does not have any provisions to remedy anti-competitive mergers and acquisitions i.e. to block them or to impose conditions to ensure that they are in the public interest of the nation.

In designing merger provisions, a number of decisions will have to be made, including:

- how will the terms "mergers" and "acquisitions" be defined;
- what competitive test will be applied;
- what factors will be considered in determining the competitive impact;
- will efficiency gains be treated as a factor or an override;
- will the total welfare standard be used;
- what criteria will be used to determine if a firm is failing;
- will there be a pre-notification mechanism, if so what will be the threshold and what will be the fee;
- will firms need to obtain authorizations before merging;
- what will be the remedy, i.e. behavioural, structural or both.

Writing merger law is very demanding not only because it involves making important policy decisions, but also because it requires taking into account the legal and regulatory environment in which mergers take place, such as the stock exchange regulations and practices, bankruptcy legislation, etc. It also involves adopting a very practical stance vis-à-vis the technicalities of the underlying economic principles. Jamaicans would benefit enormously from the international experience of developing and developed countries in this regard.

Clarifying the interface between the FCA and other laws and regulations is another element of the recommended legislative reform. In this regard, it will be much less costly to amend the FCA than to wait until challenges are brought and settled before the courts. If firms in other sectors, subject to legislation or regulation, such as electricity, water, energy, banking, insurance, telecommunication, were exempted, the effectiveness of the FCA and competition policy in general would be compromised. What is proposed is a holistic approach which would give statutory powers to the FTC to make representations or to appear before regulatory bodies; it likewise impose an obligation on the regulating body to make decisions that impede competition; it would specify the conditions for regulated conduct to be exempt from the

FCA; and would impose an obligation on new regulation proposals to include an impact statement and sunset clause.

There are numerous duplications and some contradictions in the FCA which create uncertainty and lead to contrary interpretations of the law. This report has highlighted a few instances with respect to agreements, tied sales, authorizations and others. The law needs to be revised with a fine tooth comb to ensure its consistency. In the interim, the FTC could adopt clear policies stating which circumstances will give rise to a challenge of a practice under a specific provision.

Finally, a discussion has to take place on the tools available to the FTC in the exercise of its powers. There are no provisions on wiretap, on confidentiality, on the protection of informants, on leniency and on telemarketing. The Act does not provide for the FTC to enter into agreements with other agencies with regards to the exchange of information. With the modernization of the economy and globalization, the FTC should have the required tools to do its job properly.

A considerable amount of work needs to be done to prepare alternative draft legislation for discussion, obtain Cabinet approval, set up a consultation process with interested parties, build a consensus and enact the amendments. Inside and outside expertise will be required.

Finally, one might question whether it is worth embarking in this exercise of revising the legislation considering that legislation may be enacted at the CARICOM level. Based on the limited information available, it remains to be seen if CARICOM has the power and the effective tools and machinery to enforce competition law. Nevertheless, as Jamaica is a major proponent, revising the Jamaican law is not wasteful as it can serve as a model for future CARICOM legislation.

6.2 Major shift in FTC priorities

It is clear that, at present, too much emphasis and resources are being placed on the so-called "consumer protection" provisions of the FTC. This may, in part, due to the inability of the FTC to operate normally because of the Appeal Court's decision on the JSE. In the early days of its existence, it was expected that the FTC would turn to consumers to obtain support for its programme but, after a decade of enforcement in a changed environment, more than 50 per cent of resources are still allocated to consumer protection. Recently, the government enacted the Consumer Protection Act which duplicates the misleading advertising provisions of the FCA. The signal is clear: the government wants the FTC to enforce its consumer protection provisions where there is a completive impact, leaving cases of individual consumer redress to the Consumer Affairs Commission. In this connection, the FTC should start referring to these provisions as the "unfair business practices provisions", and it should give more weight to business complaints in this area.

It is also somewhat of an anomaly that there has not been even one conspiracy case brought forward by the FTC. Enforcement should be geared towards the three cornerstone provisions of competition legislation: conspiracies, abuse of dominance and mergers. As

there are no merger provisions, it should be the mandate of the FTC to develop the evidence and analysis in support of such provisions and to provide the necessary advice to the government to ensure that the law will be up to international standards.

This shift of priorities not only falls with the FTC sphere of interests but also those of the government. The FTC's budget is well under the internationally-accepted standard of 0.05 to 0.08 per cent of government expenditures, not including military expenditures. While the government should give priority to properly fund the FTC, the latter could itself also take measures to recover some costs for services it provides to the public, especially with regard to the provision of advisory opinions, authorizations and merger pre-notifications. When fees are required, the public is justified to expect a guarantee of performance. This system of fees and standards of performance will have to be developed requiring considerable expertise drawn from international experience.

6.3 Policy goals and cultural change and improved communications

It is a recurrent complaint from various sectors of the public that there is not enough information available on the FTC, the Act and competition policy in general. Moreover there is scepticism over the benefits to Jamaica of the free market economic system. For instance, when electricity was privatized, the Minister exempted the Light and Power Company from the application of the FCA. Recently, the government imposed import duties on cement thus protecting the local monopoly from foreign competition and depriving the public from low-price cement. As justified as they may be, these actions of the government brought fuel to those arguing the virtues of the old system of government controls and ownership.

A two-prong approach is recommended. The FTC should conduct studies on the benefits of competitive markets primarily using domestic experience, complemented with international experience. Theses studies should be kept current and disseminated widely in the country. The FTC should also fine-tune its approach to communications, as more precise and specialized information is required. In order to enhance the effectiveness of its public communication, a communication strategy should be developed identifying themes, target audiences and proper tools and materials to disseminate the information.

6.4 Capacity building

Capacity building is another area that this report highlights as an area of concern. The FTC is short-staffed in part because antitrust expertise is hard to find in Jamaica. Industrial organization (IO) is not taught at the university and competition law only gets a quick mention in commercial law courses at the law faculty. The judiciary has received some, although limited, training through the FTC advocacy programme. Private law firms have limited expertise in competition law and often have recourse to experts, lawyers or specialists, from abroad when they have to deal with large complex cases.

The objective of the reform of competition policy should have an important capacity-building element. The FTC is where the expertise in

antitrust economics and law should reside. In order to meet that objective, a strategy should be developed to establish close links with the University of West Indies, and especially with its economics department and the law faculty. This relationship could take the form of a partnership whereby the staff of the FTC could participate in giving some lectures in industrial organization or at the law faculty; professors could be given contract work on cases, or they could be retained on a part-time basis. Similarly students could be offered part-time, or summer, employment opportunities, etc. The FTC could enter into partnerships to invite professors from abroad to give lectures at the University and organize conferences for targeted audiences. In sum, the objective would be to develop and maintain the expertise of the FTC through linkages with the University and extend it to specific sectors of the public.

Developing a close relationship with other competition law enforcement agencies is another vehicle which should be encouraged in building expertise. A programme of exchanges of personnel would enable the FTC to get first class on-the-job training. Last year, the FTC experienced the benefit from the assistance of the New Economy Project offered through the United States Agency for International Development (USAID). Taking advantage of the visit of international experts, the FTC opened training sessions to other government departments and agencies, universities and the private sector.

In conclusion, after a decade of enforcement, the challenges faced by Jamaica, although they are in some way unique to the country, have also been experienced in other developing countries. For each of the axes of the proposed reform, a discussion of international experience would be of incommensurable assistance, not only to Jamaica but also to other countries experiencing a similar need for reform.

Recommendations

OBSERVATIONS	RECOMMENDATIONS
Policy goals	
1 The FCA does not state its intended purposes.	• Consider amending the FCA to add a purpose clause specifying clearly that its objectives are to protect and promote competition in order to enhance economic efficiency and consumer welfare.
2 There remains a high degree of scepticism about the actual effectiveness of competition law and whether the goals are attained.	• The government should make every effort to send clear messages to the population especially when it deviates from the general policy of promoting competition. • It would be desirable that the government and the FTC in particular, conduct on an ongoing basis studies on the actual impact of competition policy and law enforcement, trade liberalization and the adoption of a market-based economy, with a view to educating the public.
Competition policy in reform	
3. A Court of Appeal judgment found that the FTC does not meet the requirements of natural justice as it has both investigative and adjudicative powers.	• Consider amending, as promptly as possible, the FCA to ensure it complies with the principles of natural justice and the standards outlined in the Appeal Court judgment in the JSE case.
Scope of application	
4. The present definition of "goods" is too restrictive and does not include real property, money, securities or choses in action.	• Consider amending the FCA to define "goods" as "... real and personal property of every description including (a) money, (b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation, (c) deeds and instruments giving a right to recover or receive property, (d) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and (e) energy, regardless how it is generated.

5. Section 3 provides an exemption for intellectual property which is unclear and too broad.	• Consider amending section 3 of the FCA to revise and clarify the exemption for intellectual property.
6 Under section 3, the Minister can exempt a business or an activity from the application of the FCA.	• Consider amending the FCA to provide guidance as to what factors the Minister should consider in granting exemptions and the process he should follow to arrive at his decision.
7. The jurisprudence establishing the regulated conduct defence in Jamaica is limited and does not fully address the scope for application of the doctrine under the FCA.	• The FTC should issue guidelines indicating the circumstances under which a conduct would be considered "regulated" and therefore exempt from the FCA.
Substantive provisions of the FCA	
8. The FCA does not contain any provisions dealing with mergers and acquisitions. There are three essential elements of competition law: merger provisions, conspiracy provisions and abuse of dominance provisions.	• In addition to our recommendation that the FTC conduct studies on the need for merger legislation, the government should initiate as promptly as possible a consultation process on merger review and enact merger law as soon as possible thereafter.
9. There is no jurisprudence on the abuse of dominant positions provisions.	• In summary, the abuse of dominance provisions are being used as much as feasible given the circumstances. But in the absence of jurisprudence, there is a need for the FTC to provide more guidance on abuses of a dominant position. In particular, it should accompany its Consent Agreements with substantial explanatory material.
10. The FCA contains specific provisions for tied sale (a *per se* prohibition), market restrictions and exclusive dealings. The general abuse of dominance provisions have application to these practices as well, creating confusion.	• Where a practice is subject to more than one provision, the FTC should provide guidance on which provision it will use to deal with the practice.
11. Section 36 prohibits *per se* bid rigging and does not allow for joint bids preventing small firms from participating on large projects.	• The FCA should be amended to allow for joint bids as long as the bidders inform the tender calling authority in advance, or at the time, of submitting a joint bid.
12. The duplications and contradictions in the various provisions dealing with agreements make the law unclear.	• The government should consider amending the legislation to clarify and simplify the law on agreements. • In doing so, it should seriously consider adopting a *per se* approach for naked price fixing and market sharing agreements. • Alternatively, the FTC should issue clear guidelines where there is duplication or contradictions in the law, as to the circumstances in which it will apply a specific provision.

Enforcement structure, practices and priorities	
13. The FTC has the power to exempt conduct from the application of any substantive of the Act. This exemption procedure is available only on application of a person.	• In a future round of amendments to the Act, it may be worth considering adding the power to exempt classes of activities to the FTC.
14 The law does not specify when the Minister should file before Parliament the Commission's Annual Report and other reports he receives from the Commission.	• The Minister could be required to file the Annual Report and other reports before Parliament within a short period of time.
15 Private actions provided under section 48 are never used.	• The government should seriously consider amending the FCA: o to widen the remedies available for private parties; o to modify the cost rules to favour greater public use of private enforcement while still guarding against frivolous court actions. • The FTC can also play a role: o in establishing a fee schedule for the recovery of its costs in the provision of advices to the business community, and o in issuing guidelines on the use of section 48 remedy.
16 The procedural provisions of the FCA need to be updated.	• It would be advisable for the government to modernize the procedural provisions of the FCA in order to: o deal adequately with computer searches; o provide safeguards to whistleblowers and leniency to informants; o address the sharing of information with Jamaican law enforcement agencies and foreign law enforcement agencies; and o strengthen the confidentiality provisions and the conflict of interest provision.
17. While the FTC is in need of increased resources, there are 5 vacant positions at the FTC. Expertise in industrial organization (IO) as it is not taught at the university, although it may be in the near future.	• It is recommended that the Commission make every effort to fill vacant positions. • The FTC should consider developing a close relationship with the university, especially with the new professor specialized in IO, and put in place a variety of programmes relating to antitrust law and economics. • The FTC should consider setting up an exchange programme to

	enhance its expertise.
18. The budget of the FTC does not meet the international standard.	• To the extent possible, additional funding should be allocated for the FTC.
19. The FTC needs to increase its revenues by establishing a cost-recovery fee for consent agreements only.	• In sum, the FTC should extend its cost recovery fee scheme applicable to Consent Agreement to include Authorizations, Advisory Opinions and eventually merger pre-notifications.
20. In order to maintain this expertise and be fully effective, the FTC needs to keep abreast of development in the antitrust world. Recently, lack of funds meant that a project to register to online library services or specialized journals had to be abandoned, even thought they were to be shared with others.	• A review of reference material available to the FTC should be conducted with a view to ensuring it has the necessary tools to function properly.
21. Similar consumer provisions in the FCA have been included in the Consumer Protection Act which became effective on 1 June 2005. The FTC and the CAC agreed on a division of responsibilities.	• The FTC should concentrate its activities respecting consumer protection on cases that are clearly within its main mandate of promoting competition i.e. on cases that have a significant impact on competition in the market.
22. At present, more resources are assigned to the consumer protection function than to the enforcement of the competition provisions	• The FTC should shift its enforcement priorities and assign more resources to the enforcement of the competition provisions. • It should also make it a priority to uncover conspiracies, including bid rigging offences and initiate prosecutions.
23. There are no merger provisions which create a big gap in the law. It is the responsibility of the FTC to advise the Minister on the operation of the FTC.	• Until amendments are introduced to deal with anti-competitive mergers, the FTC should conduct studies and build evidential support for the introduction of merger legislation.
Competition advocacy	
24. One of the functions of the FTC is to "... advise the Minister on such matters relating to the operation of this Act, as it thinks fit or as may be requested by the Minister." The FCA does not give a specific mandate to the FTC to engage in competition advocacy.	• In recognition of the importance of the advocacy role of the FTC, the Act could be amended to empower the FTC to provide advice not only to the Minister but to the government as a whole and its various departments and agencies.
25. Leaving the interface between the competition law and sector specific regulation and law to be settled in court battles is the most costly alternative.	• The government should consider adopting a four-prong policy approach to address the interface of the FCA and sector specific laws and regulations: o Enhance the powers of the FTC to provide policy advice and make interventions before regulatory bodies; o Impose an obligation on regulatory bodies to make decisions that are least restrictive of competition; o Determine in the FCA the conditions for regulated conduct to be exempt from the FCA; and

	○ Adopt a policy that any new regulation proposal should have a competitive impact analysis and a sunset clause.
26. Many consumers and small businesses do not have access to the Internet. They are therefore deprived of valuable information on their rights and obligations that is available only on the FTC's website.	• All of the substantive information on the FTC's website should be available in printed form.
27. For the business person who wants to know precisely what his or her rights or obligations are, the information material provided by the FTC is not sufficiently accurate and is sometimes contradictory.	• In addition to general information, the FTC should develop and disseminate clear, precise and non-contradictory explanation of the various provisions of the law.
28. It is a recurrent complaint from a variety of sectors that there is not enough information available on the FTC, on the FCA and on competition policy in general.	• The FTC should undertake a comprehensive review of its communication programme and develop a strategic approach to its public communications.

1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY

1.1 Economic context

Jamaica is an island in the Caribbean Sea with a population of 2.7 million inhabitants. The country obtained its independence from the U.K in 1962 at which time it joined the Commonwealth. From a typical colonial economy based on the production of sugarcane, bananas and coffee, Jamaica's economy has evolved into a relatively large and diversified economy benefiting its population. GDP per capita is close to $4,000 and Jamaica ranks 79 out of a total of 177 countries under the Human Development Index.

Table 1 - Human Development Index 2002

Country	**HDI rank** (177 countries)	**GDP per capita rank** (177 countries)	**GDP per capita** (ppp $)
Jamaica	79	107	3,980
Latin America and the Caribbean Countries	-	-	7,223
Best performer in Latin America and the Caribbean (Barbados)	29	40	15,290
Worst performer in Latin America and the Caribbean (Haiti)	153	144	1,610

Source: http://hdr.undp.org/statistics/data/country_fact_sheets/cty_fs_JAM.html.

Table 2 shows the composition of GDP and labour by sectors of the economy. The Jamaican economy is a service-based economy. At present, the services sector accounts for over 60 per cent of GDP and labour force. However, productivity is the highest in the manufacturing sector where 16 per cent of the labour force accounts for 32 per cent of GDP.

Table 2 - GDP and labour force composition by sector

Sectors	**GDP - composition by sector** (in per cent)	**Labour force - by occupation** (in per cent):
Agriculture	6.1	20.1
Industry	32.7	16.6
Services	61.3 (2004 est.)	63.4 (2003)

Source: http://www.cia.gov/cia/publications/factbook/geos/jm.html#Econ.

The economy can also be characterized as an open economy with trade representing around 50 per cent of GDP. The trade balance registered a deficit; in 2004, imports amounted to $3.93 billion while exports amounted to $1.41 billion. Alumina and bauxite are the main export products as they represented 64 per cent of the total value of exports in 2004 followed by sugar, bananas and rum.[2] Imports are comprised of food and other consumer goods, industrial supplies, fuel, parts and accessories of capital goods. Jamaica is also well known for its tourist industry. It ranks amongst the top five tourists destinations in the world. Tourism and the export of alumina/bauxite are the main contributors to foreign exchange receipts. Because of its openness, the Jamaican economy is very vulnerable to changes in international markets.

1.2 Historical context

It was in the second half of the 1980s that the government adopted progressive structural adjustment measures and market-oriented policy reforms. The objective of these reforms was to lower inflation, increase international competitiveness, improve public finance and increase per capita income. These economic liberalization measures included:

(a.) tariff reform which eliminated quantitative restrictions; removed the requirements for excessive import licensing; and significantly reduced tariff levels;
(b.) removal of price controls and deregulation of certain industries;
(c.) privatization of parastatal agencies; and
(d.) subjecting state enterprises to greater commercial pressures."[3]

As part of the package, the enactment of competition law was viewed as central to the shift from a regime of regulations and state ownership of enterprises to an economy relying on free markets and private enterprises.

Recognizing that changes in market behaviour may be slow, in 1991, the government of the day made public a competition law proposal to ensure the benefits of deregulation are shared throughout the economy, and unconstrained by private market restrictions. The proposed Competition Act contained the three internationally recognized core provisions dealing with horizontal agreements, abuses of dominant positions and mergers and acquisitions, as well as consumer protection provisions. It also proposed the creation of the Fair Trading and Monopolies Commission to administer the Act. The objectives of the competition policy and legislation to promote efficiency and consumer welfare were clearly reflected in the proposal's intended purpose, namely to:

1) provide for competition, rivalry in markets and to secure economic efficiency in trade and commerce;
2) promote consumer welfare and to protect consumer interest; and
3) open markets and guard against undue concentration of economic power."[4]

[2] The Planning Institute of Jamaica. Economic and Social Survey Jamaica 2004.

[3] Ministry of Industry, Production and Commerce, Proposal for a Competition Act, 9 April 1991.

The business community were particularly and vehemently opposed to the merger provisions and the interlocking directorate's provisions. A modified legislative proposal, which omitted these provisions, the Fair Competition Act, was later introduced in Parliament and enacted in March 1993. The law did not prohibit monopolies, but targeted the abuses of dominant positions. The legislation was further amended in August 2001 and is now the applicable statute.

1.3 Policy goals

Competition policy is a broad term that refers to a set of economic policies designed to promote competition in a country's economy. Competition law is its main expression and can be viewed as the cornerstone of a country's competition policy. One would expect to find in the law itself a statement of its goals. But the objectives of the Fair Competition Act (FCA) are found instead in explanatory material issued by the Fair Trading Commission (FTC).[5] As already stated, the objectives of the CFA are to:

- Encourage competition in the conduct of trade and business in Jamaica;
- Ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy; and
- Provide consumers with better products and services, a wide range of choices at the best possible prices.

Underlying these goals is the recognition that competition among suppliers will bring about improved products and processes, and enhance economic growth and the standard of living.

There are two widely accepted goals of competition legislation which are increasing economic efficiency and consumer welfare, although these terms may mean different things in different countries. When other goals are stipulated that are not directly related to the promotion of economic efficiency, such as ensuring an equal opportunity to participate in the economy, the way legislation is interpreted is such that it may allow conduct that will result in a less efficient economy. For a relatively small country like Jamaica, exposed as it is to an increasingly competitive world, enhancing efficiency gains should be the primary goal of competition legislation; it is therefore important that goals such as those mentioned above, should be avoided unless it is clear they are only being pursued to enhance economic efficiency.

It is important that the law itself clearly states its purposes. In the absence of a purpose clause, reliance will have to be placed on statements made by the government in the legislature at the time the law was passed, as well as from explanatory material issued by the government, or deductions from the provisions of the act itself. A purpose clause will give guidance to the public, the enforcement authorities and the adjudicative body in the interpretation of such words as "public benefit" or "substantially lessening competition". The interpretation of the provisions on

[4] *Ibid*.
[5] FTC, "The Fair Competition Act: A General Guide" and FTC, "The Fair Competition Act: a Guide to Anti-competitive Practices", accessible at: http://www.jftc.com/.

mergers, abuses of dominant positions and vertical restraints, which often necessitate complex economic analysis, would also benefit from a statement as to the purpose of the law.

It is recommended that the government consider amending the Fair Competition Act to add a purpose clause specifying clearly that its objectives are to protect and promote competition in order to enhance economic efficiency and consumer welfare.

The shift to a market economy is a long process which also calls for cultural change. Although the goals sought seem to be generally understood by the public, a high degree of scepticism remains on the actual effectiveness of competition law and whether the goals are attained. This is compounded by the fact that the population receives mixed signals from the government itself. On the one occasion that the public actually saw lower prices in the market and benefited directly from increased competition, the government decided to restrict imports of cement to protect the established Jamaican monopoly producer. Another example is when the Minister exempted the monopoly light and power utility company altogether from the application of competition law. Such examples give ammunition to those in favour of the "good old days" of monopolies, regulations and state-owned enterprises, and support the idea that monopolies are maybe good for a small economy like Jamaica.

The government should make every effort to give clear messages to the population, especially when it deviates from the general policy of promoting competition. Moreover, it would be desirable that the government and the FTC in particular, to conduct on an ongoing basis studies on the actual impact of competition policy and law enforcement, trade liberalization and the adoption of a market-based economy, with a view to educating the public on the benefits of this major change in the economy.[6]

1.4 Competition policy in reform: current issues

Although a number of proposals for amending the FCA are under review by the Ministry of Commerce, Science and Technology, there are currently no formal legislative proposals that are before Parliament, or publicly under review in Jamaica. However, the constitutional validity of the Fair Trading Commission has been successfully contested before the Court of Appeal,[7] rendering the FTC practically inoperative and many core provisions of the FCA un-enforceable. The government is considering various alternatives to remedy the situation.

In March 1994, the FTC alleged that the Jamaica Stock Exchange (JSE) breached the provisions of sections 17 and 21 of the FCA dealing with

[6] There are numerous studies dealing with this topic. Paul Crampton summarized a number of them in "Competition and Efficiency as Organizing Principles for All Economic and Regulatory Policymaking" presented at the Latin American Competition Forum in Paris in April 2003.Source:http://www.oecd.org/dataoecd/43/26/2490195.pdf.

[7] Jamaica Stock Exchange v Fair Trading Commission (2001), Supreme Court Civil Appeal 92/97.

agreements and abuse of dominance by its tardiness to consider the application for membership of Dehring, Bunting & Golding Securities Limited (DB&G). The JSE challenged the procedure before the Supreme Court which refused to make the various orders sought. Thereafter, the JSE appealed that decision to the Court of Appeal which issued in January 2001 the following order:

(1) A declaration that upon its proper construction, the Fair Competition Act is not applicable to the JSE as the JSE is expressly governed by the provisions of the Securities Act.
(2) A declaration that the action and proceedings being taken and pursued by the FTC against the JSE whereby the FTC is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and therefore void.
(3) An injunction restraining the FTC from continuing the proceedings.

The judgement had dire consequences for the enforcement of the provisions of the FCA. The FTC was found to be both a "complainant and adjudicator" and thus, is in breach of the rules of natural justice. The FTC is vested with the powers to issue remedial orders under sections 21 with regard to abuses of dominance, and section 33 which deals with tied sales, market restrictions and exclusive dealings. These sections thus became unenforceable. Section 17 respecting agreements requires a finding by the FTC of a substantial lessening of competition, and whether the agreement contributes to improving production or distribution or promoting technical or economic progress. The FTC considers this to be part of its quasi-judicial role and thus it cannot enforce this section either. As a result of the Supreme Court judgement, the FTC has not held any formal hearings or conducted any prosecutions under the anti-competitive provisions.

The core provisions of competition law have been rendered un-enforceable. To alleviate this problem, FTC staff continue to investigate all anti-competitive conduct complaints. Where a breach of the Act is found, the matter is brought to the attention of the firm whose conduct is alleged to be contrary to the Act with a view to seek voluntary compliance. This process often results in the signing of a consent agreement; otherwise, the case is discontinued but subject to be re-opened at a later stage when the law permits.[8]

The judgement also made pronouncements on the definition of "goods", on the definition of "market" where there is only one supplier and on the so-called "regulated conduct defence"[9]. These pronouncements have also had a considerable impact on the enforceability of the FCA.

The fundamental issue is the separation of the adjudicative functions from the investigative functions under the FCA. There is no quick fix: changes in the institutional set-up will only be effective if the law is changed. Thus, as

[8] This process is explained in an statement made by Jamaica at the OECD Global Forum on Competition 2004. Source: *www.oecd.org/dataoecd/19/2/23734082.pdf*

[9] The General Legal Council also challenged successfully the application of the FCA to its operations as it is governed by the Legal Profession Act.

a result of the Appeal Court judgement, two main proposals to amend the legislation are being considered by the government. One is the creation of an independent Competition Tribunal; the other is the establishment of firewalls within the FCA for the conduct of the Commissioners. The FCA will also have to comply with some other changes requested by the Appeal Court. Each one has its advantages and its disadvantages.

Competition Tribunal:

One possible solution could be to create a Competition Tribunal whose sole responsibility would be the adjudication of cases under the FCA. Under this arrangement, the FTC would administer the FCA; carry out investigations; and bring contested cases before the Tribunal for adjudication. Under this scenario, the FTC would also continue to have its other responsibilities of promoting competition, issuing guidelines, providing advisory opinions, etc. The composition of the FTC may have to be modified as it makes more sense if it was headed by a single Commissioner supported by the Commission's staff. The power to exempt activities should normally be re-assigned to the Tribunal as it is akin to an adjudicative role, although in many countries this function is left to the investigatory body.[10]

The main advantage of this arrangement is its clear delineation between the adjudicative and investigative functions. This would guarantee that the concerns of the Appeal Court would be met and the government could thus be assured without risks that the law would withstand a future constitutional challenge. The disadvantages are the costs of creating and operating another body for the enforcement of the Act and the new tribunal's lack of expertise. The cost factor would vary greatly depending on how the tribunal was structured. For example, a completely autonomous tribunal with permanent judges and staff could be excessive. However, if the Tribunal formed part of a specialized unit within an existing court, to which a few judges were appointed on a part-time basis depending on their workload, and if the registry and office support of the existing court could be used, the cost could be minimal.[11] Savings could also be made by abolishing some of the Commissioners' positions.

The issue of the tribunal's development and expertise would need to be addressed. Of course, when Commissioners participate in the investigatory stage of a case, they gain expertise in the antitrust field. Members of an independent tribunal would not develop expertise in the same way. However, the fact that all FCA cases are brought before them should help in developing their expertise. The lack of expertise could, to a large extent, also be compensated by the parties to a proceeding themselves who would bring expert evidence, orally or in writing, to support their case. Moreover, the Tribunal might not be composed of only judges – lay members with the desired expertise could also be appointed. The Canadian Competition Tribunal, which functions very well, could serve as a model in this regard.

[10] For instance, in Australia, the ACCC and in New Zealand, the Commerce Commission, have that function.

[11] The Australian Competition Tribunal operates in this manner.

In the case where the Tribunal would be composed of judges only, it may be worth envisaging appointing an economist as an advisor to the court to profit from his or her expertise; this could be done on a case-by-case basis with the consent of the parties or an appointment on a permanent basis. Although the economic expert would only provide advice and would not participate in decisions, he could, nevertheless, be perceived as influencing any decisions. This may, in itself, raise legal issues and may not, in practice, be a viable solution.

FTC with added firewalls in the FCA:
It is possible to comply with the principles of natural justice by making minimal changes to the enforcement institution, i.e. the FTC, by imposing some restrictions in the legislation on the conduct of Commissioners in carrying out their duty. The gist of the added measures would be to put in place firewalls to ensure that when a Commissioner is involved in the investigative stage of a case, he will not also become involved in its adjudication. Also, the Executive Director of the FTC, contrary to the present arrangement, would not be a Commissioner. In principle this approach should satisfy the criteria set out in the JSE case. For greater certainty, authorizations could be considered an adjudicative function and be subject to decisions of Commissioners who were not involved during the investigative stage.

The advantages of this arrangement are important. The law would not require a major overhaul, but rather a simple fine-tuning and no additional costs would need to be put in place for such a regime. Moreover, as antitrust expertise is a rare commodity in Jamaica, it would allow the Commissioners to develop their skills and knowledge in the field of antitrust law and economics as they interact with the FTC staff in conducting investigations.

The disadvantage of such a system is that it is not "bullet-proofed" in the event a constitutional challenge is made. It could be argued that the separation of functions was not maintained and it would be up to the FTC to demonstrate that, at all times, the behaviour of the Commissioners followed the strict procedures set out in the law. It could also be argued that, by some form of osmosis occurring when the Commissioners and FTC staff work closely together during investigations, that a meeting of minds has taken place and that the separation of functions no longer exists. How serious these claims are and whether they will withstand challenges in courts remains uncertain. But there is still a risk that the FTC may, once again, be found in breach of the rules of natural justice and the law becomes again inoperative for a long period. Another risk is that the government may have to pay the costs in a court battle.

Voluntary firewalls:
A variant of the "firewalls" solution, would be for the FTC to put in place firewalls similar to those discussed above, in the form of procedural regulations or simply of procedural guidelines. The advantage of proceeding in this manner would be to avoid amending the law and thus avoid the long delays that amendments entail. However, this approach would not address the risk factor associated with

firewalls. It may even increase it because the separation put in place would not have been approved by Parliament.

Supreme Court:
Similarly, the FTC could decide to get involved only in the investigation of cases and bring all cases for adjudication before the Supreme Court as the FCA allows it to do at present. Of course, authorizations are exclusively the domain of the Commission. For this function, the FTC could have recourse to firewalls. There is less risk of a challenge for authorization matters than for the issuance of punitive orders. This solution does not address the question of the lack of expertise but, in the short term, it may allow the Commission to function pending a more formal resolution of the constitutional challenge.

Super Tribunal:
Another possible solution would consist of creating a "super tribunal" which would have adjudicative functions with respect to a group of laws, one of which is the FCA. This concept is attractive because it is a means of attaining efficiencies in the adjudication of laws. There is a trend for countries to regroup under a common agency the enforcement of their competition law with the enforcement of other commercial laws dealing *inter alia* with consumer protection, product safety, packaging, weights and measures, telecommunication, etc. In the same vein, it makes sense, from a cost perspective, as well as from the perspective of the development of court expertise, to regroup the adjudication functions of these laws under a common tribunal.

The main disadvantage of such an approach is that it will take time and that harmonizing all the laws affected will be costly in time and effort as amendments have to be enacted to give effect to the new arrangement and establish this new court. Moreover, a legislative proposal such as this requires a broad base consultation process and the building of a consensus of the interested parties before it can successfully be passed in Parliament. The more issues or elements are under review, the more likely opposition will delay the process. The FCA in its present form is seriously handicapped and in urgent need of reform. Competition law is central to ensuring smooth functioning markets and ensuring that the free market economy yields the benefits expected. The Government of Jamaica should consider the need to fix the law as a priority and ensure that it is done as soon as feasible.

Undoubtedly there may be other arrangements or variations on the arrangements that may satisfy the requirements of the rule of natural justice. The Government will have to weigh all the risks, the costs and the benefits associated with each and proceed to remedy the situation in a timely manner. There is a cost to the economy and the public of not having an efficient competition law. This is why the government should act promptly to remedy the situation.

It is recommended that the government consider amending, as promptly as possible, the Fair Competition Act to ensure it complies with the principles of natural justice and the standards

outlined in the Appeal Court judgement in the JSE case.

2. SCOPE OF APPLICATION OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES

The Fair Competition Act is a general law with a general application. Its substantive provisions apply to either a "person" or an "enterprise". "Enterprise" is defined in subsection 2 (1): as "...any person who carries on business in Jamaica but does not include a person who: (a) works under a contract of employment; or (b) holds office as director or secretary of a company and in either case is acting in that capacity". The FCA also provides in section 54 that "Subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown."

The definition of the word "goods" as: "... all kind of property other than real property, money, securities or choses in action" was the basis for the Appeal Court to find that the FCA did not apply to the JSE.[12] The FTC argued that the JSE was subject to the Act by virtue of the definition of "service", but that interpretation was rejected. In practice, this decision may mean that the entire financial service sector is exempt from the FCA. The government is considering modifying the definition of "goods" to make it all inclusive. In this regard, the government is considering the wording of the Canadian Competition Act where "article" is defined as follows:

"... real and personal property of every description including:

(a.) money,

(b.) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

(c.) deeds and instruments giving a right to recover or receive property,

(d.) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(e.) energy, however generated."

It is recommended that the government adopts this modification as soon as possible.

2.1 Economy-wide exemptions and special treatment

The FCA specifically exempts, under section 3, a list of activities[13] from

[12] Op. cit. Page 21.

13 Section 3 states:
"3. Nothing in this Act shall apply to—
(a) combinations or activities of employees for their own reasonable protection as employees;
(b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
(c) the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark;
(d) the entering into or carrying out of such an agreement or the engagement in such business practice, as is authorized by the Commissioner under Part V.
(e) any act done to give effect to a provision of an arrangement referred to in paragraph (c);

its application, including collective bargaining activities of employees and employers, activities of professional associations for the protection of the public and activities in relation to a treaty to which Jamaica is a party.

Moreover, the list of exemptions applies to agreements: "... in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trade mark ... and ... any act done to give effect ..." to such a provision. The meaning of this exemption is far from clear. A literal reading of this provision could mean that any agreement, price fixing or otherwise, as long as it contains a provision relating to the use of intellectual property rights, would be excluded. This provision could exempt also agreements among competitors relating to the use of their own intellectual property rights. It should be mentioned, however, that Paragraph 20 (2) (b) exempts from the abuse of dominant positions section the mere exercise of a right granted by the intellectual property laws.

The wording of the exemption in section 3, as it applies to intellectual and industrial property, is somewhat of an anomaly and needs to be revised and clarified.

(f) activities expressly approved or required under any treaty or agreement to which Jamaica is a party;
(g) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;
(h) such other business or activity declared by the Minister by order subject to affirmative resolution."

Under section 3, the Minister of Commerce, Science and Technology is given blanket power to exempt "such other business or activity declared by the Minister by order subject to affirmative resolution." "The Minister has exercised this power in a couple of instances, notably in respect of the light and power company".[14] In this instance, the exemption was given to the company and not to some of its specific activities. It is not known which activity needed exemption but as a result of the exemption, the company was given "carte blanche" to engage in any activity, regardless of the provisions of the FCA. It is difficult to imagine why the company should be granted permission to engage, for instance, in such practices as abuses of market power or misleading advertising. The section does not provide any guidance as to what factors the Minister should consider in granting this exemption nor the process that he should follow to arrive at his decision. Moreover, this provision seems at odds with the provisions of section 54 binding the Crown in all of its activities.

The provision of section 3 empowering the Minister to exempt business or activities should be revisited to provide guidance as to what factors the Minister should consider in granting exemptions and the process he should follow to arrive at his decision.

[14] OECD Global Forum on Competition 2003, « Jamaica – The objectives of Jamaica's Competition Law and the design of the Fair Trading Commission » Source : *http://www.oecd.org/dataoecd/17/62/23720833.pdf*

2.2 Sector-specific rules and exemptions

While the FCA does not contain sector specific rules or exemptions, a regulated "industry" defence has emerged from the jurisprudence developed so far. As mentioned before, the Appeal Court has found that the sector specific legislation had precedence over the more general competition law, the FCA. It is noteworthy that the Court has exempted in two cases the whole sector as opposed to some specific conducts which were specifically regulated under the sector legislation. Exempted are the General Legal Council, the regulating body for the legal profession which is governed by the Legal Profession Act, and the Jamaica Stock Exchange which is governed by the Securities Act. These decisions, however, may reflect the particular facts of the cases. Hopefully, the jurisprudence will develop in such a way that the defence will apply only to regulated "conduct" specifically authorized under a valid law.

In a country such as Jamaica, where the transition to a market economy is fairly recent, regulated activities may account for a substantial part of the economy, especially in sectors such as transport, energy, banking, financial services, professional services and others. The best approach would be for the government to adopt a holistic approach to clarify, in legislation, the interface between competition law and other sector-specific legislation or regulations.[15] Until this is done, it may be important that the FTC issue guidance on the application of the FCA in this area as it will increase the transparency and predictability of its interpretation and enforcement of the Act. This is particularly important as the jurisprudence establishing regulated conduct defence in Jamaica is limited and does not fully address the scope for application of the doctrine under the FCA. The guidelines should indicate the circumstances under which a conduct would be considered "regulated" and therefore exempt from the FCA. In doing so, the FTC would affirm its jurisdiction subject to challenges in court that may find otherwise.[16]

The FTC should issue guidelines indicating the circumstances under which a conduct would be considered "regulated" and therefore exempt from the FCA.

[15] See below under section 5.1.

[16] The Canadian Competition Bureau issued similar guidelines in 2002 which are now undergoing revision. Source: *http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1868&lg=e*

3. SUBSTANTIVE PROVISIONS OF THE COMPETITION LAW

The Fair Competition Act can be described as a general law of general application, although some activities are exempted from its application. It contains all the traditional provisions found in competition laws with the exception of merger provisions. All the provisions are enforceable under a civil law standard of proof of the balance of probabilities. All infractions can be brought before the Supreme Court for adjudication. The FTC, as described earlier, also has concurrent adjudicative powers for selected provisions.

Under Part V of the FCA, the FTC is empowered to grant Authorizations for any agreement or practice when it is satisfied that it is likely "to promote the public benefit".[17] To date, one authorization has been granted to allow a number of companies to sell contraceptives at discount prices. As there is no jurisprudence before the courts on the anti-competitive provisions, the public has to refer to information bulletins and guidelines issued by the FTC for explanations

Substantive Provisions of the FCA

The FCA proscribes the following anti-competitive behaviours, some of which are *per se* offences while others require a rule of reason approach:

- Agreements that substantially lessen competition (section 17);
- Agreements with exclusionary provisions (section 18);
- Abuse of a dominant position (sections 20 and 21);
- Collective resale price maintenance (sections 22 and 23);
- Minimum resale price maintenance (sections 25 and 27);
- Exclusive dealing, market restriction and tied selling (section 33);
- Price-maintenance (section 34);
- Conspiracy (section 35); and
- Bid rigging (section 36).

The FCA also addresses certain consumer protection matters including the following:

- Misleading advertising (section 37);
- Representations as to reasonable test and publication of testimonials (section 38);
- Double ticketing (section 39);
- Bait and switch (section 40);
- Sale above advertised price (section 41).

[17] FCA, Paragraph 29 (2).

3.1 Mergers

A first striking observation is that the FCA does not contain any provisions dealing with mergers and acquisitions. It is generally accepted that there are three essential elements of competition law: merger provisions, conspiracy provisions and abuse of dominance provisions. It is through the interaction of these three provisions that governments can ensure that markets will function properly in a competitive manner. Merger law is necessary for two reasons: mergers can reduce the number of competitors in a market thus giving rise to the creation or enhancement of market power (or at the extreme, the creation of monopolies), and they can increase the risks of collusion amongst the players. There is also a presumption that it is easier to deal with mergers than it is, after the fact, to control market power and collusions.

The proposed legislative measure of 1991 contained merger provisions that had to be withdrawn before the legislation was enacted. The test proposed for judging mergers was whether they created a dominant position. At the time the business community argued that there was no need for merger review in a small, open economy like Jamaica. In their view, the law should not prevent companies from undergoing restructuring or merging with others in order to grow and survive in Jamaica's newly open and free market environment. As the proposal was misunderstood, the provisions were vehemently opposed and eventually withdrawn.

International experience shows that very few mergers are prohibited by merger law and only a few need to be modified. Certainly those that increase, or have no effect on, competition do not raise concerns. Those that are anti-competitive and do not give rise to efficiency benefits should be prohibited or remedied. Those that have both anti-competitive effects and efficiency enhancement effects are more complex and need to be analysed carefully to determine if, on balance, they should be prohibited outright or allowed with or without modifications. Even if it is believed that it will only rarely be used, the law is still necessary to allow the government to intervene effectively and with the appropriate tools to review mergers and take appropriate action.

The competitive impact of a merger is determined in relation to a market. Some would argue that there is no need for competition law in a small, open economy because domestic markets are open to foreign competition. In reality, many markets are local in nature and are often protected from foreign competition. For instance, this is often the case in services industries such as transport, energy, banking, retailing, etc. In Jamaica, the government has no standards to judge mergers of companies operating in those sectors. Consumers would be better protected if the FCA contained merger provisions to deal with such transactions.

It is hard to justify that, under the FCA, competing companies are prohibited from agreeing on prices, on market allocation or on profit sharing because it is against the public interest to do so, but if these companies all merged

into one company, these decisions would become internal to the merged entity and they would be allowed. It is even more so when we know that mergers, because they change the structure of industries, are much more long-lasting than conspiracies which can break apart. The competition law should be neutral as to the form that behaviour takes.

Consideration should be given to the fact that the draft CARICOM competition legislation does not contain any merger review provisions either, although Barbados, another CARICOM country which also has a competition law, does have merger provisions. With the advent of the CSME, the likelihood of mergers would be increased and it is important that the Jamaican government have the necessary tool to handle the situation.

In designing merger law, a number of questions need to be addressed, such as the following:

- what will be the definition of the terms "mergers" and "acquisitions";
- what will be the competitive test that would be applied;
- what factors will be considered in determining the competitive impact;
- will efficiency gains be treated as a factor or an override;
- will the total welfare standard be used;
- what criteria will be used to determine if a firm is failing;
- will there be a pre-notification mechanism, is so what will be the threshold and what will be the fee;
- will firms need to obtain authorizations before merging; what
- will be the remedy i.e. behavioural, structural or both.[18]

In developing legislation, consultation with interested parties at an early stage is fundamental to obtaining their support for the passage of the legislation and its enforcement once it is enacted.

In addition to our recommendation that the FTC conduct studies on the need for merger legislation, the government should initiate as promptly as possible a consultation process on merger review and enact merger law as soon as possible thereafter.

3.2 Abuse of dominance

The Jamaican law does not prohibit monopolies but addresses abuses of dominant positions. It is always a challenge for antitrust authorities to distinguish conduct that is anti-competitive from conduct that is pro-competitive. In this regard, the FCA sets out three tests that must be met for an order to be issued.

First, a firm must be in a dominant position in a market. The FCA does not apply to joint dominance cases. A firm is in a dominant position if it is able: "... to operate in a market without effective constraints from its competitors or potential competitors". The FTC guidelines determine whether a firm has market power on whether it is able to: "... charge excessively high prices,

[18] For more details see: The World Bank and OECD, *A framework for the design and implementation of competition law and policy*, Washington and Paris, 1999 pp 41 to 58.

supply goods of lower quality and/or restrict output to a lower level than would be supplied in a competitive environment."[19] A market share of 50 per cent is given as a threshold for a firm to be considered dominant, but this may depend on certain variables.

Second, it must be proven that a firm abuses its dominant position i.e. it "... impedes the maintenance or development of effective competition in a market ..."

Third, it must be proven that the abusive conduct "... has had, is having or is likely to have the effect of substantially lessening competition in a market"[20]. It is noteworthy that intent is not a factor that is taken into consideration.

The remedy is very general and provides that the FTC orders the firm to take steps that are necessary and reasonable to overcome the effects of the abuse in the market. In principle, behavioural and structural remedies are available. However, the FTC takes the position that: "... in Jamaica the remedies are primarily based on conduct, because currently the FCA does not contain provisions which will allow for structural remedies."[21]

The provision gives a non exhaustive list of conducts that are abuses of a dominant position such as when a firm:

(a.) restricts the entry of any person into that or any other market;
(b.) prevents or deters any person from engaging in competitive conduct in that or any other market;
(c.) eliminates or removes any person from that or any other market;
(d.) directly or indirectly imposes unfair purchase or selling prices or other anti-competitive practices;
(e.) limits production of goods or services to the prejudice of consumers;
(f.) renders the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.[22]

Many countries would not consider the point made under e) as abusive conduct based on the reasoning that if monopolies or dominant positions are not illegal, as a dominant firm to produce below the competitive level, which results in high prices, is normal behaviour. If the market functions properly, high prices actually would give the proper signals for potential competitors to enter the market. As competition law is designed to protect the competitive process, it is only behaviour that is exclusionary that would be considered anti-competitive, and not high prices. In the same vein, low pricing impeding entry is more likely to be found anti-competitive. There is a risk that, in situations when high prices are considered abusive, the competition authority becomes a price monitoring or regulating agency. Wisely, the FTC has not ventured in that area. It interprets the provisions as

[19] FTC, The Fair Competition Act: A guide to anti-competitive practices.
[20] FCA Paragraph 21 (1).
[21] FTC, "The Fair Trading Commission's approach to abuse of dominance cases", 2-4 December 2002.
[22] FCA, Paragraph 20 (1).

applying only to situations where the dominant firm's conduct acts as a competitive restraint in the market, and not to any company's terms of sale in respect of the ultimate consumer.

The exercise of rights derived from intellectual or industrial property is not considered as abusive conduct. Nor is the behaviour exclusively directed to improve distribution or production of goods or to promote technical or economic progress when the consumer receive a fair share of the benefits. The guidelines specify that: "... the agreement (presumably the practice) should contain the least restrictive means of achieving the benefits".

The FCA is guided in determining whether a practice has the effect of lessening competition substantially to consider: "... whether the practice is the result of superior competitive performance." This wording is used also in the Canadian Competition Act, but it is still in need of a satisfying explanation. The FTC guidelines do not provide guidance on that either. Generally speaking, this provision would apply where a firm has invented a better mouse trap and the result was that its competitors are driven out of the market. Another example would be where a firm has found a way to cut its cost and lower its prices to the point that competitors are driven out of the market. It could be argued, however, that these examples would fall under the defence for technical or economic progress. There is a need here for the FTC to provide guidance.

The FCA contains specific provisions for tied sale (a *per se* prohibition), market restrictions and exclusive dealings. The provisions on the general abuse of dominance are also applicable to these practices as well and it is unclear which provisions apply to any given set of circumstances. A proposal has been made by the FTC to apply a simple test of rule of reason to tied selling.

Where a practice is subject to more than one provision, the FTC should provide guidance on which provision it will use to deal with the practice.

The FTC has rendered a decision in application of the abuse of dominance provisions respecting an alleged ties sale on the part of Grace Kennedy Remittance Service (GKRS). The allegation was that there was a tie between electronic money transaction services and utility bill collection services. The FTC conducted the investigation and came to the conclusion that there was no tying arrangement between the two products.

The FTC also considered, under the abuse of dominance provisions, three complaints regarding predatory pricing. In its decision regarding price reductions of Super Plus Food Store, it found that the list of items for promotion was limited and the duration of the sale was short such that predation did not occur. With regard to the allegation that Tank-Weld Metals Limited (TWM) was selling nails at predatory prices, it concluded that TWM was dominant but except for one month, its prices were above average variable costs. It thus found there was no evidence of predation. The last case involves an advertisement by Telstar Cable Ltd. for three months of free cable service to

subscribers who switch from another cable company within the month of December 1999. The FTC found that the pricing was not below costs and the duration of the offer was not long enough to have an appreciable effect on competition.

The FTC concluded that the three cases brought under the abuse of dominance provisions could be resolved by accepting consent agreements to remedy the situation. One case involved Blue Cross Jamaica (BCJ) respecting the introduction of a new claims processing system. A second case involved Cable and Wireless (Jamaica) Limited which unilaterally imposed on customers an Intouch Voicemail Service and delayed the transfer of telephone lines from one location to another, causing competition problems to a competing answering service company. A third case involved Red Stripe Limited respecting its exclusive rights for the sale of brewed products at all Carnival 2002 events. Scant details of these cases can be found in the Annual Reports and the Public Register resulting in the loss of a good opportunity to educate the public.

In summary, the abuse of dominance provisions are being used as much as feasible in the circumstances. But in the absence of jurisprudence, there is a need for the FTC to provide more guidance on abuses of a dominant position. In particular, it should accompany its consent agreements with substantial explanatory material.

3.3 Horizontal agreements

Provisions dealing with horizontal agreement are one of the cornerstones of competition law. There is no jurisprudence dealing with horizontal agreements and no specific FTC guidelines on the subject. The FCA contains no less than six sections addressing horizontal agreements.

Section 17 applies to all types of agreements without distinction as to whether they are horizontal, vertical or conglomerate. As all economic transactions involve an agreement, the provision is wide-ranging in its application. However, it applies only to agreements that have as their purpose or that have, or are likely to have, the effect of substantially lessening competition in a market. The FCA prohibits anyone from giving effect to any provision of an agreement which has the purpose or effect of substantially lessening competition. The FCA specifies the following agreements as agreements that have or are likely to have the effect of substantially lessening competition (SLC) in a market when they contain provisions that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share of markets or sources of supply;
- affect tenders to be submitted in response to a request for bids;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary

obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[23]

Some agreements are exempt, e.g. agreements for which an authorization has been issued on public benefit grounds and those that improve the production or distribution of goods and services or technical or economic progress, as long as consumers obtain a fair share of the benefit. The agreements must be least restrictive of competition or it should not offer the possibility of eliminating competition in respect of a substantial part of the product market.

Under section 18, agreements among competitors, potential or actual, that have the effect to prevent, restrict or limit the supply of goods or services or their acquisition are prohibited *per se*.

Section 22 prohibits *per se* suppliers from engaging in collective resale price maintenance. Similarly, section 23 prohibits *per se* dealers to engage in collective resale price maintenance.

Section 35 prohibits all types of agreements or arrangements to:

a) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
b) prevent, limit or lessen unduly, the manufacture or production of any goods or to enhance unreasonably the price thereof;
c) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any goods or in the price of insurance on persons or property;
d) otherwise restrain or injure competition unduly.

Not all agreements are prohibited. Agreements which relate only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public are exempt.

Section 36 makes it a per se offence to agree to submit a bid or to refrain from making a bid. This prohibition may prevent small firms from participating in large projects as no provisions exist allowing the submission of a joint bid.

The FCA should be amended to allow for joint bids as long as the bidders inform the tender calling authority, either in advance or at the same time, of submitting a joint bid.

As can be observed, horizontal agreements are subject to so many prohibitions that, in the final account, the law becomes unclear. For instance, there is considerable amount of duplication between section 17, which requires a proof of an SLC, and section 35, which requires a proof of an undue lessening of competition. What is the test that will be applied to a particular set of facts is unknown. Information material issued by the FTC explains that section 35 is designed to deal with cartel activity. This does not make much sense as section 17 clearly refers to price fixing and market sharing in paragraph

[23] FCA, Paragraph 17 (2).

17 (2) (a) and (c) which are cartel activities. Moreover, section 36 requires a much higher standard of proof of an "undue lessening of competition", whereas section 17 requires only an SLC.

There is a contradiction between the treatment of bid rigging under section 17, where it can be exempt, and section 36, where it is a *per se* offence with no exemption. The same is true for section 18 that creates a *per se* offence of agreeing to limit supplies, whereas the same conduct is subject to an SLC test in section 17, with the possibility of exemption, and an undue lessening of competition test in section 35.

The treatment of tied sale is the most bizarre. Tied sale is subject to paragraph 17 (2) (f) where it is specified as a practice which creates an SLC but it is subject to exemptions. It is considered an abuse of dominance under paragraph 20 (1) (f) subject to exemption as well. It is a *per se* prohibition under subsection 33 (2).

Whereas the law provides for *per se* offences for a number of conducts, it is noteworthy that price fixing and market sharing agreements are not among them. A modification in the law would greatly assist in clarifying its application.

Many observers have commented that the FCA is not clear. This unnecessary duplication of legislative provisions and sometimes contradictory provisions contribute to the confusion. There are two ways of enhancing clarification: one is to amend the law to make it clear what conduct is prohibited and under what test, and the other would be for the FTC to adopt policies stating in which circumstance it will challenge a conduct and under which specific provision. If amendments are contemplated to fix the constitutionality of the FTC and to provide for the lack of merger law, tidying up of the law to remove duplicate or contradictory provisions can be done at the same time.

The government should consider amending the legislation to clarify and simplify the law on agreements. In doing so, it should seriously consider adopting a per se approach for naked price fixing and market sharing agreements. Alternatively, the FTC should issue clear guidelines, where there is duplication or contradictions in the law, as to the circumstances in which it will apply a specific provision.

3.4 Vertical restraints

Some countries make a distinction in their law and have separate provisions for vertical restraints. This introduces the much desired clarity in distinguishing conduct that is permitted from conduct that is offensive. In Jamaica, a multitude of sections of the FCA deal with vertical restraints. Some are general provisions that have application to vertical restraints, while others are specific vertical restraints provisions. We have already covered the general provisions of section 17 on agreements that lessen competition substantially and abuse of dominance of section 20. Resale price maintenance through collective or individual action is prohibited *per se* in sections 22, 23, 25, 27 and 34. Under section 33, tied sale is prohibited *per se* whereas market restriction and exclusive dealing are

subject to a substantial lessening of competition test.

Section 17 prohibits agreements that: "... directly or indirectly fix purchase or selling prices or any other trading conditions...being provisions which have or are likely to have the effect referred to in subsection (1)".[24] When read in the context of a vertical agreement between a buyer and a seller, this provision could be interpreted to outlaw normal market transactions. However, in the view of the FTC when subsection 17 (2) is read in the context of subsection 17 (1), it becomes clear that such agreement is prohibited only if it substantially lessens competition. Surely better wording could be used to restrict the prohibition to agreements among competing sellers, actual or potential.

There is no jurisprudence dealing with vertical restraints with the exception of the tied sale case involving Grace Kennedy Remittance Service (GKRS). The case was dismissed as the FTC found that there was no tying arrangement between the two products at issue.[25]

3.5 Unfair competition and consumer protection

The FCA does not have a heading specifically referring to unfair competition and it is the practice at the FTC to refer to the unfair competition practices as consumer protection measures.

Consumer protection measures are comprehensive and ensure the transparency of the marketplace. The FCA deals with misleading advertising,[26] representations as to reasonable test and publication of testimonials,[27] double ticketing,[28] bait and switch[29] and sale above advertised price.[30] Contractual obligations towards consumers are covered in the newly-enacted Consumer Protection Act. In Jamaica, as in other countries, misleading advertising cases comprise the vast majority of unfair competition cases handled by the FTC.

Practices such as price discrimination are sometimes considered to fall within the category of unfair competition practices, but in Jamaica these provisions do not have application to unfair practices directed towards the consumers. They are dealt with as agreements[31] and abuses of dominance,[32] where, in both cases, they are subject to a test of lessening competition substantially.

With the advent of new technology and cheap telecommunication fees, deceptive telemarketing, either targeted at the domestic market or offshore, has flourished in some countries. So far, deceptive telemarketing is not a problem in Jamaica and thus is not specifically dealt with in the FCA. While there is nothing in the FCA that could prevent the Commission from dealing with such conduct, if it becomes a problem,

[24] FCA, Paragraph 17 (2) (a).
[25] This case is described briefly in the Abuse of Dominance section of this report.
[26] FCA, section 37.
[27] FCA, section 38.
[28] FCA, section 39.
[29] FCA, section 40.
[30] FCA, section 41.
[31] FCA, section 17 (2) (e).
[32] FCA, section 20 (1) (d).

because of the individuals involved and the nature of the conduct, specific measures should then be considered.

Unfair practices such as the fraudulent use of someone else's name, trademark or product labelling, etc. are not covered in the FCA, but are dealt with in the appropriate intellectual or industrial property legislation.

4.INSTITUTIONAL ARRANGEMENT: ENFORCEMENT,STRUCTURES AND PRACTICES

4.1 Competition policy institutions

The Fair Competition Act provides that three bodies come into play for its administration and enforcement, a description of the roles and activities of these three bodies is given below:

(1) The Fair Trading Commission

The FTC is the main body responsible for the administration and enforcement of the FCA. It is composed of a minimum of three Commissioners and maximum of five Commissioners appointed by the Minister of Commerce, Science and Technology,[33] and is headed by an Executive Director. The Executive Director is an *ex-officio* member of the Commission. The Minister also appoints one of the members as the Chairman of the Commission. Tenure is for a maximum of three years with a possibility of re-appointment. The Executive Director is appointed by the Commission for a seven-year period with the possibility of renewals for periods of five years.

The functions of the Commission are to carry investigations at the request of the Minister, of any person or on its own initiative, into the conduct of business in Jamaica to determine contraventions of the FCA; to advise the Minister at his request or on its own initiative, on matters relating to the operation of the FCA; and to issue remedial orders respecting abuse of dominant positions, exclusive dealing, market restrictions and tied selling. The Commission may also authorize agreements under subsection 17(4) and issue under section 29 other authorizations for agreements or practices that may be contrary to any provisions of the FCA if it is likely to promote the "public benefit". The Commission may apply to the Supreme Court for orders and penalties in relation to breaches of the substantive provisions of the Act.

To carry out its functions, the Commission has the power, under section 7, to summon and examine witnesses, to call for and examine documents, to administer oaths, conduct hearings and require the production of statements of facts. In addition, the Commission may require an authorized officer of the FTC to enter and search a premise, and seize documents for a maximum period of seven days. Before using this search power, the officer must obtain a warrant from a Justice of the Peace.

The FTC has the ability to exempt under a public benefit test conduct which may be contrary to any of the substantive provisions of the FCA. To date, one such authorization has been granted. This exemption procedure is available only on application of a person. The FTC, for instance, could not on its own initiative exempt classes of activities. With experience, it may become clear that certain activities always meet the public benefit test and the FTC should have the power to exempt them. For instance, it is common for the issuance of new stocks or bonds

[33] There are currently five part-time Commissioners.

that investments dealers form a syndicate for their primary distribution. When securities are brought within the ambit of the Act, such a class exemption may be necessary for the public benefit under specifically prescribed conditions.

In a future round of amendments to the Act, it may be worth considering giving the FTC the power to exempt classes of activities.

(2) The Minister of Commerce, Science and Technology

In addition to the Commission, the Minister of Commerce, Science and Technology plays a substantial role in the enforcement of the FCA. As mentioned above, he can exempt businesses or activities from the application of the FCA by order subject to affirmative resolution (subsection 3 (h)). He appoints the members of the Commission, designates one member as its President (Fair Competition Schedule sections 1 and 3), and fixes their remuneration (section 15). He has the power to terminate the appointment of a member, other than the Executive Director, but only for cause (section 6) and to grant leave of absence (section 8). In fact, the power to remove a Commissioner is carefully crafted to enable him to do so only if a Commissioner becomes permanently ill and unable to fulfil his duty, is convicted and sentenced to imprisonment, fails without reasonable excuse to carry out his functions, or engages in activities that are prejudicial to the interest of the Commission.

With respect to investigations, the Minister can request them to be made (subsection 5 (b)). It is noteworthy that he cannot terminate them or determine their outcome. The Minister can also give directions of a general nature, as he considers necessary in the public interest, as to policy to be followed by the Commission (section 9). He may also request advice from the Commission on any matter relating to the operation of the FCA (subsection 5 (c). The Commission is obligated to make a report to the Minister upon discontinuing an inquiry, but the Act does not specify what the Minister is supposed to do with it. The Commission submits to the Minister each year its statement of accounts and its estimates of revenues and expenses for the following year. The Minister approves the estimates or the budget of the Commission.

The Commission is also required (sections 13 and 14) to submit to the Minister an annual report of its activities and it may submit a report on a matter investigated or under investigation that the Commission thinks requires the special attention of the Minister. The Minister is required to submit to Parliament the reports he receives from the Commission. However, the law does not specify when he should do that. In case there is a conflict between the Minister and the Commission on a particular issue, it is important for transparency reasons that the Minister is obliged to file these reports before Parliament within a short period of time. Such a provision would also enhance the independence of the Commission.

The Minister should be obliged to file important reports, e.g. Annual Reports, before Parliament within a short period of time.

(3) The courts

Finally, the courts also play a role in enforcing the FCA. Obstructing the Commission's investigation, refusing to supply information, destroying or altering or giving false and misleading information to the Commission are offences brought before the Resident Magistrate's Court and liable to fines of up to five hundred thousand dollars or imprisonment for a maximum of one year or both (sections 42, 43, 44). The failure to attend a hearing or give evidence before the Commission is also an offence brought before the Resident Magistrate's Court and liable to fines of up to one million dollars or imprisonment for a maximum of two years or both (section 45).

The Commission may apply to the Supreme Court, under a civil standard of proof, for the issuance of orders, penalties and injunction relief as regards any obligations or prohibitions under the substantive provisions of the FCA or failure to comply with a direction of the Commission (section 46). Any person who is aggrieved by a finding of the Commission may bring an appeal to the Supreme Court. Finally, the FCA provides for the recovery of damages for conduct contrary to the Act.

4.2 Competition law enforcement

Enforcement of the law means different things to different people. Some think it is the application of the law to unlawful conduct by taking remedial or punitive legal action. The success of an enforcement agency is measured by the number of successful cases it wins in court. This is a very narrow definition that misses the broader picture. Competition law is premised on the idea that economic operators will operate according to market rules because they recognize it is in their best interest that everybody does so. While this may be true, at the same time there will always be delinquencies which call for corrective action. In such an environment, the enforcement of competition law is a set of elements or instruments, ranging from information dissemination to punitive court proceedings, which are used by the enforcement agency to ensure the law is abided by. In principle, the more emphasis is put on information and voluntary compliance, the less contested proceedings should be required. In practice, experience has shown that the most efficient way to enforce competition law is a balanced approach comprised of various instruments. The FTC, which is continuously striving for resources, uses an array of instruments to fulfil its mandate.

The FTC makes a distinction between its competition enforcement activities and consumer protection. Table 3 is a compilation of the total work hours and budget for these separate functions and administration/ management over the last six years. It is clear that fewer resources are assigned to competition than to consumer protection. This may be the result of vacancies in the Commission, the constitutional challenge, or other reasons. At an early stage of its existence, such an allocation of resources is to be expected. But after more than a decade of existence, the FTC should place more emphasis on competition matters as these provisions are fundamental to the smooth functioning of markets.

Table 3 - FTC budget and working hours spent on different issues between 1999 and 2004 (in per cent)

	Competition enforcement	Consumer protection	Administration management
Work hours spent on	29.58	44.58	25.84
Budget allocated	34	39	27

Source: Compilation prepared by the FTC.

The situation may change in the near future. Some similar consumer provisions to those in the FCA have been included in the Consumer Protection Act[34] which became effective on 1 June 2005. Similar substantive provisions are thus enforced by both the Consumer Affairs Commission and the FTC. Where there is duplication, the two Commissions agreed distributing responsibilities as follows: complaints that affect only one person would fall under the responsibility of the CAC, while conduct affecting a large group of people or other businesses would become under the responsibility of the FTC. The effect of this arrangement should be to free up resources at the FTC. To the public, the situation appears confusing and only time will say if it is efficient. It would be advisable for the government to keep a close eye on developments in this regard.

Another perspective on the work of the FTC is presented in Table 4, which shows the number of completed cases over four recent fiscal years. A first observation is that the total number of cases closed varies considerably in the last five years. Secondly, the number of complaints received that dealt with issues not subject to the FTA has diminished considerably in the last five years. The Table also shows the large number of misleading advertising cases handled by the FTC.

[34] Consumer Protection Act, sections 28 to 35.

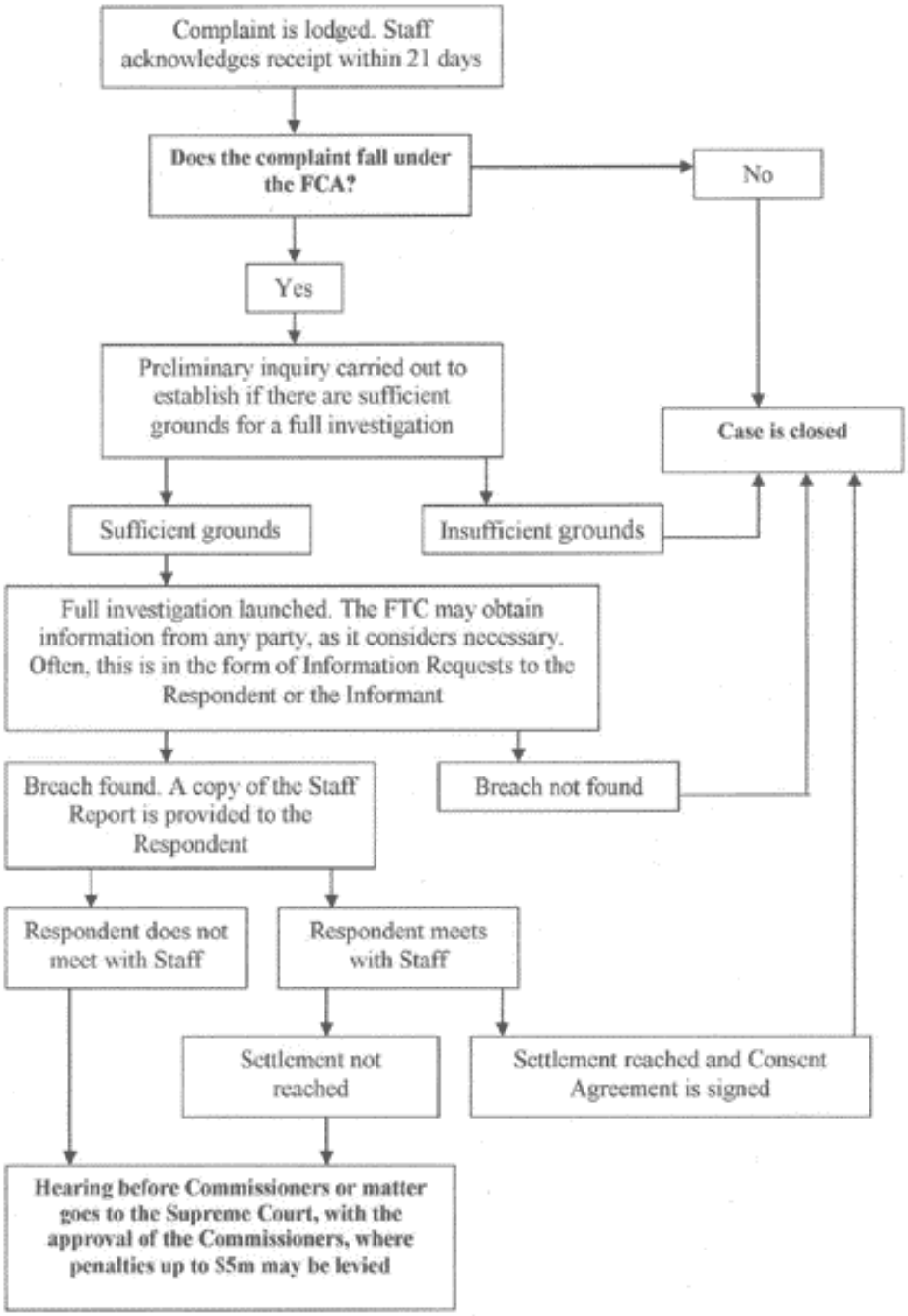
Table 4 - Cases completed in selected fiscal years

Breach/Investigation	2003-2004	2002-2003	2001-2002	1999-2000
Abuse of dominant position	1	11	6	11
Market restriction				3
Tied selling				1
Other offences against competition	7	16	12	7
Double ticketing	1		1	
Misleading advertising	205	464	131	145
Sale above advertised price		7	5	2
Application for authorization		4		1
Investigation initiated by the FTC		2		3
Requests for information/opinions	14	22	32	28
Not covered by the Act	16	63	86	147
Total	**244**	**589**	**273**	**348**

Source: FTC Annual Reports.

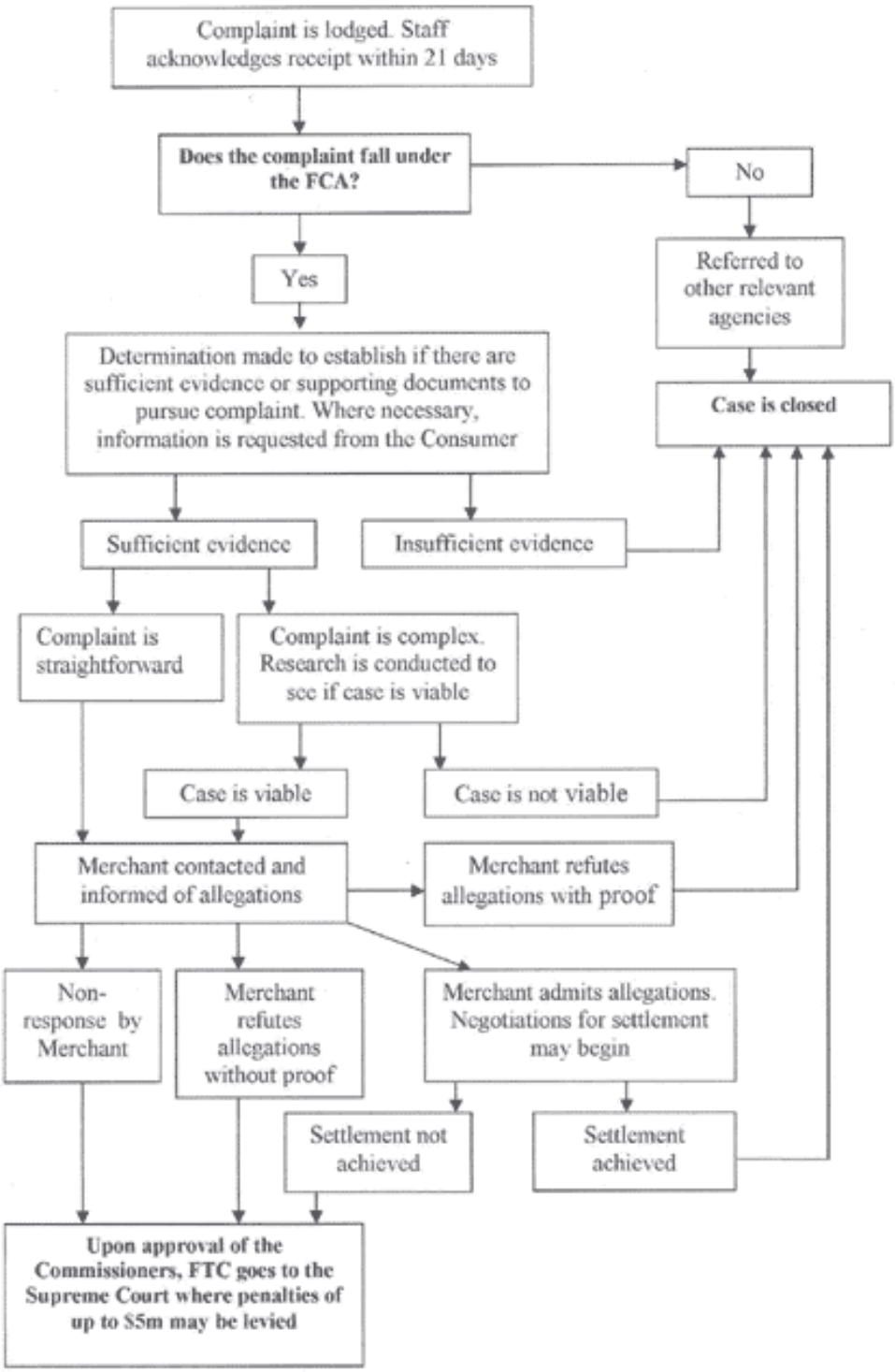
There are two distinct procedures for handling FTC cases which reflect the degree of complexity of the cases. The investigative procedure starts with the receipt of the complaint, its acknowledgement within 21 days and a determination as to whether the matter falls within the purview of the FCA. If it does, the procedures are slightly different for anti-competitive practices and consumer protection, as is illustrated in Charts 1 and 2.

Chart 1 - Investigation procedures into anti-competitive practices



Source: FTC Annual Reports.

Chart 2 - Investigation procedures into consumer affairs protection



Source: FTC Annual Reports.

With respect to anti-competitive practices, a preliminary inquiry is conducted to determine if there are sufficient grounds for a full investigation, in which case, it is launched and the formal powers of the FTC to obtain information may be used. If a breach is found, a copy of the staff report is provided to the respondent and he is invited to meet with the staff to negotiate a settlement. When a settlement is reached, a consent agreement is signed and filed in the FTC Register. When the respondent does not want to negotiate a settlement or a settlement can not be arrived at, in principle, the Commission starts a hearing or it brings the matter before the Supreme Court. As mentioned before, there have not been any such hearings before the Commission nor has there been any cases brought before the Supreme Court.

The procedure followed for the enforcement of the consumer protection provisions is similar to the previously described procedure, except that the process recognizes that there is no need to conduct a full investigation in straightforward cases where there is sufficient evidence.

What is important is that both procedures allow an opportunity for the target company to be informed of its breach of the Act and to negotiate a settlement. This definitely is the most efficient way to enforce the law, especially in a civil law context.

Table 5 is a synopsis of documentation found in the Commission's Public Register. It is unclear what exactly is reported in this register as some cases appear to have been left out, e.g. the consent agreement with Red Stripe Limited signed in May 2002 on the exclusivity arrangements reported in the FTC's Annual Report. Other matters dealing with anti-competitive conduct, called "Economic Studies" or "Investigations" in the FTC Annual Reports, have presumably been closed without requiring a Commission decision, as they are not reported in the Registry. The 2002-2003 Annual Report refers to investigations into the conduct of the Jamaica Optometric Association, The Jamaica Lottery Company, the pharmaceutical industry, or practices respecting surcharges levied on credit cards, electronic money transactions, etc. Matters that were brought before the Supreme Court, which required the Commission's approval are not reported in the Register. Falling under this category are all the misleading advertising cases filed by the Commission, as well a case filed before the Supreme Court in September 2001 dealing with the petroleum industry, FTC v Shell Company (Jamaica) Limited, concerning the distributorship agreement. The 2000-2001 Annual Report states that: "... Authorization requests were completed and recommendations forwarded to the Ministry of Industry Commerce and Technology for Spirits Pool Association, Jamaica Banana Board and Jamaica Cane Products Sales Limited". These decisions regarding authorization requests are not found in the Register either. The Register does not accurately reflect all decisions made by the Commission or approvals the Commission granted.

Nevertheless, and as incomplete as this may be, the Register clearly indicates, like previous statistics, that insufficient priority is assigned to dealing with anti-competitive conduct. It is surprising, for instance, that not a single formal case dealt with conspiracy to lessen competition, including bid rigging has been brought.

Table 5 - Public Register of the FTC

Case	Date of complaint	Subject matter	Resolution	Date of closure
Commissioners' decisions				
Super Plus Food Store	09-04-2001	AOD section 20 - Predatory pricing	Behaviour found not contrary to the Act	13-08-2001
Tank Weld Metals Ltd	28-01-2000	AOD section 20 - Predatory pricing	Behaviour found not contrary to the Act	10-08-2001
Grace Kennedy Remittance Services	NA	AOD section 20 - Tied selling	Behaviour found not contrary to the Act	30-04-2002
Telstar Cable Ltd.	08-12-1999	AOD section 20 - Predatory pricing	Behaviour found not contrary to the Act	29-08-2001
Consent agreements				
Cable & Wireless (Jamaica) Limited		AOD section 20	Remedial Consent Agreement signed	10-11-1999
Executive Motors Limited	1998	Section 37 - False and misleading advertising	Remedial Consent Agreement signed and filed before the Supreme Court.	03-03-2000
National Commercial Bank	NA	Section 37 - False and misleading advertising	Consent Agreement and penalty of $125,000 signed	13-02-2001
Blue Cross of Jamaica	NA	Section 20 - Access to electronic claim system	Remedial Consent Agreement signed	10-09-2002

Crichton Automotive Limited		Section 37 - False and misleading advertising	Remedial Consent Agreement signed	11-04-2000
Desnoes $ Geddes	NA	Section NA – vertical restraints and resale price maintenance	Remedial Consent Agreement signed	20-05-2002
Homelectrix		Section 37 - False and misleading advertising	Remedial Consent Agreement signed	31-03-1999
Restaurants of Jamaica		Section 37 - False and misleading advertising	Remedial Consent Agreement signed	14-07-1998
Stewart Auto		Section 37 - False and misleading advertising	Remedial Consent Agreement signed	20-09-1999
Sunset Beach Resort		Section 37 - False and misleading advertising	Remedial Consent Agreement signed	25-05-1999
Courts		Sections 37 – Misleading information, 40 – bargain price claim breaches	Remedial Consent Agreement signed	05-02-2001
Health Corporation Limited	19-06-2003	Sections 20 - AOD, 37 – Misleading information	Remedial Consent Agreement signed respecting section 37 conduct; other matter pending	-01-2004
Judgment in court matters				
SBH Holdings Limited		Section 37 - False and misleading advertising (Strict liability issue)	Appeal allowed, Co found guilty, and fined $2.5 millions	30-03-2004

4.3 Other enforcement methods

As indicated before, the Commission's *modus operandi* leans towards negotiated settlements over adversarial prosecutions; it thus seeks alternative case resolution whenever possible. The FTC considers adversarial court proceedings as a last resort – one it will not hesitate to take in proper circumstances. In the area of anti-competitive practices, the JSE decision means that the only available tool the FTC can use to remedy an anti-competitive situation is moral suasion. Therefore emphasis is put on voluntary compliance as a means to enforce the FCA. In this regard, voluntary compliance may result in the signing of consent agreements with the FTC.

The Commission also favours voluntary compliance by issuing advisory opinions to businesses who want to obtain the views of the Commission before adopting a business strategy that may be contrary to the Act. These advisory opinions are free.

The Commission also has recourse to codes of conduct which it develops for application to specific sectors. For example, in the telecommunications sector, a code of conduct was developed to put an end to increasing cases of misleading advertising. The FTC gathered from the high volume of complaints it received that the behaviour of the firms was often contrary to the provisions of the Act. It called meetings of the parties and, through negotiations, a voluntary code of conduct was accepted by the industry. The FTC was also involved in an elaborate code of conduct for the Petroleum Industry in Jamaica with respect to a wide range of practices in that industry.[35]

The FCA provides for private parties to recover damages for any loss they may suffer because of conduct that is contrary to the law.[36] However, this provision was used only once and the court decision is being awaited. A number of explanations were offered for this: a) the culture is such that Jamaicans will try to not settle their disputes before the courts; b) affected parties do not have enough knowledge of their rights to have the confidence to initiate legal proceedings; c) only damage can be recovered and other types of remedies, such as injunctions and cease and desist orders, are not available; and d) private enforcement is costly whereas it does not cost anything to submit a complaint to the FTC and let the FTC take care of the matter, including all related costs. Private recovery of damages is not a real alternative to enforcement by the FTC; it is rather seen as a safety valve to be used only in rare cases where the FTC would not take on a case.

The government should seriously consider amending the FCA to widen the remedies available for private parties. It should also consider modifying the cost rules to favour greater public use of private enforcement, while still guarding against frivolous court actions. The FTC can also play a role in establishing a fee schedule for the recovery of its costs in the provision of advices to the business community and in issuing

[35] Source : http://www.jftc.com/news&publications/Publications

[36] FCA, section 48.

guidelines on the use of section 48 remedy.

Finally, the Commission offers through its communication programme, guidelines, brochures, speeches, and other documentation to enhance public awareness and understanding of the law. Part 5 of this report deals in more details with this aspect of law enforcement.

4.4 Investigative tools

As described earlier, the FTC has broad powers to obtain evidence in order to carry out its investigative function. In short, it can summon and examine witnesses, request and examine documents, conduct hearings and require the production of statements of facts. It may require an authorized FTC officer to enter and search a premise, and seize documents under a warrant issued by a Justice of the Peace. These are broad powers indeed, but do not suffice in a modern economy. For example, the terms "document" and "evidence" are not defined and may not include electronic or computer evidence. There are no provisions for searches of computers which require special provisions to force the person under investigation to provide the keys or codes and assistance in the search of its computers. Similarly, there are no provisions for wiretap to obtain oral evidence often necessary in conspiracy cases. There are no whistleblower provisions to protect informants, or leniency provisions to provide an incentive for informants to divulge conduct prohibited by the FCA.

Jamaica is a very open economy and international trade is beginning to account for an increasing share of the economy. In such an environment, it is essential for the FTC to exchange information with foreign competition agencies. There are no provisions allowing the sharing of such information. Likewise, neither are there any provisions for sharing information with enforcement agencies responsible for other domestic laws.

Sharing information is also made difficult because there are no provisions in the FCA which clearly stipulate the sets of information which are confidential and which are not. However, section 8 allows the Commission to conduct hearings in private. Section 53 stipulates that the Commission may prohibit the communication of information it obtained, and makes a breach of such a prohibition an offence subject to a maximum fine of $1,600 or a maximum of two years of imprisonment, or both. The FCA contains a provision for conflicts of interest but it applies only to the Commissioners; this provision shoul, however, apply to all staff.

It would be advisable for the government to modernize the procedural provisions of the FCA to deal adequately with computer searches, to provide safeguards to whistleblowers and leniency to informants. The Act should also be amended to address the sharing of information with Jamaican law enforcement agencies and foreign law enforcement agencies. The government should also strengthen the confidentiality provisions and the provision on conflicts of interest.

4.5 International issues in competition law enforcement

The FCA does not contain any provision addressing the question of extra-territoriality. The Act states that the term "market" refers to a market in Jamaica. However, "business" is defined as including the export of goods from Jamaica, and the effect on competition includes: "... competition from goods or services supplied or likely to be supplied by persons not resident or carrying on business in Jamaica."[37]

Jamaica is participates in the work of numerous international organizations including the UN, UNCTAD and WTO. It is also a major player in the FTAA negotiations where the Executive Director of the FTC represents CARICOM on the Negotiating Group on Competition Policy.

Of particular relevance to the present analysis is the fact that Jamaica is a member of the Caribbean Community and Common Market (CARICOM) Treaty. The Caricom Single Market and Economy (CSME) is planned to take full effect for a limited number of countries in January 2006. This initiative raises questions not only regarding the necessity of harmonizing competition legislations and regulations amongst participating countries, but also of enacting competition legislation at the regional level. In this connection, the CARICOM Secretariat has prepared a draft CARICOM Competition Law based on chapter IX of the Chagnaramas Treaty. As of March 2005, this draft bill had been approved by the Legal Affairs Committee and all Member States; Barbados, Jamaica and St Vincent and the Grenadines have still to take action to adopt it in their respective legislatures. In many respects, this competition bill resembles Jamaica's FCA.

The coming into force of the CSME will make the movements of goods, capital and persons more free, or without restrictions. In making assessments on the impact of a business practice on competition, the FTC will have to take this factor into account. In as much as markets are regional, competition should also be increased to the benefit of consumers.

4.6 Agency resources, caseload, priorities and management

The FTC is a relatively small organization and resources, expertise and funds are not always readily available. In addition to the five Commissioners, the FTC currently has 17 members of staff, the total number of staff would rise to 22 with unfilled posts. Chart 3 provides the Commission's present structure. At present, there are two economists, two lawyers, three complaints officers and one research officer whose job is to carry investigations and enforce the Act. The economists and research officer almost exclusively deal with anti-competitive practices, while the other staff are responsible for consumer protection measures. Antitrust expertise is a rare commodity in Jamaica, but the FTC must make filling the vacant positions one of its highest priorities.

It is recommended that the Commission make every effort to fill the vacant positions.

[37] FCA, section 2.

This is easier said than done. There is insufficient expertise in Industrial Organization (IO) in Jamaica. The Economics Department of the University of West Indies in Kingston does not teach IO or competition law; these subjects are only briefly touched upon in commercial law courses at the Law School. In essence, the FTC has to select possible candidates for its job openings among economists with a background in micro-economics. From there, expertise has to be acquired on the job. Fortunately, a Professor who has specialized in IO is expected to join the Economics Department in September 2005. It is expected that an IO course may be offered in the near future but most probably not before the 2006-2007 academic year. This development represents a great opportunity for the FTC to develop a close relationship with the University.

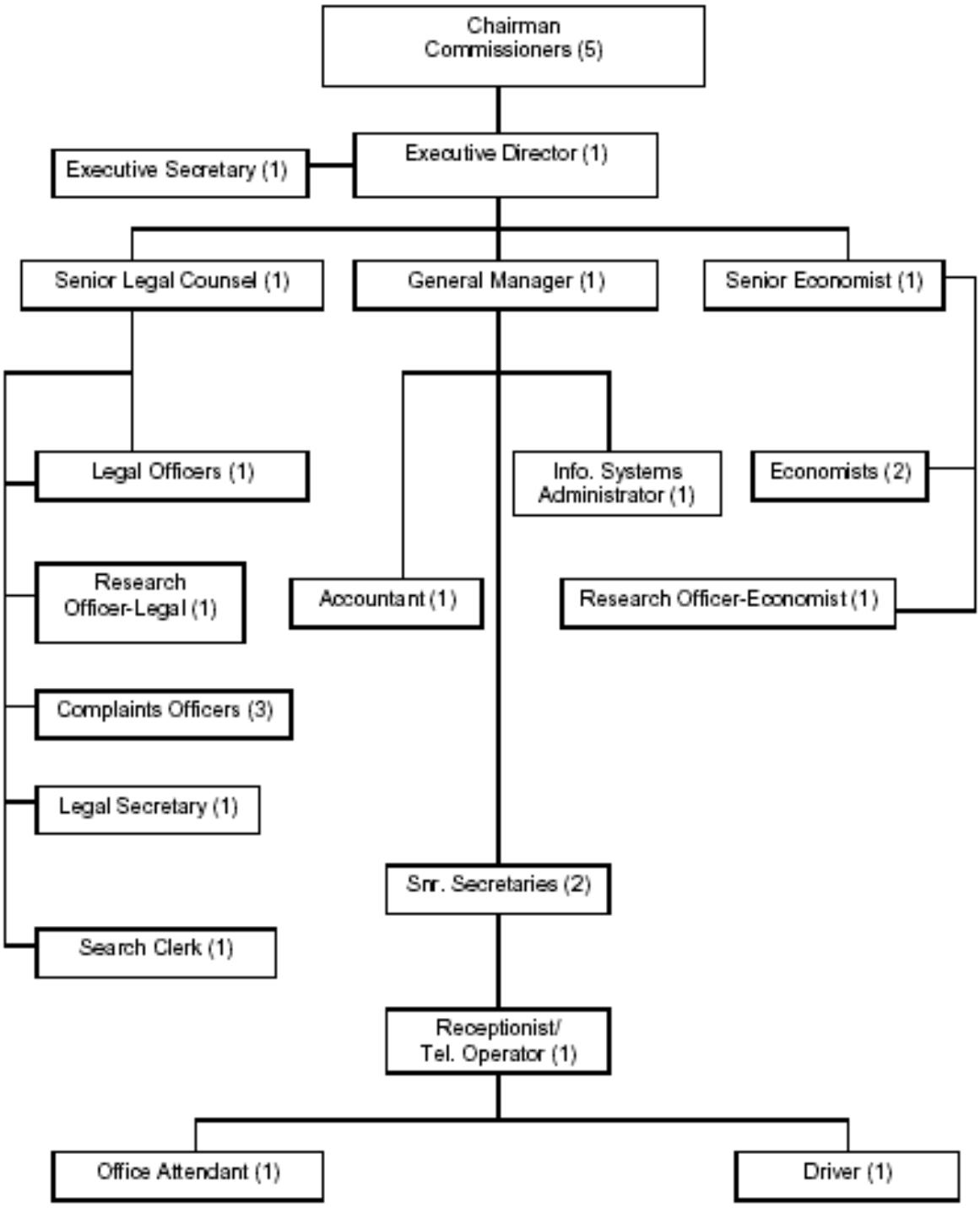
The relationship with the University could take different forms. The FTC could participate in the preparation of the curriculum; it could offer special lecture on concrete case studies; it could offer summer employment or part-time employment to students, articling students or professors; could participate in bringing in visiting professors; and could contract some research to the university, etc. In short, this association with the university could help to develop a pool of expertise which the FTC could recruit from.

The FTC should consider developing a close relationship with the university, and put in place a variety of programmes relating to antitrust law and economics.

Another avenue for enhancing the expertise of the FTC staff would be through an exchange programme with competition law enforcement agencies in other countries. This could either be a two-way exchange, or a staggered exchange, or even a one-way stage for a Jamaican to gain experience in working abroad. The challenges in setting up such a programme are numerous, and could include: finding a willing counterpart country; finding volunteer candidates; agreeing on terms of the exchange or course; arranging for all the various security clearances and work permits; and agreeing on work and training to be performed and funding of the programme.

The FTC should consider setting up an exchange programme to enhance its expertise.

Chart 3 – Fair Trading Commission Organizational Chart



The Commission's budget is also limited and only increased from $524,972 in 2001 to $597,425 in 2004. About 80 per cent of expenses are for salaries and 10 to 15 per cent for rental of building, equipment and machinery and public utility services. A survey of the budgets of competition authorities in developing countries indicates that their average budget varies from 0.06 to 0.08 per cent of their government's non-military expenditures. If applied to Jamaica, this ratio represents an amount between $1,966,666 to $2,616,666 for the fiscal year 2004-2005.[38]

There is a need for the government to re-evaluate its commitment to competition policy and to the extent possible, additional funding should be allocated for the FTC.

The FTC can itself try to recover some of its operation costs. It is customary now for the FTC to include in its consent agreements a clause to recover its costs incurred in the case investigation and the preparation of the consent agreement. The FTC should consider imposing fees for other services it provides, namely the issuance of advisory opinions and authorizations. The FTC lumps together in its statistics general information requests and advisory opinions requests. The FTC has an obligation to inform the public on competition law and policy, but when it provides advisory opinions, it provides a service in competition with private law firms. The FCA has been active since 1993, and the time has arrived for private firms to pay for any opinions they obtain on whether a market practice they are thinking of adopting is contrary to the FCA. The FTC does not appear to have formally issued any authorizations, but annual reports refer to authorization requests and recommendations having been given. The FTC should also treat these authorization requests in a formal manner and impose a fee to recover costs.

Presently, the FCA does not contain any merger provisions, let alone any pre-notifications. If merger law was passed and pre-notification of merger transactions was rendered mandatory, the FTC could impose a transaction fee. Similarly, it could offer "merger clearance certificates" and recover its costs for their issuance.

In sum, the FTC should extend its cost recovery fee scheme applicable to consent agreement to include authorizations, advisory opinions and eventually merger pre-notifications.

The FTC should be where expertise resides in antitrust law and economics in Jamaica. In order to maintain this expertise and be fully effective, the FTC needs to keep abreast of developments in the antitrust world. In order to do so the FTC needs access to indispensable reference material and acquire online access to library services or specialized journals. Recently, due to lack of funds, registration to such services, although shared with others, had to be abandoned.

A review of reference material available to the FTC should be conducted with a view to ensuring it has the necessary tools to function properly.

[38] This calculation is based on the government's non-military expenditures of $3,274,620,000 over the same period.

The statistics provided earlier show that more than half of enforcement resources are assigned to enforcing the FCA's consumer protection provisions. It is normal that such a high proportion of enforcement activity should be spent on this area of competitive activity; however, after more than a decade, a shift in enforcement priority is needed. This is even more so because the Consumer Protection Act, which has just been passed, contains a series of provisions on misleading advertising and representations duplicating the FCA provisions.

To handle the large number of complaints they receive in the area of consumer protection, other countries have put in place a simple procedure. This consists in acknowledging receipt of the complaint; offering no certainty that the matter will be pursued by the agency and inviting the consumer to seek redress himself by filing for recovery of damages. The same recovery of damages provision exists under the FCA in section 48. In Jamaica, the complainant may also be invited to file his or her complaint with the Consumer Affairs Commission. There are also two consumer associations which could be asked to provide assistance if the government would agree to fund part of the costs of the civil suits for recovery of damages.

There are thus a number of alternatives which would allow full flexibility to the FTC to prioritize cases and only select a few cases, notably those originating from complaints of competing businesses, which raise serious competition issues. To give the proper signal to the public of its new orientation, the FTC should consider changing its reference to these provisions from "Consumer Protection" to a better descriptive term of "Unfair Business (Trade or Market) Practices."

The FTC should concentrate its consumer protection activities on cases that are clearly within its main mandate of promoting competition, i.e. on cases that have a significant impact on competition in the market.

If this implicit test was applied to select cases, the level of resources needed for consumer protection would be reduced, freeing resources for the enforcement of the anti-competitive practices provisions of the FCA. In this respect, there have been very few cases formally handled and none dealing with conspiracy and bid rigging. This is somewhat of an anomaly after a decade of competition law enforcement. Either the tools are not adequate to handle these types of cases, and recommendations to strengthen the FTC in this area have been proposed earlier, or the priorities of the FTC need to be shifted. At present, more resources are assigned to consumer protection function than to the enforcement of competition provisions. This needs to be corrected because the provisions on conspiracies, abuses of dominance and mergers are fundamental to the well-functioning of markets.

The FTC should shift its enforcement priorities and assign more resources to the enforcement of the competition provisions. It should also make it a priority to uncover conspiracies, including bid rigging offences and initiate prosecutions.

It is noteworthy that the FTC's Executive Director has put in place the 'FTC Case Selection Criteria' which provides an effective case screening mechanism; this is an example of an initiative that should be continued. It nevertheless does not replace the need for decisions to be made on a case-by-case basis taking into account a range of factors outside the reach of a straight mathematical case selection system.

Another anomaly is that the FCA does not contain merger review provisions. The reasons supporting the addition of merger provisions in the FCA are discussed elsewhere in this report. Experiences from around the world would seem to indicate that not many of the mergers that are likely to take place in Jamaica would raise competition concerns; however, the FTC should give a high priority to those cases that do raise such concerns. When the legislation is amended and merger review is provided for, it will be a high priority.

Until amendments are introduced to deal with anti-competitive mergers, the FTC should conduct studies and build evidential support for the introduction of merger legislation.

The general public holds conflicting views on the FTC. Some say that, given its limited resources and the constitutional challenge, it is doing the best it can. The comment that more emphasis and resources should be put on the enforcement of anti-competitive practices provisions was also expressed during the fact-finding mission. The question of the FTC's lack of expertise was raised, but it was also recognized that it played a very useful purpose. Its role in correcting misleading advertising and its impartiality were praised. One public representative concluded that the FTC is not a very effective agency as: it is not well organized; does not provide for informal discussions of cases; its public communications are not effective; and it lacks expertise. However, a new entrant in a dynamic market praised the FTC for assisting in preventing misleading advertising and having developed a voluntary code of conduct for the industry. A law professor considered that the duplication of agencies, whose roles are all to protect the public, such as the FTC, FSC, and CAC lead to inefficiencies. This was not a scientific survey, but *ad hoc* expressions of public comments. No hard conclusions can thus be drawn from these comments except maybe that, at least, the FTC should improve its communications and work on its public image.

5. COMPETITION ADVOCACY

Competition policy is a broad term that includes all the economic policies of a country designed to promote competition. It includes trade liberalization, sector specific regulation, state aids, privatizations, industrial policy, etc. Competition law is one element of this set of policies, albeit the most important one. Enforcement of competition law is mostly aimed at private sector restraints of competition, including government enterprises when they are engaged in business activity. It is important for an antitrust law enforcement agency not to limit its activities to private sector restraints to competition, but to use advocacy to influence the government's other policies, which have a bearing on competition. This is often referred to as public sector advocacy.

Another facet of the advocacy role of competition agencies is geared towards the dissemination of information to enhance awareness of competition law. In developing economies and economies in transition, this often implies affecting a cultural change. The Jamaican Parliament recognized that role and provided in the FCA that:

> "(2) It shall be the duty of the Commissioner—
>
> (a) to make available—
>
> (i) to persons engaged in business, general information with respect to their rights and obligations under this Act;
>
> (ii) for the guidance of consumers, general information with respect to the rights and obligations of persons under this Act affecting the interests of consumers;
>
> (b) to undertake studies and publish reports and information regarding matters affecting the interests of consumers;
>
> (c) to cooperate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act."[39]

5.1 Competition advocacy and regulatory policy

The FTC fully understands its advocacy mandate and allocates resources to it. Public sector advocacy was certainly in the line of sight of Parliament when it passed the legislation. The FCA actually specifies that: "subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown."[40] But unlike the laws in Canada, Korea or Italy, the Jamaican law does not give a specific mandate to the FTC to engage in competition advocacy. For example, the only link to public sector advocacy in the FCA is found in one of the functions of the FTC, which is limited to: "... advise the Minister on such matters relating to the operation of this Act, as it thinks fit or as may be requested by the Minister."[41]

In recognition of the importance of the advocacy role of the FTC, the Act could be amended to empower the FTC to provide advice not only to the Minister, but to the government as a

[39] FCA, subsection 5 (2).
[40] FCA, section 54.
[41] FCA, paragraph 5 (1) (c).

whole and its various departments and agencies.

When it was founded the FTC spent a considerable amount of time and effort trying to influence the various sector-specific regulatory bodies to take into consideration competition principles. With the passage of time, these regulatory bodies became non-functional and government authorities became more receptive to arguments and proposals advanced by the FTC. The FTC shifted priority towards enforcement activity while advocacy is still considered a high priority.

For instance, the FTC raised with the Registrar General's Department the numerous complaints it was receiving on the pricing of some of its services to the public. The Department agreed to put measures in place to ensure it complied with the misleading advertising provisions of the Act. Another area of complaint related to the years of car models; the FTC raised the issue with the government and the Island Traffic Authority has now been mandated to deal with these concerns.

The relationship of the FTC with some regulatory bodies appears to be working well. The Intellectual Property Office does not hesitate to refer to the FTC complaints it receives which fall under the responsibility of the FTC. Similarly, the Office of Utilities Regulation (OUR), which deals with telecommunications, water and sewage, electricity and public transportation, also refers competition matters to the FTC. Moreover, in the conduct of its consultations, it will call upon the expertise of the FTC. With respect to telecommunications, this coordination of activities is dictated by law:

> "Where after consultation with the Fair Trading Commission the Office determines that a matter or any aspect thereof relating to the provision of specified services
>
> (a) is of substantial competitive significance to the provision of specified services; and
>
> (b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,
>
> the office shall refer the matter to the Fair Trading Commission."[42]

The relationship between the FTC and the Financial Services Commission (FSC) revolves around finding a common ground between the FCA and the legislation under the authority of the FSC. The FSC raised the issue of the supremacy of legislation as it applies to financial services. In essence, and very briefly, for prudential reasons and for the protection of sensitive information held by financial institutions, the FSC is arguing the supremacy of the Financial Services Act. The FTC argues, on the contrary, that competition law is a general law of general application and, as such, it should have application to the financial services sector as well.[43] While these are fundamentally opposing views, there are areas of agreement between the two agencies; for example, both agree that the unfair practices provisions of the FCA have application to the financial sector. But, when it comes to abuses of dominance, agreements or eventually mergers and acquisitions, their views are conflicting. The only jurisprudence in Jamaica on the

[42] Telecommunications Act (Act 1 2000), Section 5. http://www.our.org.jm/pdf/telecomsact.pdf

43 The FTC issued a report on the matter, "Competition Policy and the Financial Sector", 13 October 2004. Source: http://www.jftc.com/news&publications/Speeches/.

issue of overlapping legislation in the field of competition is the Supreme Court's decision in JSE cases, where it exempted the JSE from the ambit of the FCA. This decision serves as a guide in the discussions between the two agencies. Fortunately, both agencies understand that it is preferable to find a mutually agreeable coordination mechanism rather than to wait until a challenge is brought before the courts for adjudication.

Privatisation is another traditional area of interest for competition agencies. Their role is usually to assist in: putting in place a set of bidding rules that will favour competition; providing advice from a competition point of view on the successful bidder; and preventing or investigating possible bid rigging infractions. Liberalization of government-owned enterprises or assets is nearing completion in Jamaica.

Telecommunications

At present, the telecommunications sector is fully liberalized. Further to Jamaica's signing of the WTO Agreement on Basic Telecommunications Service in 1997, the government initiated negotiations with Cable & Wireless and reached an agreement in September 1999 to remove, on a phased basis, the company's monopoly over domestic fixed line and international voice telephony. Since then, competition was gradually introduced in all sectors of the telecommunications industry culminating in March 2003 with the opening up of the international market to competition and thus with the full liberalization of the industry.[44]

One of the stated objectives of the Telecommunications Act is to promote competition. The introduction of competition and new technology has had a marked effect on the market. There are at present three mobile telephone providers actively competing in the market. Since 2002, the number of subscribers to fixed telephone line services has fallen while the number of subscribers to mobile services has been rising very fast. In 2003, it was estimated that there were more than three times more mobile telephone subscribers than fixed-line subscribers.[45]

The OUR has the responsibility to enforce the Telecommunications Act. In the conduct of its operations, which normally lead to regulatory decisions, the OUR holds consultations, which other countries may call hearings. In the last few years, a variety of matters, including revisions to the price cap regime, rate rebalancing, interconnection fees, and the issuing of licences in various segments of the industry, have been the subject of such consultations. Internet access through the cable companies is also regulated by the FSC. The FTC is a participant to some of these proceedings.

Electricity

The sole commercial distributor of electricity in Jamaica is the Jamaica Public Service Company Limited (JPS). The Minister exempted JPS from the application of the FCA when the company was privatized in 2001; this meant that the FTC's role has been limited to that of advocacy. JPS accounts for around 75 per cent of all electricity generation; the remaining 25 per cent is accounted for by three independent power producers. The bauxite and alumina industries, as well as

[44] The Telecommunications Act at section 78 provides the details of the three phases of liberalization of telecommunications.

[45] OUR, Annual Report 2003-2004, page 22.

the sugar industry, have their own captive power generation system.

One of the main challenges of the electricity sector has come from its quasi sole reliance on fuel for electricity generation. Recent fuel price increases have provided a clear signal to Jamaica that other sources of energy will have to be found for electricity generation in the near future. The government is looking at Liquid Natural Gas as a substitute for fuel and offshore oil explorations are carried out in a bid to reduce Jamaica's exposure to fluctuations on international oil markets.

The electricity industry is subject to regulation by the OUR under the Electricity Act. Pricing is regulated under a price cap regime. The conditions of privatization included a three-year exclusive right to JPS to add capacity. This exclusive right ended last year, and from now on, any addition to capacity has to go through a competitive bidding process in which JPS could be a bidder. Hopefully, the FTC will be called to play an important role in that process.

Banking and Financial Sector

Following unstable conditions in the mid-1990s, the financial sector was re-organized. The Bank of Jamaica (BOJ) is the country's central bank and, in that capacity, it has supervisory powers over deposit taking institutions.[46] The Financial Service Commission supervises non-bank institutions such as the JSE, insurance companies, securities dealers, pension funds, etc. At the end of 2004, there were 65 deposit taking institutions. Concentration in the banking sector is relatively high with the five largest banks accounting for about two-thirds of deposits.[47] The Minister of Finance in consultation with the BOJ gives licences to operate banks.

All financial institutions are subject to the FCA like any other firm in Jamaica. The FTC successfully convinced the banks to include a fact sheet using reader-friendly language in their loans to consumers. Moreover, the banks agreed to add a notice indicating whether their posted interest rates are just opening rates and subject to variations during the day. If a bank fails to post this notice, it should make available the posted rate to consumers throughout the day. The banks also agreed to indicate any additional charges it would add to prevailing interest rates.

In conclusion, the interface of the competition environment with the regulatory environment is multi-faceted, and governments should consider them as a whole in designing their legislation. For example, a comprehensive approach would include the following four elements:

[46] It is noteworthy that the Bank of Jamaica did not find the time to meet with the mission representatives.

[47] CARICOM Secretariat, Jamaica Country Brief, December 2004, page 31.

Interface with the sector-specific regulatory environment:
A holistic approach

A. Powers of the competition agency:

- The agency should have the power and mandate to provide broad policy advice to the government, departments and agencies.
- The FTC should be given the legal right to make representations and be a party in any proceeding of a regulatory board or agency to promote competition. The FTC should be given the same right as other parties to appeal the decisions of the regulatory body when such rights exist.

B. Obligations of the sector-specific regulators

- An obligation should be imposed on all regulatory bodies to make decisions that are least restrictive of competition while fulfilling their statutory mandate.

C. Regulated conduct defence under the competition law

- Regulated activity should be exempt from the application of competition law only when the following conditions are satisfied:
    1. the activity is actively regulated by a regulatory body;
    2. the activity is regulated under a valid legislation of Parliament;
    3. the regulatory body is not surpassing the powers conferred to it by the law;
    4. the regulatory body has not been mislead or frustrated by the persons being regulated; and
    5. the regulatory body is independent i.e. it is not composed of representatives of the persons or group of persons whose conduct is subject to the regulation.

D. New regulations

- Any new regulation proposal should include a competitive impact analysis prepared by the FTC or subject to its review and comment.
- Any new regulation should have a sunset clause.

Leaving the interface between the competition law and sector-specific regulation and law to be settled in court battles is the most costly alternative. To do so would be a time consuming and costly process. Pending resolution, the legislation is at a standstill and quite often un-enforceable, thus depriving the public of their benefits. Moreover, the outcome is uncertain, and the government may have to amend the legislation in any event. The best approach is for governments to take a holistic approach, as described above, and decide in advance how the interface will work. For Jamaica, at this stage, this will require legislative amendments. That process too takes time. In the interim, the FTC should negotiate, with sector-specific regulators, and formulate Memoranda of Understandings (MOU) to address the issue and coordinate the activities of the agencies to avoid legal battles.

The government should consider adopting a four-prong policy approach to address the interface of the FCA and sector-specific laws and regulations:

- **enhance the powers of the FTC to provide policy advice and make interventions before regulatory bodies;**
- **impose an obligation on regulatory bodies to make decisions that are least restrictive of competition;**
- **determine in the FCA the conditions for regulated conduct to be exempt from the FCA; and**
- **adopt a policy that any new regulation proposal should have a competitive impact analysis and a sunset clause.**

5.2 Competition advocacy and public education

Although the FTC believes that it is devoting considerable effort in informing the public, a recurrent complaint from a variety of sectors is that there is not enough information available on the FTC, on the FCA and on competition policy in general.

A quick review of the Commission's Internet site reveals that there is an abundance of information for businesses and consumers. As long as businesses and consumers are connected to the Internet, information can continue to be disseminated using this media. Unfortunately, not everyone has Internet access or the required skills to use it properly. All of this information should be available in printed form such as booklets, handouts, pamphlets, magazine or specialized reviews. At present it is not, thus depriving many consumers and small businesses of valuable information on their rights and obligations.

All of the substantive information on the FTC's website should be available in printed form.

The FTC's information material need to be checked for accuracy and harmonized. For example, thresholds for the application of the law are sometimes not consistent throughout the publications. Also, because of the duplication and contradictions in the law, information material is too general or does not reflect the wording of the law. In this regard, we have mentioned the treatment of cartels and horizontal agreements, the treatment of tied sales, etc. For a specialized audience or the business person who wants to know precisely what his rights or obligations are, this information material is not accurate enough.[48] For example, the discussion of the market definition does not raise the issue of the non-applicability of the hypothetical monopoly approach in abuse of dominance cases because of the so-called "cellophane fallacy". In its public benefit guidelines,[49] the FTC takes the "total welfare approach" and does not consider distributional effects but both exemptions provided in the horizontal agreement and the abuse of dominance provisions require that consumers be allowed: "... a fair share of the benefits."[50] In its "Guide to Anti-competitive Practices", the FTC specifically states that if benefits accrue only to shareholders, the

[48] Another example is the explanation for section 21 (1) where the test is: " ... has had or is having the effect...." This is interpreted as: "... has had, is having or is likely to have..."

[49] FTC, Guidelines to the Analysis of Public Benefits and Detriments, May 1998, *inter alia*, pp. 9 and 10.

[50] FCA Paragraphs 17 (4) (a) and 20 (2) (a) (ii).

benefits would not meet the test.[51] The test of public detriment under part V applies simultaneously with the exemptions in the sections themselves. Once this exercise is over, the public is uncertain as to what is the meaning of the law, and the question of whether the "public detriment test" will override the "passed on to consumers" test remains unanswered. There is a need to provide to the public precise information.

Thus, in addition to general information, the FTC should develop and disseminate a clear, precise and non-contradictory explanation of the various provisions of the law.

The FTC is the seat of knowledge in Jamaica with respect to antitrust economics and law. In this capacity, it has taken measures to inform and educate various interested parties in competition law. For instance, it organized some training sessions for judges to ensure they would have sufficient basic knowledge to adjudicate cases. Members of the FTC made presentations to groups of business people, lawyers, among others. The FTC organizes an annual consumer day during which the public can quiz the staff during Q&A sessions and receive information bulletins. In 2000, the FTC instituted the Annual Shirley Playfair Lecture Series in memory of a former chairman of the Commission. It also launched an annual newsletter to inform the public of major developments in the area of competition law. Finally, the FTC issues press releases when appropriate.Ina nutshell, considerable efforts are made to educate and inform the public. Education is a never-ending project, particularly in the area of antitrust law and economics, as it has to be accompanied by cultural change. These efforts of the FTC should be continued. It is not clear, however, whether the FTC has developed a strategic plan for educating and informing the various interested sections of the public. The FTC may, perhaps, be better off targeting more specialized audiences. With time and continuous effort, complaints that there is not enough information available on the FTC, on the FCA and on competition policy in general, should diminish.

In any event, the FTC should undertake a comprehensive review of its communication programme and develop a strategic approach to its public communications.

6. FINDINGS AND POSSIBLE POLICY OPTIONS

The report analyses in detail Jamaica's competition policy and law, the institutions responsible for their application and enforcement methods and priorities. Numerous recommendations have been made with the view to enhancing competition in Jamaica. At the conclusion of this exercise and following the review by peer countries, Jamaicans will have to develop a strategy establishing priorities, and turn these recommendations into an action plan.

There are four axes of reform, for which recommendations are made, that could form the basis of a plan of action. The first axe is a legislative review. After more than a decade after its enactment, the Fair Competition Act has revealed serious flaws in its design and it is in need of a major policy review and legislative overhaul. The second axe of reform has to do with an important shift in the enforcement priorities of the Fair Trading Commission towards an increased

[51] FTC, The Fair Trading Act: A Guide to Anti-competitive Practices, pp. 4 and 5.

enforcement of the anti-competitive practices provisions of the Act. Third, the transition from an economy based on state-owned enterprises and regulation, to a free market economy and private enterprise represents a major change and needs to be accompanied by cultural change. This process is still in progress and there are considerable doubts as to the benefits of that transition. Conducting studies and disseminating information in this regard is the third axe of the recommended reform. The fourth axe is the necessity to build capacity in the FTC, the judiciary, the academia, the legal community and other sectors of the public in the area of antitrust law and economics.

1. Legislative review:

The most important challenge that the FTC faces is certainly its own structure, which was found by the Appeal Court to be contrary to the principles of natural justice. This judgement has had dire consequences on the FTC's ability to enforce the anti-competitive practices provisions of the Act. The FTC did not have a choice but to revert to moral suasion and voluntary compliance to fulfil its mandate. Every competition agency in the world would agree that these tools are insufficient to do a proper job.

The judgement, which restrained the activities of the FTC was rendered in 2001 with major debates continuing over fundamental disagreements on how best to resole the problem. We have briefly reviewed five alternatives:

a) Establishing a Competition Tribunal;
b) Adding firewalls in the current legislation;
c) Establishing voluntary firewalls without legislative review;
d) Bringing all case to the Supreme Court;
e) Creating a "Super Tribunal" to hear competition and other commercial cases.

Legal and procedural expertise is an absolute necessity in designing a system that will meet the test of natural justice and resist future constitutional challenges. At their early stage, competition laws of all countries had to face constitutional challenges. Experience of the Commonwealth countries, however, would be more relevant as the judicial environment and jurisprudence would be similar. Jamaicans have the opportunity to utilize this experience as a reference to decide which option is best suited for them. What is important is that the problem should be resolved in the very near future so that competition law is rendered effective again.

Another important legislative issue that needs to be addressed is the lack of merger and acquisition provisions in the FCA. Although contemplated in the 1991 proposal these provisions were never enacted. As a consequence, Jamaica does not have any legislative provisions setting up a framework to review and make decisions on whether a proposed merger, domestic or foreign, is against the public interest of having a competitive economy. *Ipso facto*, Jamaica does not have any provisions to remedy anti-competitive mergers and acquisitions i.e. to block them or to impose conditions to ensure that they are in the public interest of the nation.

In designing the merger provisions, a number of decisions will have to be made, including:

- what will be the definition of the terms "mergers" and "acquisitions";

- what competitive test will be applied;
- what factors will be considered in determining the competitive impact;
- will efficiency gains be treated as a factor or an override;
- if the total welfare standard be used;
- what criteria will be used to determine if a firm is failing;
- will there be a pre-notification mechanism, if so what will be the threshold and what will be the fee;
- will firms need to obtain authorizations before merging;
- what will be the remedy, i.e. behavioural, structural or both.

Writing merger law is very demanding because it requires making important policy decisions and also because it requires taking into account the legal and regulatory environment in which mergers take place, such as stock exchange regulations and practices, bankruptcy legislation, etc. It also involves understanding in a very practical manner a number of technical aspects underpinning economic principles. Jamaicans would benefit enormously from the international experience of developing and developed countries in this regard.

Clarifying, in the FCA itself, the interface between the FCA and other laws and regulations is another element of the recommended legislative reform. In this regard, it will be much less costly to amend the FCA than to wait until challenges are brought and settled before the courts. Considering that the Appeal Court exempted the Jamaica Stock Exchange from the FCA, it is possible that firms in other sectors, subject to legislation or regulation, may also be exempted, such as electricity, water, energy, banking, insurance, telecommunication, etc. If all these sectors were exempted, the effectiveness of the FCA, and competition policy in general, would be compromised. What is proposed is a holistic approach which would give statutory powers to the FTC to make representations, or to intervene before regulatory bodies; would impose an obligation to the regulating body to make decisions least restrictive of competition; would specify the conditions for regulated conduct to be exempt from the FCA; and would impose an obligation on new regulation proposals to include an impact statement and a sunset clause.

There are numerous duplications and some contradictions in the FCA, which create uncertainty and lead to contrary interpretations of the law. This report has highlighted a few instances with respect to agreements, tied sales, authorizations and others. The law needs to be revised with a fine tooth comb to ensure that it is consistent and clear on what conduct is acceptable and what conduct is reprehensible, this is needed in order to ensure that the law is to be adhered to.

Finally, a discussion has to take place on the tools available to the FTC in the exercise of its powers. No provisions exist on wiretaps, on confidentiality, on the protection of informants and leniency, and on telemarketing. The Act does not provide for the FTC entering into agreements with other agencies to exchange information. With the modernization and globalization of the economy, the FTC should, at the very least, have the required tools to do its job.

Many observers have commented that the FCA is not clear. The duplication of legislative provisions and sometimes contradictory provisions contribute to the confusion. There are two ways to go about

enhancing clarification: one would be to amend the law to make it clear what conduct is prohibited and under what test, and the other would be for the FTC to adopt clear policies stating which circumstances will lead to a conduct being challenged and under which specific provision. If amendments are contemplated to fix the constitutionality issue and provide for merger law, tidying up of the law to remove duplicate or contradictory provisions can be carried out at the same time.

A considerable amount of work needs to be done to prepare alternative draft legislation for discussion, it involves obtaining Cabinet approval, setting up a consultation process with interested parties, building a consensus and enacting the amendments. Inside and outside expertise will be required.

Finally, one might question whether it is worth embarking on the exercise of revising the legislation considering that it may be enacted at the CARICOM level. Based on the limited information available, it remains in doubt whether CARICOM has the power and the effective tools and machinery to enforce competition law. Nevertheless, as Jamaica is a major proponent, revising the Jamaican law is not wasteful as it can serve as a model for future CARICOM legislation.

2. Major shift in priorities of the FTC

It is clear that, at present, too much emphasis and resources are being placed in the so-called "consumer protection" provisions of the FTC. This may be due in part to the inability of the FTC to operate normally due to the JSE decision of the Appeal Court. In the early days of its existence, it was expected that the FTC would turn to consumers to obtain support for its programme but, after a decade of enforcement in a changed environment, more than 50 per cent of resources are still allocated to consumer protection. Recently, the government enacted the Consumer Protection Act which duplicates the misleading advertising provisions of the FCA. The signal is clear: the government wants the FTC to enforce its consumer protection provisions where there is a completive impact, leaving cases of individual consumer redress to the Consumer Affairs Commission. In this connection, the FTC should start referring to these provisions as the "unfair business practices provisions", and it should give more weight to business complaints in this area.

It is also somewhat of an anomaly that not a single conspiracy case has been brought forward by the FTC. Enforcement should be geared towards the three cornerstone provisions of competition legislation: conspiracies, abuse of dominance and mergers. As there are no merger provisions, the FTC's mandate is to develop the evidence and analysis in support of such provisions and provide the necessary advice to the government to ensure that the law is up to international standards.

This shift of priorities affects the government as much as the FTC. The FTC's budget is well under the internationally-accepted standard of 0.05 to 0.08 per cent of government expenditures, not including military expenditures. While the government prioritizes funding of the FTC, the latter could take measures to recover some costs for services it provides to the public, especially respecting its advisory opinions, authorizations and merger pre-notifications. When fees are

required, the public is justified to expect a guarantee of performance. This system of fees and standards of performance will have to be developed requiring considerable expertise drawn from international experience.

3. Policy goals and cultural change, improved communications

Various sections of general public have complained that there is insufficient information available on the FTC, the Act and competition policy in general. Moreover, there is a degree of scepticism on the benefits that the free market economic system can bring to Jamaica. For instance, when electricity was privatized, the Minister exempted the Light and Power Company from the application of the FCA. Recently, the government imposed import duties on cement thereby protecting the local monopoly from foreign competition and depriving the public from cheaper cement. As justified as they may be, these actions of the government brought fuel to those arguing the virtues of the old system of government controls and ownership.

A two-pronged approach is recommended. The FTC should conduct studies on the benefits of competitive markets primarily using domestic experience, complemented with international experience. Theses studies should be kept current and disseminated widely in the country. The FTC should also fine-tune its communications approach, as more precise and specialized information is required. In order to increase its public communication effectiveness, a communication strategy should be developed identifying themes, target audiences and proper tools and materials to disseminate the information.

4. Capacity building

Capacity building is another area that this report highlights as an area of concern. The FTC is short-staffed in part because antitrust expertise is rare in Jamaica. Industrial organization is not taught at the University of West Indies and competition law gets only a quick mention in commercial law courses at the law faculty. The judiciary has received some, although limited, training through the FTC advocacy programme. Private law firms have limited expertise in competition law and often have recourse to experts, lawyers or specialists, from abroad when they have to deal with large complex cases.

The objective of the reform of competition policy should have an important capacity-building element. The FTC is where the expertise in antitrust economics and law should reside. In order to meet that objective, a strategy should be developed to establish close links with the University of West Indies, especially its economics department and the law faculty. This relationship could take the form of a partnership whereby the staff of the FTC could participate in giving some lectures in IO or at the law faculty; professors could be given contract work on cases, or they could be retained on a part-time basis. Similarly students could be offered part-time, or summer, employment, etc. The FTC could enter into partnerships to invite professors from abroad to give lectures at the University and organize conferences for targeted audiences. In sum, the objective would be to develop and maintain the expertise of the FTC through linkages with the University and extend it to specific sectors of the public.

Developing a close relationship with other competition law enforcement

agencies is another vehicle which should be encouraged to assist in building expertise. An exchange programme for staff would enable the FTC to get first class on-the-job training. Last year, the FTC experienced the benefits gained from participating in the New Economy Project offered through the United States Agency for International Development. Taking advantage of the visit of international experts, the FTC opened in a collegial way the training sessions to other government departments and agencies, universities and the private sector.

In conclusion, after a decade of competition law enforcement, Jamaica faces challenges – even if in some way unique to the country – are also experienced in other developing countries. For each of the axes of the proposed reform, a discussion of international experience would be of incommensurable assistance not only to Jamaica, but to other countries experiencing a similar need of reform.