

**UNITED NATIONS CONFERENCE ON TRADE AND
DEVELOPMENT**

**VOLUNTARY PEER REVIEW ON
COMPETITION POLICY: JAMAICA**

OVERVIEW



UNITED NATIONS
New York and Geneva, 2005

Note

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to Competition Policy. UNCTAD seeks to further the understanding of the nature of Competition Law and Policy and its contribution to development and to create an enabling environment for an efficient functioning of markets. UNCTAD's work is carried out through intergovernmental deliberations, Capacity-Building activities, policy advice, seminars, workshops, and conferences.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a reference to the document number. A copy of the publication containing the quotation or reprint should be sent to the UNCTAD secretariat.

The Overview contained herein is also issued as part of the full version of the Voluntary Peer Review Report on Competition Policy: Jamaica, 2005 (UNCTAD/DITC/CLP/2005/5).

TD/RBP/CONF.6/7

CONTENT

I. Foundations and history of competition policy in Jamaica.....1

II. Scope of application of competition policy 5

III. Substantive provisions of the Fair Competition Act..... 7

 A. Mergers..... 7

 B. Abuse of dominance 9

 C. Horizontal agreements 11

 D. Vertical restraints 14

 E. Unfair competition 14

IV. Institutional arrangements: enforcement structure and practices..... 15

 A. Competition policy institutions 15

 B. Competition law enforcement..... 18

 C. Other enforcement methods..... 20

 D. Investigative tools..... 20

 E. International issues in competition law enforcement..... 21

 F. Agency resources, caseload, priorities and management 22

V. Competition advocacy 25

VI. Findings and policy options 27

 A. Legislative review 28

 B. Major shift in priorities of the FTC 31

 C. Cultural change and improved communication 32

 D. Capacity building..... 33

I. Foundations and history of competition policy in Jamaica

1. Jamaica is an island in the Caribbean Sea with a population of 2.7 million inhabitants. The country obtained its independence from the United Kingdom 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.

2. The GDP per capita is close to US\$4,000, and Jamaica ranks seventy-ninth out of a total of 177 countries in the Human Development Index. The Jamaican economy is mostly service-based; currently the services sector accounts for over 60 per cent of GDP and the labour force. However, productivity is 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, and parts and accessories of 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.

3. In the second half of the 1980s, the government adopted structural adjustment measures and market-oriented policy reforms. This set of economic liberalization measures included

(a) tariff reforms that 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) the subjection of state enterprises to greater commercial pressures.

4. 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 were 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 that did not contain these provisions, the Fair Competition Act (FCA), was later introduced in Parliament, and was enacted in March 1993. The legislation was further amended in August 2001 and is the applicable statute at present.

5. Two widely accepted goals of competition legislation are increasing economic efficiency and increasing consumer welfare, although these terms may take different meanings in different countries. Three objectives of the FCA are found not in the law itself but 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.”¹

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 prohibits conduct that would result in a less efficient economy. It is important that the law itself clearly state its purposes.

6. The shift to a market economy is a long process necessitating cultural change. Although the goals sought seem to be generally understood by the public, great scepticism prevails regarding the effectiveness of competition law and whether its goals are attained.

7. Although a number of proposals for amending the FTC have been made by the FTC to the Ministry of Commerce, Science and Technology, there are no formal legislative proposals before Parliament or publicly under review at present in Jamaica. However, the constitutional validity of the FTC 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.

¹ See the FTC's site www.jftc.com.

II. Scope of application of competition policy

8. The Fair Competition Act is a general law of general application. It 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 choses in action” creates a problem, as it may mean that the entire financial service sector is exempt from the FCA.

9. 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 submitted them to the Ministry of Commerce, Science and Technology. The proposals were formulated with the aim of removing the strictures regarding intellectual property rights.

10. 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 few

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 or the process that should be followed to arrive at a decision.

11. 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 specific conduct that is explicitly regulated under the sector legislation. Exempted thus 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). In a transition economy such as Jamaica, regulated activities in sectors such as transport, energy, banking, financial services, professional services and others account for a large share of the economy and, under this jurisprudence, risk being completely exempted.

III. Substantive provisions of the Fair Competition Act

12. The FCA is a general law of general application and 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 has concurrent adjudicative powers for selected provisions. It is also empowered to grant authorizations for an agreement or practice when this 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.

A. Mergers

13. 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. Through the interaction of these three provisions, governments can ensure that markets function in a competitive manner. The reason why merger law is necessary is twofold: mergers can reduce the number of competitors in a market, thus giving rise to the creation or enhancement of market power (or, in extreme cases, the creation of monopolies), and they can increase the risks of collusion among 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.

14. International experience shows that very few mergers are prohibited by merger law. Nevertheless, the law is still necessary in order 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. (Examples are local banking, insurance and transport.) Moreover, the economy may be too small to attract international competition. Nevertheless, it is hard to justify the fact that, under the FCA, competing companies are prohibited from agreeing on prices or allocating markets or engaging in profit sharing, whereas if these companies all merged into one entity, these agreements would become internal decisions and thus would be allowed. This is even less logical 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.

15. 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, although Barbados, another CARICOM country with a competition law, does have merger provisions. With the advent of the CARICOM Single Market and Economy (CSME), the likelihood of mergers will increase, and it is important that the Government of Jamaica have the necessary tools to handle the situation.

B. Abuse of dominance

16. 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 anti-trust authorities to distinguish conduct that is anti-competitive from conduct that is pro-competitive. In this regard, the FCA specifies three tests that must be met for an order to be issued: (a) 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. (b) It must be proven that a firm abuses its dominant position – that is, “impedes the maintenance or development of effective competition in a market”. (c) 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 to be considered in assessing the impact on competition.

17. The remedy is very general and provides for the FTC to order 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 allowing for structural remedies, the FTC takes the position that only behavioural orders are available.

18. The abuse of dominant position provision gives a non-exhaustive list of abusive conducts, such as the following:

- restricting the entry of any person into that or any other market;
- preventing or deterring any person from engaging in competitive conduct in that or any other market;
- eliminating or removing any person from that or any other market;
- directly or indirectly imposing unfair purchase or selling prices or other anti-competitive practices;
- limiting production of goods or services to the prejudice of consumers;
- 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.

19. 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.

20. The exercise of rights derived from intellectual or industrial property is not an abusive conduct. Nor is behaviour exclusively directed to improving distribution or production of goods or to promoting 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”.

21. 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 also used in the Canadian Competition Act, but it still needs a satisfactory explanation.

22. 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; 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.

C. Horizontal agreements

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

24. 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 that agreements have or are likely to have the effect of substantially lessening competition 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 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 some parties at a competitive disadvantage; or
- 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.

25. 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 agreement must be least restrictive of competition, or it should not eliminate competition in respect of a substantial part of the product market.

26. 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.

27. Section 22 prohibits per se suppliers from engaging in collective resale price maintenance. Similarly, Section 23 prohibits per se dealers from engaging in collective resale price maintenance.

28. Section 35 prohibits all types of agreements or arrangements to:

- limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
- prevent, limit or lessen unduly, the manufacture or production of any goods or to enhance unreasonably the price thereof;
- 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; or
- otherwise restrain or injure competition unduly.

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

30. Section 36 makes it a per se offence to agree for the purposes of submitting a bid or of refraining 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.

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

D. Vertical restraints

32. Some countries make a distinction in their law and have separate provisions for vertical restraints. This brings 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 having 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, 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.

33. Section 17 prohibits agreements that “directly or indirectly fix purchase or selling prices or any other trading conditions”. 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 Section 17 (2) is read in the context of Section 17 (1), it becomes clear that such agreement is prohibited only if it substantially lessens competition. Surely better wording could be used to define the prohibition on agreements among competing sellers, actual or potential.

E. Unfair competition

34. The FCA does not have a heading specifically referring to unfair competition, and it is the practice at the FTC to refer to measures dealing with 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 tactics 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.

35. With the advent of new technology and cheap telecommunication fees, deceptive telemarketing, whether 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 to prevent the commission from dealing with such conduct. Although unfair practices such as fraudulent use of someone else's name, trademark, product labelling and the like are covered in the appropriate intellectual or individual property legislation, specific measures would be needed if such conduct become a problem in Jamaica.

IV. Institutional arrangements: enforcement structure and practices

A. Competition policy institutions

36. The FCA provides that three bodies come into play for its administration and enforcement: the FTC, the Minister of Commerce, Science and Technology and the courts.

37. The FTC is the main body responsible for the administration and enforcement of the FCA. It is composed of a minimum of three and a 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 chairman of the Commission. Tenure is a maximum of three years, with the possibility of reappointment. The executive director is appointed by the Commission for a seven-year period, with the possibility of renewals for periods of five years.

38. The functions of the Commission are to carry out investigations at the request of the Minister, of any other person or on its own initiative; to advise the Minister, at the latter's request or on its own initiative, on matters relating to the operation of the FCA; and to issue remedial orders regarding abuse of dominant position, 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 this 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.

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

40. The Minister can give directions of a general nature as to policy to be followed by the Commission. He or she 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 obligated to make a report to the Minister upon discontinuing an inquiry, but the Act does not specify what the Minister should do with this report. 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 to submit to the Minister an annual report of its activities, 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 reports received from the Commission.

41. Finally, the courts are called upon in the enforcement of 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 direction of the Commission. 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.

42. With respect to procedural matters, the Resident Magistrate's Courts can impose fines or penalties up to a maximum of US\$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, destructing or altering information, giving false and misleading information to the Commission, or failing to attend a hearing or to give evidence before the Commission.

B. Competition law enforcement

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

Table 1. The FTC's budget and employee work hours, 1999–2004

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

44. The number of completed cases for 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 varied considerably over the past five years, and the number of complaints received regarding issues not subject to the FTA diminished considerably during the same period.

Table 2. Cases completed for 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

45. 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 FCA and to negotiate a settlement. This definitely is the most efficient way to enforce the law, especially in a civil law context.

C. Other enforcement methods

46. It is the modus operandi of the Commission to favour negotiated settlements over adversarial prosecutions, which are considered a last resort. In the area of anti-competitive practices, as a result of the Jamaica Stock Exchange 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 that 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 that it develops for application to specific sectors. Private parties can recover damages for any loss they suffer because of conduct that is contrary to the law. However, this provision has been used only once, and the court decision is being awaited.

D. Investigative tools

47. The FTC has broad powers to obtain evidence in order to carry 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 officer of the FTC to enter and search premises and seize documents under a warrant issued by a Justice of the Peace. These are broad powers indeed, but in a modern economy they are not sufficient. For example, there are no provisions for searches of computers or for wiretaps to obtain oral evidence (often necessary in conspiracy cases), no whistleblower provisions to protect informants, and no leniency provisions to provide incentives for informants to divulge conduct 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.

E. International issues in competition law enforcement

48. The FCA does not contain any provisions addressing extra-territoriality as such. It states that the term “market” is in reference 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”.

49. With the exception of the Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy (CSME), Jamaica is not a signatory to any bilateral or multilateral treaties on the application of competition law. Jamaica is a participant in numerous international organizations including the United Nations, UNCTAD and the World Trade Organization. It is also a major player in the Free Trade Area of the Americas (FTAA) negotiations, where the executive director of the FTC is representing CARICOM in the

Negotiating Group on Competition Policy. Jamaica is a member of the Caribbean Community and Common Market (CARICOM) Treaty. The CSME is planned to take full effect for a limited number of countries in January 2006. This initiative raises questions regarding the necessity not only of harmonizing competition legislation 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 Chaguaramas Treaty.

F. Agency resources, caseload, priorities and management

50. The FTC is a relatively small organization, and obtaining resources, expertise and funds is a continuous challenge. Currently the FTC has 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 deal almost exclusively with anti-competitive practices, while the other staff members are responsible for the consumer protection measures.

51. The budget of the Commission is also limited; it has ranged from US\$499,973 in 2001 to US\$568,976 in 2004. About 80 per cent of expenses are for compensation of employees and 10 to 15 per cent for rental of buildings, 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 per cent to 0.08 per cent of their government's non-military

expenditures. If this ratio applied to Jamaica, the figures just quoted would be US\$1,871,211 and US\$2,494,948.²

52. It is noteworthy that the Executive Director of the FTC has implemented FTC Case Selection Criteria. This system is an effective case screening mechanism and should be maintained. Nevertheless, it does not replace the need to make decisions on a case-by-case basis taking into account all considerations outside the reach of a straight mathematical case selection system.

53. 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 devoted to enforcement of the anti-competitive practices provisions was also expressed during UNCTAD's fact-finding mission in connection with this report. While the FTC's lack of expertise was mentioned, it was also recognized that the FTC played a very useful role, especially in correcting misleading advertising. Its impartiality was praised. One public representative concluded that the FTC was not a very effective agency as it was not well organized, did not provide for informal discussions of cases, and was deficient in its public communications and in expertise. However, a new entrant praised the FTC for assisting in preventing misleading advertising. A law professor cited the inefficiency of the duplication of functions among agencies whose roles are all to protect the public, such as the FTC, the Financial Services Commission (FSC) and the Consumer Affairs Commission (CAC). These views were not expressed in the context of a scientific survey but as a collection of ad hoc

² See www.mct.gov.jm, Debates.

public comments. No conclusions can thus be drawn from them except that, at a minimum, the FTC should improve its communications and work on its public image.

V. Competition advocacy

54. 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. But unlike the laws in Canada, Italy or the Republic of Korea, the Jamaican law does not give the FTC a specific mandate to engage in competition advocacy. There is no comprehensive approach for dealing with the interface of competition law and other laws and regulations, which is a major flaw that needs fixing.

55. The relationships of the FTC with some regulatory bodies appear to be working well. The Intellectual Property Office does not hesitate to refer to the FTC complaints it receives that fall under the responsibility of the FTC. Similarly, the Office of Utilities Regulation, which deals with telecommunications, water and sewage, electricity and public transportation, refers competition matters to the FTC. Relationships with the FSC aim at resolving the interface between the FCA and the legislation under the authority of the FSC. Both agencies understand that finding a mutually agreeable coordination mechanism is preferable to waiting until a challenge is brought before the courts.

56. Privatization is another traditional area of interest for competition agencies. Liberalization of government-owned enterprises or assets is nearing completion in Jamaica. What is left has been characterized by some as unwanted leftovers.

57. Although the FTC believes it is devoting considerable effort to informing the public, recurrent complaints are heard from a variety of sectors that there is not enough information

available on the FTC, on the FCA and on competition policy in general. A quick review of the FTC's website reveals an abundance of information for businesses and consumers. There is a need, however, to ensure the harmonization and accuracy of this information. For example, cited thresholds for the application of the law are sometimes not consistent throughout the publications. Also, because of the duplication and contradictions in the law, the information is often too general or does not reflect the wording of the law. In the final analysis, the public is uncertain as to the meaning of the law.

58. The FTC is the seat of knowledge in Jamaica with respect to anti-trust 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 organizes an annual consumer day in public places to disseminate information to the public through question-and-answer periods with the staff and the handing out of informational literature. In 2000, the FTC instituted the Annual Shirley Playfair Lecture Series in memory of a former chairman of the Commission and launched an annual newsletter on developments in the field of competition. Finally, the FTC issues press releases when appropriate. In a nutshell, considerable efforts are being made to educate and inform the public, but they do not seem to be sufficient.

VI. Findings and policy options

59. The report at hand 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 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 the recommendations into an action plan.

60. Recommendations are made for four axes of reform that could form the basis of such an action plan. The first axis is a legislative review. Since its enactment more than a decade ago, the FCA has revealed serious flaws in its design and is in need of a major policy review and legislative overhaul. The second axis of reform has to do with an important shift in the enforcement priorities of the FTC towards increased enforcement of the anti-competitive practices provisions of the FCA. Third, the transition from an economy based on state-owned enterprises and regulation to private enterprise and a free-market economy was a brutal shift accompanied by cultural change. This process is ongoing, and there are considerable doubts regarding the benefits of the transition. Conducting studies and disseminating information in this regard is the third axis of the recommended reform. The fourth axis 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 anti-trust law and economics.

A. Legislative review

61. The most important challenge that 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 for the ability of the FTC to enforce the anti-competitive practices provisions of the FCA. The FTC had no choice but to revert to moral suasion and voluntary compliance to fulfil its mandate. Five alternatives are considered:

- Establishing a competition tribunal;
- Adding firewalls in the current legislation;
- Establishing voluntary firewalls without legislative review;
- Bringing all cases to the Supreme Court;
- Creating a “super-tribunal” to hear competition and other commercial cases.

The experience of the Commonwealth countries, which were confronted with similar challenges, would be most relevant and would provide the Jamaicans with a reference to help decide which option is best suited for them. It is important to resolve this problem in the very near future so that the FCA is rendered effective again.

62. 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 in having a competitive economy. *Ipsa facto*, Jamaica does not have any provisions to remedy anti-competitive mergers and acquisitions – that is, to

block them or impose conditions to ensure that they are in the public interest of the nation.

63. In designing the merger provisions, a number of decisions will have to be made, among which are the following:

- 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 whether 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 authorization before merging?
- What will be the remedy (i.e. behavioural, structural or both)?

64. Writing merger law is very demanding not only because it requires making important policy decisions, but 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, and so on. It also involves understanding in a very practical way the technicalities of the underlying economic principles. Jamaicans would benefit enormously from the international experience of developing and developed countries in this regard.

65. 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. If firms in other sectors subject to legislation or regulation, such as electricity, water, energy, banking, insurance and telecommunications, were exempted, the effectiveness of the FCA and competition policy in general would be compromised. What is proposed is a holistic approach that would give the FTC statutory powers to make representations or be an intervener before regulatory bodies; would impose an obligation on the regulating body to make decisions least restrictive of competition; would specify the conditions under which regulated conduct would be exempt from the FCA; and would impose an obligation on new regulation proposals to include an impact statement and a sunset clause.

66. There are numerous duplications and some contradictions in the FCA that 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 other areas. The law needs to be revised with a fine-toothed comb to ensure its consistency. In the interim, the FTC could adopt clear policies stating which circumstances will lead to a challenge of a conduct under a specific provision.

67. 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 wiretapping, confidentiality, leniency and the protection of informants, or telemarketing. The FCA does not provide for the FTC to enter into agreements with other agencies regarding exchange of information. With the modernization and globalization of the economy, the FTC should have the tools it needs to do its job properly.

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

69. 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 doubtful whether CARICOM has the power and the effective tools and machinery to enforce competition law. Nevertheless, as Jamaica is a major proponent of and a leader in CARICOM, revising the Jamaican law is not a waste of effort, as the law can serve as a model for future CARICOM legislation.

B. Major shift in priorities of the FTC

70. It is clear that currently too much emphasis and resources are devoted to the “consumer protection” provisions of the FTC. This may be partly a result of the FTC's inability to operate normally owing to the Jamaica Stock Exchange decision of the Appeal Court. In the early days of the FTC's existence, it was expected that the FTC would turn to consumers to obtain support for its programme. However, 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 complete impact, leaving cases of individual consumer redress to the Consumer Affairs Commission (CAC).

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.

71. It is also somewhat of an anomaly that the FTC has not brought forward a single conspiracy case. Enforcement should be geared towards the three cornerstone provisions of competition legislation: conspiracies, abuse of dominance and mergers. Since there are no merger provisions, it should be the mandate of the FTC to develop 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.

72. This shift of priorities is not only the affair of the FTC; it is also that of the government. The budget of the FTC is well under the internationally accepted standard of 0.05 per cent to 0.08 per cent of government expenditures, not including military expenditures. While the government should give priority to funding the FTC properly, the FTC could take measures on its own to recover some of the costs of services it provides to the public, especially respecting its advisory opinions, authorizations and merger pre-notifications. When fees are required, the public is justified in expecting a guaranteed level of performance. Developing a system of fees and standards of performance will require considerable expertise drawn from international experience.

C. Cultural change and improved communication

73. There are recurrent complaints from various sectors of the public that there is not enough information available on the FTC, the FCA or competition policy in general. Moreover,

there is scepticism regarding the benefits to Jamaica of the free-market economic system. The Government itself is sending confusing signals to the population. For instance, when electricity was privatized, the Minister of Commerce, Science and Technology 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 of low-price cement. As justified as they may be, these actions by the Government support the arguments of those extolling the virtues of the old system of government controls and ownership.

74. A two-pronged approach is recommended. The FTC should conduct studies on the benefits of competitive markets, relying primarily on domestic experience but complementing this with international experience. These studies should be kept current and should be 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, it should develop a communication strategy identifying themes, target audiences, and appropriate tools and materials for disseminating information.

D. Capacity building

75. Capacity building is another area that the report at hand highlights as an area of concern. The FTC is short-staffed in part because anti-trust expertise is rare in Jamaica. Industrial organization is not taught at the University of the West Indies in Jamaica, 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 turn to lawyers or other experts from abroad when they have to deal with large, complex cases.

76. The reform of competition policy should have an important capacity-building element. The FTC is where the expertise in anti-trust economics and law should reside. In order to meet that objective, a strategy should be developed to establish close links with the University of the West Indies in Jamaica, especially its economics department and the law faculty. This relationship could take the form of a partnership whereby the staff of the FTC participates in giving lectures in industrial organization or at the law faculty; instructors 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. The FTC could enter into partnerships to invite instructors from abroad to give lectures at the University and could 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.

77. Developing a close relationship with other competition law enforcement agencies is another vehicle that 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 benefited from the assistance of the New Economy Project offered through the United States Agency for International Development. Taking advantage of visits by international experts, the FTC opened the training sessions to other Government departments and agencies, universities and the private sector.

78. In conclusion, the challenges faced by Jamaica after a decade of enforcement are, although to some degree unique to the country, similar to those experienced in other developing countries. For each axis of the proposed reform, a discussion of international experience would be of immeasurable assistance not only to Jamaica but to other countries in similar need of reforms in this area.