WHY THE NEED FOR COMPETITION LEGISLATION?

Stewart Stephenson

Foundations of the Fair Competition Act

The decade of the 80's witnessed a worldwide trend toward economic liberalization with emphasis being placed on market forces rather than state direction as a means of determining the production and distribution of goods and services. In keeping with this trend, the Jamaican Government, in the early 1990's, introduced a number of policy measures popularly associated with such terms as liberalization, deregulation and divestment. In order to ensure that on the introduction of these new policy measures, market restrictions were not resurrected in the private sector, the Fair Competition Act (FCA) was passed in 1993 and its administrative body, the Fair Trading Commission (FTC) was established in that same year.

Genesis of the FCA

The stated objectives of the Jamaican Government's Competition Policy, as outlined in the Green Paper on the Proposals for a Competition Act are as follows:

- to provide for competition, rivalry in markets and to secure economic efficiency in trade and commerce;
- to promote consumer welfare and to protect consumer interest; and
- to open markets and guard against undue concentration of economic power.

A review of the Green Paper reveals that the Government intended the legislation to be all embracing, extending the reach of competition law to cover all sections of society, to provide, in a manner of speaking, an economic constitution for the country.

Legal Foundations of Jamaica's Competition Law

The period from inception to enactment of the FCA in 1993 was marked by several redrafting exercises. The first draft of the Act, which accompanied the Green Paper, was submitted for public comment. Many aspects of the draft faced widespread resistance.

In particular, provisions which sought to regulate monopolies, mergers and interlocking directorships attracted unfavourable responses from the Jamaican public, primarily because it was felt that the Jamaican economy was still in its infancy and subjecting these aspects of its economy to scrutiny might impair economic development.

Many of these concepts are tenets of US anti-trust legislation and in light of the contrasting stages of economic development between the United States and Jamaica, it was
felt that these concepts would not have been well suited to the country's economic environment.

It was argued that a monopoly as a structure is not inherently wrong and that monopolies by virtue of their scale of operations can be appropriate to maximize the efficiency of production which can lead to low unit costs.

With respect to interlocking directorships, it was argued that this type of structure is not offensive, *per se*. Rather, as with monopolies, it is the abuse of such structures that causes concern. Regarding mergers, it was felt that proposed amendments to the Companies Act would monitor the activities of companies in this area.

For subsequent drafts, precedents were obtained from Commonwealth jurisdictions. Initially, the United Kingdom, Canadian, New Zealand and Australian statutes were consulted, but thereafter reference was made primarily to legislation from New Zealand and Australia.

It was integral to the drafting exercise to examine the institutional structures of various model agencies which give effect to competition legislation. It was determined that the New Zealand and Australia models, which are based on US anti-trust law principles, were the most appropriate for the local scenario.

Under the New Zealand and Australian model, the Commission has not only an investigatory role, but also the responsibility for authorizing anti-competitive practices on the basis of public benefit. In addition, persons injured by anti-competitive practices have two courses of action - they may either lodge a complaint to the Commission, in the hope that the Commission will take some action, having investigated it and found that a breach of the Act has occurred, or undertake private litigation under the Act, a right otherwise referred to as a private right of action.

The Jamaican policy makers favoured the adoption of the New Zealand and Australian approach as these two agencies were not subject to a substantial amount of ministerial intervention but were given the requisite statutory powers to make them into independent bodies. The Jamaican FTC is, therefore, structurally akin to the agencies in New Zealand and Australia.

On completion of the drafting exercise, the Jamaican Parliament enacted a comprehensive statute which sought to address the fundamental aspects of competition policy. As if to demonstrate its commitment to this new economic philosophy, provision was made for the imposition by the Court of substantial pecuniary penalties for various breaches of the Act - J$5 million per breach for businesses and J$1 million for individuals.

The Jamaican FTC is, therefore, structurally akin to the agencies in New Zealand and Australia.

<table>
<thead>
<tr>
<th>THE FCA AND THE FAIR TRADING COMMISSION (FTC)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Structure and Functions of the Fair Trading Commission</strong></td>
</tr>
</tbody>
</table>

**Composition**

The Commission is a quasi-judicial body made up of two parts. The first arm comprises four (4) Commissioners who behave very much like judges. They may summon witnesses, call for documents and are empowered to make "findings" in certain instances, namely, abuse of dominance, exclusive dealing, market restriction and tied
selling. In these instances, if the Commissioners find a breach of the FCA, the respondent has up to fifteen days from the date of the finding to appeal to a Supreme Court Judge in Chambers. The Judge has the discretion to uphold the Commissioners’ finding, modify it or reverse it completely.

The Executive Director, who directs Lawyers, Economists, Research Officers and Complaints Officers, collectively best described as the investigative arm, heads the second arm of the Commission. That arm is involved in conducting investigations to determine if a breach of the FCA has occurred. Depending on the gravity of the matter and the level of cooperation received from the entity being complained against, the Staff may recommend to the Commissioners some sort of settlement. If respondents are reluctant to cooperate with the Staff, they are served with a Notice of Examination to appear before the Commissioners. The Commissioners will then meet with the respondent to determine the cause for the lack of cooperation and outline the Commission’s expectations with a view to settling the matter. If settlement seems unlikely, the Staff may request the Commissioners approval to take the matter to Court so that the issues can be adjudicated.

The Commission as a body performs the functions of investigator, complainant and adjudicator. While this may appear conflicting, in practice it is not, given that on the occasions that the Commissioners act in a judicial capacity, the Commission’s Staff has to observe certain rules. Most notably, there can be no ex-parte communications with the Commissioners with regard to the matter being adjudicated.

**Jurisdiction**

The Commission has been empowered to regulate the conduct of all business in Jamaica, whether public or private. However, trade unions, matters covered by copyright, and treaties, which bind Jamaica internationally, are exempt.

Other governmental agencies may also be regulated, to the extent that they engage in trade. The Commission’s power does not extend to government when the latter acts in its executive capacity.

**Procedure for Investigating Complaints**

The Commission may carry out on its own initiative or at the request of anyone, such investigations in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in practices in contravention of the FCA.

Complaints are lodged by completing a complaint form, giving a summary of the complaint and the necessary particulars of the parties involved. Complaints are also accepted via facsimile, regular mail, e-mail or through office visits. Irrespective of the method by which complaints are submitted, an acknowledgment letter is sent to complainants within fifteen (15) working days. At the end of the Staff’s investigation, the complainant is informed of its findings. However, the Staff is not obligated to give updates as the case progresses. Given the FTC’s status as a law enforcement agency, the Staff must act independently. In other words, the Staff does not act on behalf of the complainant and therefore, cannot appear to favour any side.
Economic Rationale for Conduct Prohibited by the FCA

It can be argued that there are essentially two basic premises underlying competition legislation. The first stems from the somewhat paternalistic notion that even in a free market economy there is the need for government to provide protection for the weak, the gullible and the ignorant.

The second reflects the recognition that despite its merits the market economy is susceptible to certain failures, the more pervasive of which are captured in any of the following categories:

- the existence of monopolies and dominant firms, which present an occasion for significant welfare loss to society and inefficient allocation and use of resources;
- significant information asymmetry, which leads to consumer making sub-optimal decisions; and
- the presence of externalities, which distort the allocation of resources in terms of what goods and services they are used to produce and in what quantities.

The Jamaican FCA reflects both of the above premises, but arguably, places greater emphasis on the latter.

The typical competition legislation is cast along one of two lines. The law either focuses on market structure or on conduct within the market. Thus, at the very outset the legislature must make a decision as to whether its economy is such that it would wish to prohibit a priori, the development of market structures that are susceptible to anti-competitive practices or, to simply regulate conduct. Presumably, major considerations in arriving at such a choice would be factors such as market size, scale of existing firms and stage of economic development.

For obvious reasons, the Jamaican legislators have opted for an approach that regulates conduct as opposed to structure. By and large, the provisions of the FCA are only activated after it is clear that a certain conduct is taking place or is likely to take place.

Some Conduct Prohibited by the FCA and Practical Difficulties Encountered

A look at some of the major provisions prohibited by the FCA will illustrate the extent to which the legislation emphasises conduct over structure. Additionally, it also provides opportunities for examination of possible shortcomings of the Act.

Prohibition of Abuse of Dominance

Sections 19 – 21 of the FCA deals with the matter of dominance and abuse of dominance. Section 19 states that

... an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

A number of practices are cited in the Act as constituting an abuse of dominance but it is
important to note that these examples are but illustrative. They include,

- 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 uncompetitive practices;
- limiting the production of goods or services to the prejudice of consumers; and
- 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.

Notably, dominance is not a breach of the FCA but rather, it is the abuse of a dominant position that constitutes an offence. This means that the first requirement in the institution of proceedings for abuse of dominance is to establish that the entity in question is dominant. Once this is established, the Commission must also show that the conduct in question is an abuse. An abuse only takes place however, if there is injury to competition.

Even after the above requirements are satisfied, there is another hurdle to be scaled. This is the requirement that the abuse “has had or is having the effect of lessening competition substantially in a market.”

This means that consideration of instances in which injury to competition is likely to take place but has not yet taken place are ruled out. Additionally, since by definition a monopoly faces no competition, this stipulation poses a difficulty for investigating such firms operating in their own markets.

An example in point is the FTC’s case against the Caribbean Cement Company (Jamaica’s only producer of cement) for abuse of dominance. In that investigation, inefficiencies were identified in certain areas of the Company’s operation, which contributed to the Company’s frequent price increases. The Staff, however, could not identify a market in which competition was substantially lessened. This despite the fact that the Company’s operation undoubtedly had an adverse effect on the welfare of consumers.

Another difficulty that arises in dealing with abuse of dominance under the FCA is that relating to the prohibition of the imposition of unfair prices. A dominant firm may be accused by its competitors of pricing so low, as to remove its competitors from the market, or to discourage prospective competitors from entering the market. This is termed predatory pricing.

The difficulty with predatory pricing is that it is often difficult to make a distinction between low pricing due to efficiency and/or market condition as opposed to predatory intent.
Conspiracy

Section 35 of the FCA deals with the matter of collusion and agreements to limit competition. The section makes it illegal for any person to combine, agree or arrange with another to limit unduly the manufacture, transport or supply of any goods or services or to enhance the price of same or to restrain or injure competition unduly. This provides another area under which such anti-competitive practices as cartelisation and the behaviour of associations in respect of market sharing and price fixing may be examined. Some difficulty is envisaged in the application of the expression, limit unduly, as so far, the Staff has found very little judicial precedence for it application.

Exclusive Dealing, Tied Selling and Market Restrictions

All three of the above mentioned practices are prohibited by Section 33 of the FCA. Exclusive Dealing is defined as any practice whereby a supplier of goods requires that his customers interact exclusively with him as a condition precedent to the supply of the goods. The section essentially seeks to prevent the foreclosure of markets to incumbents or new entrants by way of agreements between firms to deal only with select entities.

Notably, the section on Exclusive Dealing requires that the Commission refrains from taking action where it is determined that the practice is only for a limited time, is aimed at promoting entry or is an arrangement between connected company. Such exemptions may not be entirely sufficient, however, as from an economic point of view, Exclusive Dealing may be justified as a measure to prevent free-riding. Perhaps a good example of this is a case in which a marketing company undertakes a substantial investment to facilitate a dealer selling its brand. Were that dealer allowed to sell competing brands which utilises the investment, it would clearly lead to free-riding.

Tied Selling is defined as any practice whereby the supplier of an article, as a condition of supplying the article requires his customer to, at the same time, purchase any other item. The section is regarded as a throwback to a period in the Jamaican economy where artificial restrictions created scarcity in respect of a number of goods, facilitating the practice called marrying.

As it appears in the FCA, the provision in respect of Tied Selling is strictly prohibited. In economic terms, however, tied selling is only detrimental if the practice is widespread or if it is engaged in by an entity that has substantial market power.

Market Restriction is any practice whereby the supplier of goods requires that his customer supplies goods only in a defined market or extracts a penalty of any kind from the customer if he supplies any goods outside the defined market. Similar to Exclusive Dealing, Market Restrictions may prevent entry and substantially limit the ability of consumers to exercise choice. The exemptions for Market Restriction are the same as those applicable to Restrictive Dealing.

Bid Rigging

Section 36 of the FCA prohibits Bid Rigging. The section states that it is unlawful for two or more persons to enter into an agreement whereby the persons attempt to influence who wins the bid by either deciding...
amongst themselves that one should not participate in the bid or agreeing amongst themselves on the dollar amount to be bid.

Bidding is one of the market mechanisms that is used to promote competition. Any attempt to predetermine qualifiers in a bidding process must therefore be regarded as an attempt to frustrate this objective.

**Misleading Representation, Double Ticketing and Advertised Sale at a Bargain Price without Adequate Stock**

The above prohibitions are set out respectively under Sections 37-38, 39 and 40 of the FCA. **Misleading Advertising** makes it illegal for anyone to make a representation to the public that is false or misleading in a material respect. The representation may be oral or written and there is no requirement that the person making the representation intends to mislead.

**Double Ticketing** is the practice whereby, the seller charges the consumer the higher of two or more prices displayed in respect of a product. According to the FCA, only the lowest of the prices displayed on the good may be charged.

**Advertised Sale at a Bargain Price without Adequate Stock** is a phenomenon referred to as *bait and switch* in other jurisdictions. This is because the aim is usually to pull in consumers on the lure of a low price with the hope that, even if they fail to obtain the advertised item, they will make other purchases.

A common objective running through these sections is the need to provide the public with clear, accurate and adequate information.

In short, the above sections may be interpreted as a clear attempt to reduce information asymmetry in markets thus improving the efficiency and rationality of decision making.

**Proposed Amendments to the FCA and Pending Regulations**

After five (5) years of enforcement of the FCA by the FTC, the Commission has identified areas of the Act that can be fortified by way of amendments and/or procedural regulations. The staff of the Commission has also undertaken a comprehensive review of legislation that may be in conflict or inconsistent with the FCA.

The proposed amendments deal mainly with:

- **definitions**
- **consistency in terminology**
- **improving the efficient use of the Courts and**
- **broadening the scope of the Act.**

**Definitions**

These amendments seek to widen the scope of the FCA, thereby allowing the FTC to investigate markets that would otherwise have been excluded from the jurisdiction of the FTC. Amongst the proposals, it is specifically recommended that the definition of *goods* should include money, securities and/or choses in action. It is also recommended that services be defined in such a manner, that will remove any doubts with regards to the FTC’s jurisdiction over the practices of professional associations, where such actions have impacted or are likely to impact negatively on competition in the relevant market.
Consistency in Language

In an effort to standardize the terminology used throughout the Act, it is proposed, inter alia, that goods and services be used consistently throughout the Act, and thereby replacing the term article.

Efficient Use of the Courts

Currently, criminal matters prosecutable under the FCA can be brought before the Circuit Court and the Resident Magistrate (RM) Court depending on the particular section of the FCA. The Act will be amended to allow all matters to be brought before the RM Court to facilitate a speedier resolution of these cases.

Broadening the Scope of the Act

Another proposed amendment is the inclusion of the phrase likely to have or likely to be in relevant sections of the Act. This will help to deal with the difficulty cited earlier in respect of matters relating to abuse of dominance.

Regulations

As previously mentioned, the Commission has also taken steps to formalize a number of procedures developed over the first five (5) years of operations.

The following procedures are in the final stages of becoming regulations:

- Notice of Examination of Witness
- Notice to Produce Document
- Settlement Procedures

Notice of Examination of Witness is used to formally summon before the Commissioners of the FTC, those business entities which have failed to respond to requests/requirements concerning specific FTC investigations.

Notice to Produce Documents, is a summon, which require the Respondents to produce, for the Commission’s perusal, specific documents relevant to particular FTC investigations.

Settlement Procedure contain guidelines relating to Out-of-Court settlements that are being negotiated by the Commission. These Procedures guide the FTC’s negotiations with offending parties and contain a draft Consent Agreement, the instrument used by the Staff to document and secure agreed settlement terms.

THE PUBLIC’S RESPONSE TO THE FCA

In general, the FCA and its enforcement body, the FTC have received a positive reception from the Jamaican public. This is due primarily to the provisions of the Act which permit the agency to seek stiff penalties for failure to co-operate with the Commission. The Commission has also established a reputation for quick and efficient action.

Although the Commission’s focus is the nation at large, that all-encompassing term can be divided into three categories: the business community, consumers and the professional sector. The FTC has also recognized the need to foster a competition culture among the different sectors of the Jamaican economy.
The Business Community

The Commission's experience with this sector has been mixed. Many of the provisions of the FCA attack time honoured practices of the business community. It is human nature to resist change. However, the Commission has been successful in implementing its policies where it has been able to show that its recommendations are beneficial to the business, as well as the consumer.

A tool that the Commission has found to be useful is the publication of guidelines and policy papers relating to different industries. These documents are sources of information particularly where the Commission receives numerous complaints about a practice or industry. Over the years topics have included Comparative Price Advertising, the Treatment of Dominant Companies, Franchises and the Automobile Industry.

The primary issue that surfaces with regard to the business community is the matter of disclosure, which is addressed by Section 37 of the Act which speaks to Misleading Advertising. Businesses have been required to provide more complete disclosure regarding their products and services, methods of payment and other relevant areas to enable the consumer to make informed decisions.

Other issues which have been investigated include acts by dominant companies such as Cable and Wireless (Jamaica) Limited pursuant to Section 17, and authorization of business practices normally in contravention of the Act, pursuant to Section 29, where such practices have overriding public benefit.

Consumers

Many consumers take the name FCA literally and the Commission often receives the cry that particular matters are 'not fair.' In fact, many of the complaints received by the Commission do not fall under the FCA. Thirty percent (30%) of all complaints received since inception are outside of our jurisdiction. Many are private contractual matters, and the complainants are often in need of the services of an attorney. The Staff therefore directs the complainants to the appropriate entity which can address their concerns.

In an effort to assist the consumer, the FTC has also forged a successful working relationship with a variety of affiliated agencies and other interest groups. An example of this is FTC's referral of matters to the Consumer Affairs Commission (CAC), which is the agency with specific responsibility for matters affecting consumers. The Commission also works in tandem with the Jamaica Bureau of Standards, such as in cases where the Bureau's expertise is required to provide definitive findings regarding the quality or condition of a product that is the subject of a complaint.

The Commission's working relationships with other agencies have contributed ultimately to a more healthy business environment through constant dialogue and co-operation.

The Professional Sector

Since its inauguration, the FTC has worked closely with the professional sector. Most professions have their own regulatory body and understandably then, have looked with mistrust and apprehension on the Commission's powers under the FCA.
The legal profession has been a particularly harsh critic. In fact it brought the FTC before the Supreme Court in 1995 to have the matter of the extent of the FTC's jurisdiction in the regulation of attorneys-at-law clarified. The Court declared that the General Legal Council, the body regulating the conduct of attorneys under the Legal Profession Act, is not subject to the jurisdiction of the FCA.

Further, there are fundamental differences between the common law principles and those of competition law. Competition law has its own unique nuances and concepts. These differences have not been readily accepted by the legal community. This must be considered against the background of the fact that attorneys represent the businesses investigated by the Commission. Thus, the Commission accepts that the adversarial stance of some lawyers may simply be vigorous representation of their clients, as well as a defensive reaction to an extremely pro-active statutory body.

Fostering a Competition Culture

Initially, the Commission focused on consumer protection. This proved to be useful as it helped the Commission to earn public support, and effectively communicated to the average person those aspects of this new law which would directly impact on their day-to-day existence. The Commission was seen as the saviour for every beleaguered consumer who had purchased a malfunctioning appliance or was duped by slick advertising.

The agency has attempted to shift its focus to some extent; unfortunately public perception is difficult to change. Further, the matters which directly affect the condition of the lives of the ordinary Jamaican are consumer-related issues which in some instances can be dealt with under Section 37 of the Act which deals with Misleading Advertising. Since inception, almost fifty percent (50%) of cases investigated by the FTC fell under this category. Annex I provides details on cases investigated to date by breach.

Although the Section of the Act dealing with misleading advertising is an indirect means of ensuring greater competition in the marketplace, the Commission is aware of the need to focus attention on the more sophisticated issues of competition law. To this end the FTC is currently undertaking studies of the competitive environment within critical sectors of the Jamaican economy. It is anticipated that such studies will give the Commission a better understanding of the marketplace. The FTC also intends to use this information to regulate industries and generally provide guidance to the public.

GENERAL ACHIEVEMENTS OF THE FTC

The Commission's achievements to date have undoubtedly emanated from its active and continuing educational programme, its resolve to enforce the law and its willingness to provide guidance in terms of how businesses should operate within a free market system.

Since its inception, the FTC, as the regulator of business practices and conduct within the free market, has created a more sensitized and enquiring business community. This is evidenced by the numerous opinions and advice sought by businesses operating in the Jamaican marketplace.

A similar relationship has been forged with the consuming public. This liaison has seen
an increase in consumer vigilance and a
deepening of the recognition of the rights and
responsibilities of consumers and the recourse
available to them under the FCA.

As a result, consumers are now
demanding information relevant to purchases,
refusing to purchase from stores where they
are not adequately informed, and notifying the
FTC if they believe the practices of these
entities run afoul of the law. Perhaps the major
accomplishment of the FTC lies in the area of
complaint resolution by way of settlements or
through legal proceedings. Statistics for the
period September 1993 to June 1999 indicate
that of a total of three thousand and eighty-eight
(3,088) cases investigated, two thousand, eight
hundred and eleven (2,811) have been resolved
or closed. This represents a resolution rate of
91% of all matters examined for the stated
period. A statistical summary of the cases
investigated and completed over the period is
shown in Appendix II. Details of some of the
more celebrated cases are referred to in
Appendix III.

Conclusion

The Jamaican FTC has been in
existence for six (6) years. As far as
competition agencies go, this is an embryonic
state. However the pace of economic
development— from the liberalization of the
1980’s, to the globalization of the 1990’s— does
not allow the Commission the luxury of gestation.
Further, our place as the only competition agency
in the Commonwealth Caribbean gives us a
greater responsibility to ensure that proper
competition policy is developed both nationally
and regionally.

In this short time there has been a shift
in policy from a focus on consumer-related
matters to heavier competition matters such
as market restrictions and barriers to entry
and exit. The rationale being that consumer
protection is merely a by-product of
successful competition policy.

This is a message that cannot be over-
emphasized as we finalize the Rules of
Competition for the Region in Protocol IX
amending the Treaty of Chaguaramus. The
Preamble to the Protocol reads inter alia that
the Member States are “determined to
encourage the establishment of efficient
enterprises in the Community and to ensure
that the operations of such enterprises are
conducted with a view to ensuring the
Community welfare is enhanced through
improved product quality, increased product
variety and price competitiveness.” This is
indeed our mandate at the FTC, and could be
the basis of a mandate for any Caribbean State
developing its competition policy.
## APPENDIX I

### Number of Cases Received and Completed from September 1, 1993 to June 31, 1999

<table>
<thead>
<tr>
<th>Breach/Investigation</th>
<th>Number Received</th>
<th>Number Completed</th>
<th>Percentage of all Investigated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abuse of Dominant Position</td>
<td>59</td>
<td>43</td>
<td>1.90</td>
</tr>
<tr>
<td>Misleading Advertising</td>
<td>1,530</td>
<td>1,347</td>
<td>49.60</td>
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<tr>
<td>Double Ticketing</td>
<td>16</td>
<td>16</td>
<td>0.52</td>
</tr>
<tr>
<td>Market Restriction</td>
<td>38</td>
<td>35</td>
<td>1.20</td>
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<tr>
<td>Sale Above Advertised Price</td>
<td>29</td>
<td>27</td>
<td>0.94</td>
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<tr>
<td>Tied Selling</td>
<td>24</td>
<td>23</td>
<td>0.80</td>
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<tr>
<td>Other Offences against Competition</td>
<td>71</td>
<td>67</td>
<td>2.30</td>
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<tr>
<td>Investigation Initiated by FTC</td>
<td>38</td>
<td>31</td>
<td>1.20</td>
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<td>Application for Authorization</td>
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<td>0.36</td>
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<td>Request for Information from FTC</td>
<td>183</td>
<td>170</td>
<td>5.90</td>
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<tr>
<td>Request for Opinion from FTC</td>
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<tr>
<td>Not Covered by the FCA</td>
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<td>923</td>
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<td><strong>TOTAL</strong></td>
<td><strong>3,088</strong></td>
<td><strong>2,811</strong></td>
<td><strong>100</strong></td>
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</table>

**Note:** The last column shows each category of investigation as a percentage of the total number of cases received over the period.
## APPENDIX II

### Fair Trading Commission

**Number of Cases Investigated* and Completed from September 1, 1993 to June 30, 1999**

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Year 2</th>
<th>Year 3</th>
<th>Year 4</th>
<th>Year 5</th>
<th>Year 6</th>
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<tr>
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<td>Investigated</td>
<td>Completed</td>
<td>Investigated</td>
<td>Completed</td>
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<tr>
<td>Abuse of Dominant Position</td>
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<tr>
<td>Misleading Advertising</td>
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<td>181</td>
<td>595</td>
<td>398</td>
<td>499</td>
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<td>Double Ticketing</td>
<td>16</td>
<td>13</td>
<td>3</td>
<td>2</td>
<td>1</td>
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<tr>
<td>Market Restriction</td>
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<td>10</td>
<td>20</td>
<td>12</td>
<td>11</td>
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<tr>
<td>Sale Above Advertised Price</td>
<td>5</td>
<td>2</td>
<td>23</td>
<td>13</td>
<td>11</td>
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<tr>
<td>Tied Selling</td>
<td>8</td>
<td>7</td>
<td>5</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>Other Offences Against Competition</td>
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<tr>
<td>Investigation Initiated by FTC</td>
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<td>0</td>
<td>31</td>
<td>8</td>
<td>84</td>
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<tr>
<td>Not Covered by the FCA</td>
<td>90</td>
<td>86</td>
<td>181</td>
<td>159</td>
<td>225</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>415</strong></td>
<td><strong>302</strong></td>
<td><strong>950</strong></td>
<td><strong>651</strong></td>
<td><strong>946</strong></td>
</tr>
</tbody>
</table>

*Cases investigated include cases received during the period as well as those carried over from the previous period.

The 'Years' referred to are from September 1 of one Calendar Year, to August 31 of the next, with the exception of Year 6. Data for that year ends at June 30th, 1999 as subsequent statistical data are not yet available.
APPENDIX III

SUMMARY OF MAJOR CASES DEALT WITH BY THE FTC SINCE ITS INCEPTION

These are placed in the following categories:

1. Cases determined by the Court
2. Cases settled out of Court
3. Cases pending in Court
4. Consent Judgments

CASBS WHICH WERE DETERMINED BY THE COURT

1. GLC vs FTC

On the 29th November, 1994 the FTC wrote to the President of the Jamaica Bar Association indicating, inter alia, that it was the view of the Commission that some of the Canons of the Professional Ethics (especially those related to advertising) were inconsistent with the FCA and may contravene the provisions of Section 35 of the FCA as amounting to a conspiracy between the Government of Jamaica and the GLC with Attorneys-at-Law in Jamaica to restrain or injure competition unduly.

The GLC thereupon filed an Originating Summons seeking inter alia, a Declaration that the Legal Profession (Canons of Professional Ethics) Rules, being subsidiary legislation and/or statutory rules made under the Legal Profession Act are not governed by the Fair Competition Act 1993.

The Court, on the 14th November, 1995, granted the Order sought by the GLC. Subsequently, the GLC has permitted conditional advertising by the Legal Profession.

2. FTC vs JSE

On or about 1994 the Fair Trading Commission (FTC) received a complaint against the Jamaica Stock Exchange (JSE) alleging that the JSE is the only stock exchange in the country, and has a prohibitive entry fee for some potential members. This fee was considered by the staff of the FTC to be anti-competitive as its effect was a restriction of the number of possible entrants to the JSE.

The JSE contended that it was to be regulated only by the Securities Commission. The Securities Act, however, does not address competition issues and therefore, it is the position of the FTC that at best both agencies exercise concurrent jurisdiction over the JSE.

The JSE took the FTC to court claiming, inter alia, that the FTC did not have jurisdiction over the JSE, that the FTC had acted in breach of the constitutional provisions regarding separation of powers and freedom of association and had abused its statutory powers as well as the rules of natural justice.

On July, 1997 judgment in favour of FTC was delivered. The judge had denied all the declarations sought by the JSE. However, the JSE applied for and was granted a six
weeks stay of proceedings. Subsequently, the JSE filed notice and grounds of appeal. The matter is currently before the Court of Appeal.

3. FTC vs HOMEBUILDER DEVELOPMENT COMPANY LIMITED, ET. AL.

On 4th February, 1999, Mr. Justice Theobalds of the Supreme Court ordered Home Builder Development Company Limited and Jintsu Limited to pay the Crown a pecuniary penalty of $1.5m for breaching Section 37 of the Fair Competition Act, which prohibits Misleading Advertising. The Commission presented evidence to show that in 1997 the Contractors and Developers of "The Worthington" failed to provide proprietors with an Intercom System between the gate house and each apartment and, individual metering of water as promised to prospective purchasers in the brochure which advertised "The Worthington."

This is a landmark judgment, as it is the first time the Supreme Court declared a Breach of s. 37 of the FCA, and ordered a penalty to be paid.

CASES SETTLED OUT OF COURT

1. FTC vs C.O. JACKS

In this matter a housing scheme was advertised with an estimated date of completion. The completion date was changed several times and the purchasers were being forced to pay the penalties for the delayed completion date, in the form of price escalations. The Commission investigated and found that the company engaged in misleading representation as the completion dates given were not reasonable in the circumstances. The FTC brought suit against the company, but on the 24th November, 1994 the defendant agreed to settle with the complainants out of court and to pay costs to the Commission. The Commission thereupon removed the matter from the court list.

2. FTC vs AIR JAMAICA LIMITED

The FTC received several complaints from members of the public alleging misleading representation, based on the company's non-disclosure of charges in addition to the quoted cost of the "Love-a-Fare" package. The staff's investigation revealed that there were in fact charges, of which the customers were not notified before they attempted to pay for the package. The FTC brought suit against Air Jamaica. However, the matter was settled on the 20th July, 1995 before a determination could be made by the Court.

Air Jamaica agreed that passengers who could prove that they travelled within the period that the "Love-a-Fare" package was offered, would be eligible for special upgrades on subsequent flights taken.

3. FTC vs TELECOMMUNICATIONS OF JAMAICA LIMITED (TOJ)

After an in-depth investigation, the staff of the FTC determined that TOJ imposed an unjustifiable access charge on its internet users which amounted to an abuse of its dominant position in the market for telecommunications services. As a result of these findings, the staff lodged a complaint before the Commissioners.

TOJ brought suit against the FTC in the Supreme Court of Jamaica claiming that the Commission lacked jurisdiction because, inter alia, TOJ enjoyed certain privileges by
virtue of the All Island Telephone Licence of 1988, an exclusive 25 year license for the provision of certain telecommunications services. The Court did not have an opportunity to rule on the matter as it was settled out of court. TOJ in November, 1995 agreed to roll back its charges until it received approval from the Government regarding the increase.

4. R vs CARIBBEAN HOUSING FINANCE CORP LTD. (CHFC) ET. AL.

This matter concerned the failure of CHFC to provide the FTC, in a timely manner, with certain information which the staff of the Commission requested as part of its investigation of a complaint against the company. This caused a breach of Section 43 of the FCA which states that any person who refuses to supply any information when required to do so by the Commission under this Act is guilty of an offence and liable on conviction to a fine or imprisonment.

The matter was scheduled to go to trial in June 1997. However, following the reading of a statement of apology on behalf of the defendants in court, the Office of the Director of Public Prosecution (DPP) offered no evidence against them and the case was settled. The CHFC did provide the FTC with the information which had been requested.

5. FTC vs PREMIER FOOD COMPANY (POPEYES FAMOUS FRIED CHICKEN & BISCUITS)

The staff of the FTC received and investigated a complaint alleging misleading advertising by the fast food restaurant in the advertising of its “free lunch” promotional campaign. The FTC filed an action in court against the company on the basis that they had omitted material information from their promotion of the “free lunch” special, and in so doing the representation which they made to the public may have been misleading.

On the 22nd September, 1997 the company agreed to settle the matter and FTC has taken no further action in court.

6. JOHN CROOK LIMITED

In June 1994, the Commission received several complaints which, in sum, alleged that John Crook sold forty-one (41) 1989 Ladas to the public as 1993 vehicles. While that investigation was on-going, the Commission received further complaints in November of 1994 that claimed seventy (70) new 1993 Subaru Justys were sold as 1994 motor cars.

John Crook Limited was contacted in order to ascertain its position. However, new management had taken over the company in the interim and requested an opportunity to look into the matter. The new management, having completed its own investigation, confirmed the allegations. It also stated that it appeared that ‘honest mistakes’ had been made by the previous management in the representations of the year of manufacture of the vehicles in question. Furthermore, the Ladas, though represented as 1993 vehicles were unused and, had been sold at a discount. The Commission verified that this was in fact so.

In the interest of good customer relations and in keeping with John Crook’s commitment to quality service (not as an admission of liability) the Commission arrived at an agreement whereby
John Crook agreed to compensate the original purchasers of the vehicles in question.

7. THE BANKING INDUSTRY

In response to complaints from consumers who appeared not to have understood the terms of loan documents signed by them, the Jamaica Bankers Association was contacted by the FTC concerning the issue.

The Association willingly worked with the FTC towards a resolution of this matter.

After several meetings and extensive consultation, certain amendments to the banking policy were agreed upon. These became effective April 18, 1995. The issues addressed were:

Clarity in Banking Documents

It was agreed that a fact sheet in reader-friendly language would be attached to the face sheet of all loan documents for individual consumers. That fact sheet will contain information the average person would consider material. For example the sheet would detail, at the very least, the effective interest rate, whether or not there are prepayment penalties and the total amount of the loan.

The Posting of the Exchange Rate

The banks should indicate whether or not these rates were opening rates only. In other words, the consumer should be put on notice if the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate given is the set rate and should be given foreign exchange at that rate.

The Advertising of Interest Rates

Where “add-on” rates are used, they will be designated as such. However, it was generally agreed that it would be more useful to state the effective rate of interest when advertising. This will minimize confusion and the average consumer will be better able to compare rates among banks.

8. TELECOMMUNICATIONS OF JAMAICA LIMITED (TOJ) NOW CABLE & WIRELESS JAMAICA LIMITED

Following negotiations between the TOJ and the FTC, an agreement was reached whereby TOJ’s residential customers were allowed to connect certain compatible equipment to the TOJ network for a reasonable price. Prior to the FTC’s intervention, this had not been the case. The consumer was required to purchase all equipment from TOJ and if TOJ did not have the item in stock thereby necessitating its purchasing elsewhere, the customer was still required to pay a rental charge to TOJ. The FTC took the position that TOJ’s conduct constituted an abuse of dominant position in the market for telecommunication services. TOJ agreed to interconnection without admitting liability.

9. MEDIA ASSOCIATION OF JAMAICA (MAJ)

Prior to the advent of the FCA, media houses, by means of the so-called Recognition agreement, would pay a fixed commission and extend credit to only recognized agents. To be recognised, an agent had to apply to the MAJ and satisfy it as to certain billing and other structural capabilities. Having been duly
satisfied, the MAJ would then pay a fixed commission of 18% to that agency in addition to extending it a credit period for advertisements placed in the various media. Should the agency fail to pay its bills on a timely basis to even one media house, all media houses would deny that agency credit.

It was the view of the Staff of the FTC that under the FCA those portions of the agreement were illegal. The collusion of the media houses to fix the amount of the commission, in the view of the Staff, constituted both a conspiracy to restrain competition and price-fixing. Conspiracy was also apparent when media houses acted in concert to deny any agency credit. The very tone of the agreement was philosophically inconsistent with the newly enacted free market regime.

The unequal treatment of unrecognized agents also invited the scrutiny of the Staff, for while the MAJ could certainly put in place reasonable standards for recognition, it was anti-competitive to penalize media houses which chose to extend credit and pay commissions to those agents who did not happen to meet those standards. It is beyond cavil that commercial entities must not be deprived of their ability to engage in independent decision-making vis-a-vis trading partners.

In light of the Staff's views, the MAJ entered into negotiations with a view to arrive at a form of Agreement which would not offend the terms of the FCA. The parties developed a Recognition Agreement which conforms to the terms and spirit of the FCA. The MAJ has agreed, as part of the settlement with the FTC's staff, that it would institute a 90-day period for the processing of applications for recognition and, should an applicant be denied, that denial may be appealed to a three-person panel who are unconnected to the media.

Also under the new arrangement, there would now be the possibility of provisional recognition, whereby an agency, new to the marketplace, would nonetheless be afforded the legal benefits of a recognized agency. Provisional recognition would automatically expire at the end of one (1) year, at which point the agency could apply for full recognition.

10. FTC v GALLERIA LIMITED

Suit was brought by the Commission against Galleria Limited in the Supreme Court for breaching S.37 of the Fair Competition Act. However, the case was settled and settlement was endorsed in the Court before Mr. Justice Reckord on the 22nd April, 1999, and involved two complainants. One alleged that he was induced to purchase a high priced refrigerator from Galleria as the Company stated they had a compatible icemaker, and this was not so. The other customer went to purchase a 4 speaker stereo system, based on an advertisement he saw. However, the stereo only had 2 speakers. Galleria agreed to and did refund the value of the speakers and icemaker, donate a stove to the SOS Children's Village, and pay the Commission's costs in Court.

MATTERS PENDING IN COURT

Matters pending are those involving Executive Motors Limited, Mr. Dennis Woodbine of J&J Garage Limited and Cable & Wireless Ltd.

In September 1998, the Fair Trading Commission applied to the Supreme Court for a Declaration that Executive Motors Limited contravened s.37 of the Fair Competition Act
and for an Order that it pays to the Crown such pecuniary penalty not exceeding $5M in accordance with ss.46 and 47 of the FCA. This matter is yet to be heard in Court.

The Commission in September 1997 began prosecuting a matter before the Half Way Tree Resident Magistrate of the Criminal Court against Mr. Dennis Woodbine of J&J Garage Limited. It is alleged that he, having been required to appear before the Commission in relation to two complaints against his business, without reasonable excuse, refused or failed so to appear and give evidence, contrary to Section 45 of the F.C.A. The matter is to be tried later this year.

During 1999, the Commission initiated two (2) legal actions against Cable & Wireless Limited for Abuse of Dominance and Misleading Advertising. The matters were filed in June 1999. Customers complained that from and since October 1998, C&W unilaterally imposed the in touch Voice Mail Service on them without their consent. It is also alleged that this service was offered free of cost for twelve (12) months, but that the service was not free to all customers as advertised.

CONSENT JUDGMENTS

In the first quarter of 1999, the Commission entered into Settlement Agreements with Homelectrix Limited and a North Coast Resort as a result of complaints filed with the Commission. The companies admitted that they had breached s.37 of the Fair Competition Act which prohibits Misleading Advertising.

The Resort had advertised a special package of US$80.00 per person per night double occupancy, but when the customer called he was informed that the rate was US$220.00 not US$80.00 as advertised. In the Consent Agreement entered into on the 22nd March, 1999, the Resort agreed to give the complainant two (2) nights accommodation free of cost and pay the Commission's costs.

On the 23rd April, 1999, a company, Homelectrix Limited, recalled Three (3) sofas advertised and sold as leather, and refunded their customers, less depreciation, after they lodged complaints with the Fair Trading Commission that the sofas were made largely of synthetic material. They also paid the Commission's costs.

Generally, the Commission finds that Companies tend to be co-operative when they realise the seriousness of the Breach and the amount of penalty involved should the Court make a Declaration in these matters.