



Jamaica¹ is situated near Caribbean Sea, and at the southern end of Cuba. Jamaica gained full independence within the British Commonwealth in 1962. Deteriorating economic conditions during the 1970s led to recurrent violence and a drop in tourism. Elections in 1980 saw the democratic socialists voted out of office. Political violence marred elections during the 1990s.

Economy

The economic landscape in the pre-1993 era was marked by an elaborate scheme of government regulations, which created and enforced barriers to entry in various sectors. These barriers included both tariff and non-tariff restrictions. There were excessive import licensing requirements, and price controls; and Government-owned enterprises operated with little or no commercial pressure. The allocation of resources, in terms of what goods and services were produced; and in what quantities was largely determined by the Government.

This era was soon overtaken by an international trend, which saw more and more governments of the 1980's relying on the market to set prices and determine the allocation of resources. In keeping with this trend, the Jamaican Government undertook a number of structural adjustment programmes, aimed at removing entry barriers created by government regulations.

These measures included:

- (a) tariff reform which eliminated quantitative restrictions; the removal of requirements for excessive import licensing; the significant reduction of tariff levels;
- (b) removal of price controls and the deregulation of certain industries e.g. motor vehicles, tourism, banking, air and ground transportation;
- (c) privatisation/divestment of certain parastatal agencies e.g. media houses, Government printing services, Sugar Redundancy Housing Programme; and

PROFILE	
Population:	2.6 million***
GDP (Current US\$):	7.8 billion***
Per Capita Income: (Current US\$)	2,760 (Atlas method)*** 3,980 (at PPP)**
Surface Area:	10,990 thousand sq. km
Life Expectancy:	75.6 years **
Literacy (%):	87.6 (of ages 15 and above)**
HDI Rank:	79***
Sources: - World Development Indicators Database, World Bank, 2004 - Human Development Report Statistics, UNDP, 2004 (**) For the year 2002 (***) For the year 2003	

- (d) subjecting state enterprises to greater commercial pressure.

The Jamaican economy is heavily dependent on services, which now account for 70 percent of the GDP. The country continues to derive most of its foreign exchange from tourism, worker remittances, and bauxite/alumina. The global economic slowdown, particularly after the terrorist attacks in the US on September 11, 2001, stunted economic growth. The economy rebounded moderately in 2003, with one of the best tourist seasons on record.

But the economy faces serious long-term problems: high interest rates; increased foreign competition; a pressured, sometimes sliding, exchange rate; a sizable goods trade deficit; large-scale unemployment; and an increasing internal debt, the result of government bailouts to ailing sectors of the economy. The ratio of debt to GDP is close to 150 percent. Inflation, previously a bright spot, is expected to remain in the double digits. Depressed economic conditions have led to increased civil unrest,

* Prepared by Fair Trading Commission of Jamaica in October 2005. Revised in March 2006.

1 <http://cia.gov/cia/publications/factbook/geos/jm.html>

including gang violence fueled by the drug trade. In 2004, the government faced the difficult prospect of having to achieve fiscal discipline in order to maintain debt servicing while simultaneously attacking a serious and growing crime problem that is hampering economic growth.

Competition Evolution and Environment

The emerging economy was characterised by words such as ‘liberalisation’, ‘deregulation’ and ‘privatisation’. Further, the Government was concerned that without supporting legislation, the benefits expected from the ‘freeing’ up of Government regulation might not be realised; e.g. that possible price fixing activities of private firms would replace price controls. It was concerned too that having been conditioned by a long history of price controls and other regulatory constraints, private firms would be slow to change their behaviour in the market. It was felt that without regulatory legislation, the aims of Government’s social policy, to ensure that the benefits of deregulation are shared throughout the community, would be defeated.

The 1991 Green Paper on the Proposals for a Competition Act indicates that the Government was mindful of the school of thought that the freeing up of entry barriers through tariff reform displaces the need for competition law. The Paper also notes, that ‘the realities of the market place in other countries support the need for the Law’.

Competition Law

The Green Paper previously referred to sets out the objectives of the competition law as follows:

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

With the clear recognition that the competition law may encompass a variety of policies, the first draft of the Act was made available for public review and comment. Private sector interest groups like the Chamber of Commerce, the Exporters Association and the Media Association got an opportunity to make their contribution. Professional and consumer groups also contributed to the process. Much debate centred on features of the Act which had the potential for negative impact on investment in the newly liberalised economy, viz. the specific treatment of monopolies and mergers; and the accommodation of interlocking directorships.

By February 1992, one year before the Act was passed, it was clear that the Government had been persuaded that monopolies are not inherently bad; that by virtue of their

scale of operation they are best suited to maximise efficiency of production, which can be beneficial to consumers. Accordingly, monopolies would not be singled out for any special treatment in the Act, but instead would be treated within the context of abuse of dominance.²

Similarly, it was felt that pressing issues related to mergers could be addressed under the provisions for abuse of a dominant position. Further, it was argued, such issues would be properly addressed in the proposed amended Companies Act and the relevant activities monitored by the Registrar of Companies. Central to this approach was the feeling that given Jamaica’s level of economic development small firms should have an opportunity to make themselves more competitive by merging, without being subjected to the strict requirements of competition law.

The position articulated in respect of interlocking directorships was that they are not offensive in themselves; rather it is the potential for abuse by directors that raises cause for concern. It was acknowledged that in an economy as small as Jamaica’s is, it would be impossible to avoid the phenomenon of inter-connected companies and directorships.

The Government was satisfied that as in the cases of monopolies and mergers, competition issues could be addressed within the context of abuse of dominance, depending on the relevant market share of such directorships. Issues of insider trading and such securities concerns were considered to be amenable to being adequately addressed in the banking and securities laws.

Thus, the Fair Competition Act as passed in March of 1993, does not contain specific provisions to regulate monopolies or control mergers. Section 2(b) stipulates that ‘a group of interconnected companies shall be treated as a single enterprise’. Against the background of the arguments advanced, however, it would seem reasonable to accept that the first and second objectives set out in the 1991 Green Paper have not been compromised in any material respect, by the scheme of the Act.

Commensurate with those objectives the FCA prohibits the abuse of dominance; collusion and agreements which seek to or have the potential to limit competition; exclusive dealing; tied selling; market restriction and bid-rigging.

In keeping with the objective of promoting consumer welfare and protecting consumer interest, the FCA prohibits false and misleading advertising; double ticketing; sale above the advertised price; and advertising at a bargain price, goods which the seller does not have in reasonable quantities.

² Cabinet Submission, February 28, 1992.

Together with the right of private action, contained in Section 48 of the Act, these consumer-related prohibitions guarantee that the consumer is provided with full and clear information to guide his/her decision-making; and ultimately appropriate redress where his/her rights have been infringed.

Fair Trading Commission

The Commission is established under Section 4 of the Fair Competition Act, as a body corporate to which Section 28 of the Interpretation Act applies. This means that the Commission is vested with all the rights and powers which are vested in a natural or juridical person – including the right to sue in its corporate name and the right to acquire, hold and dispose off property.

The Commission may be described as a statutory body wholly funded from the Government coffers, accountable to the Government through the Ministry of Commerce, Science and Technology. The Commissioners, referred to in the Schedule to the Act as members, are appointed by the relevant Minister of Government and the said appointments may be terminated by the Minister. A member's tenure is for a period, not exceeding three years. It is stipulated that there shall be a minimum of three commissioners and a maximum of five, one of whom the Minister shall appoint as Chairman.

Pursuant to Section 5 of the FCA, the Commission, on its own initiative or at the request of any person, will carry out investigations in relation to the conduct of business in Jamaica to enable it to determine whether the Act is being breached. Accordingly, it is authorised to, *inter alia*, summon and examine witnesses; administer oaths; and hear evidence. As such, the Commission is a quasi-judicial body, whose decisions may be appealed to a Judge of the Supreme Court sitting in Chambers, within fifteen days of the date of the relevant decision. The Judge may confirm, modify or reverse the said decision, giving reasons.

Other functions of the Commission include carrying out investigations at the request of the Minister; and advising the Minister on sundry matters relating to the operation of the Act.

The day-to-day operations of the Commission are carried out by an Executive Director, who is supported by a professional staff, comprising among other professionals, lawyers and economists. The Executive Director is an *ex-officio* member of the Commission.

It must be noted that the Act fails to establish any clear demarcations between the role of the Commissioners and the role of the staff, especially in view of the Executive Director's status; and this has resulted in what the Jamaican Court of Appeal has referred to as the merger of the judicial function of the Commission into its investigative function.

The Court observed further, that there was no proper provision for the delegation of the investigative functions of the Commission to the staff or other agencies to be administered independently of the Commission. In those circumstances, the Court found, a determination by the Commission would likely lead to a breach of the rules of natural justice.³ The Act is currently being amended to correct this inherent flaw. For starters, the Executive Director will no longer be an *ex officio* member of the Commission.

As a general safeguard against the Government itself undermining the benefits of competition Section 54 of the Act declares that 'subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown'.

The Minister is allowed under Section 3(h) however, to exempt from the operation of the Act by order subject to affirmative resolution any business or activity not otherwise exempted. The Minister has exercised this power in a couple of instances, notably in respect of the light and power company.

Generally, the utility companies are regulated under various statutes, which are administered by the Office of Utilities Regulation (OUR). In respect of the telecommunications sector, however, consultation between the OUR and the Commission regarding determinations of dominance is made mandatory under the Telecommunications Act, 2000. The sector has been opened up to competition and in March 2003 it was fully liberalised.

Box 112.1: FTC vs. Air Jamaica Limited

The Fair Trade Commission (FTC) of Jamaica 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 price of the "Love-a-Fare" package. FTC's investigation revealed that there were charges, which were not informed to the customers before they attempted to pay for the package. The FTC brought a suit against Air Jamaica.

However, the matter was settled before the Court could make a determination. Air Jamaica agreed that passengers, who could prove that they traveled within the period that the 'Love-a-Fare' package was offered, would be eligible for special upgrades on subsequent flights taken. Costs were also paid to the Commission.

Source: Jamaica: Report on Developments and Enforcement of Competition Policy and Laws (1993-1996), Report on Developments and Enforcement of Competition Policy and Laws in the Western Hemisphere, Foreign Trade Information System.

3 The Jamaica Stock Exchange v. The Fair Trading Commission Supreme Court Civil Appeal No. 92/97 – Page 39 Prepared by The Fair Trading Commission, October 2004.

Sectoral Regulation

The Office of Utilities Regulation (OUR) is a multi-sector regulator exercising remit over:

- water and sewerage;
- electricity;
- transport by rail, road, and ferry; and
- telecommunications

The OUR is constituted by an Office (comprised of a Director General and Deputy Directors General with assigned responsibilities for specific sectors). The Office is the regulatory decision making body and it is assisted by staff, which is made up of technical, administrative and support personnel.

In Telecommunications the Office shares jurisdiction with:

- The sector Minister who grants licenses and has the authority to issue general directive;
- The Fair Trading Commission (the competition authority) with which it is obliged to consult on matters of competitive significance;
- The Spectrum Management Authority which allocates and regulates the spectrum on behalf of the Minister; and
- The Telecommunications Appeals Tribunal to which the Office's decisions can be appealed on the grounds of material error of fact or law.

The Telecommunications Act 2000 and regulations made under it, the Office of Utilities Regulation Act, 1995 and the Fair Competition Act, 1993 are the major statutes under which the sector is regulated.

In electricity, the Government has granted an exemption to the current license holder, which explicitly ousts the jurisdiction of the competition authority as provided for in the Fair Competition Act. The OUR exercises regulatory authority over this sector by the terms of the Office of Utilities Regulation Act and the provisions of the All-Island Electricity Licence 2001.

The Minister grants licences under the Electric Lighting Act and exercises his regulatory authority under that Act and the provisions of the All-Island Electricity Licence. As in most jurisdictions the decisions of the regulator in respect of all the above sectors are always subject to judicial review.

Electricity and Telecommunications Sector

In keeping with global trend and driven by a number of other imperatives, Jamaican authorities have been actively pursuing the liberalisation of a number of critical infrastructure sectors, telecommunications and electricity being notable examples. Progress in respect of telecommunications has been particularly advanced with

all markets open to competition with varying degrees of successes. Consistent with the liberalisation of these sectors, there has also been a move to put in place the requisite appropriate regulatory framework to ensure their appropriate regulation. Chart 1 provides an overview of the extent of liberalisation that has taken place in respect of the various sectors.

Table 112.1: Status of Liberalisation

<i>Sectors</i>	<i>Ownership</i>	<i>Market Structure</i>
Telecommunications	Private	Competition
Electricity	Private	Competition only in generation
Water & Sewerage	Public ownership for the dominant supplier (99 percent) but private participation is being sought	Monopoly plus a number of small operators
Transport	Public	Limited competition

Notably, telecommunications was privatised but handed over to a monopolist in 1988 with the granting of an exclusive licence for twenty-five years. Competition was finally allowed in 2000 with the enactment of the Telecommunications Act 2000, which provided for a phased liberalisation of the sector over a three-year period ending March 2003 where competitive entry is now allowed in respect of the full range of telecommunications services. The result of this is that now there is competition in respect of: mobile, internet services, domestic services (very weak in fact), international, data service provision etc.

In terms of electricity, privatisation took place in 2001 with provision for limited competition for the right to add generating capacity. Operators are still obliged to sell power to the grid. Entry was allowed in generation as of March 2004 but there is exclusivity with respect to transmission, distribution and supply until 2021.

Anticompetitive Business Practices⁴

Aim of a competition policy is to protect the consumer from the power of monopolies or firms acting together in an anticompetitive fashion. Monopolies and cartels are often in a position to charge higher prices or sell shoddy goods, allowing them to reap windfall profits at the expense of the consumer. A final important goal is to promote equity by preventing extreme concentrations of wealth. When monopolies and cartels come to dominate an economy, business opportunities, freedom of choice, and even social stability can suffer.

4 www.cipe.org/publications/fs/ert/e23/sampsE23.htm - 33k -

- *Merger Control*. Some observers objected to the proposed legislation's call for scrutiny of M&As on the grounds that a degree of concentration is inevitable in a small economy such as Jamaica's. To simply eliminate monopolies could thus make some markets less efficient. In addition, restrictions on size could make Jamaican firms less competitive in international markets.

The rationale for subjecting mergers to competition oversight is that they may reduce competition and harm consumers. Studies carried out in the US and Britain show that while some mergers do benefit competition, many are indeed harmful. In Jamaica, however, this particular proposal provoked strong objections from the business sector, and the merger control clauses were removed from the draft law.

Consumer Protection

The provision for consumer protection is embedded in the Fair Competition Act. FCA indeed was established to provide consumers with better products and services and give them a wider range of choices at the best possible prices. This is done through the promotion of competition. While the Act focuses primarily on anticompetitive practices of business it does have provisions for consumer protection. Besides there are many laws and institutions, which afford some measure of consumer protection.

The FCA does not address all consumer matters. Sometimes, FTC receives complaints that do not fall under their jurisdiction, but rather under, the Consumer Affairs Commission (CAC). Consumers are currently "protected" by way of a mixture of various legislative instruments that cut across several sectors.

However, still the need was felt to enact a separate consumer protection law along with a separate Commission or a channel through which consumers can convey their views and opinions. Thus, recently after a long argument on several critical issues, a bill was passed in the Senate in 2004.

The CAC, an Agency of the Government of Jamaica is dedicated to protecting the interests of consumers.

The new Consumer Protection Act is aimed at:

- establishing additional rights for the protection of consumers and the duties of consumers and providers of goods and services;
- improving redress received by a consumer whose rights have been breached;

- creating offences for misleading and deceptive conduct, false representations, unfair and unsafe practices by providers;
- ensuring that the contracts made between consumers and providers contain provisions that satisfy the test of reasonableness;
- providing for the registration of providers of such goods and services to consumers; and
- providing redress for the commission by the offender where the commission defends a matter in court.

Concluding Observations and Future Scenario

Despite the fact that the FTC is fully funded by the Government; and the Commissioners are appointed by the relevant Minister there has been no evidence of political interference in the operations of the FTC. This is not to understate in any way, the significance of financial independence in the functioning of a competition agency.

Jamaica's experience shows that an assertive competition policy fits hand in glove with other measures to liberalise the economy.

An examination of Jamaica's experience also underscores the old lesson that any policy that attacks entrenched privileges will face resistance from the interest groups that stand to lose. Opposition to the Fair Competition Act was mounted by many businesses as well as professional groups. While their efforts did not succeed wholly, they helped create a much more lenient law.

Some changes are already evident in how Jamaica's businesses compete. In most cases, businesses have made an effort to comply with the new law without resort to litigation. One example of this pragmatism is the consent decree between the FTC and Telecommunications of Jamaica Ltd., which eliminated that company's monopoly over customer equipment.

However, after more than a decade of its enactment, Fair Competition Act calls for following reforms:

1. The Fair Competition Act has revealed serious flaws in its design and therefore the need for a major policy review and legislative overhaul;
2. To carry out a shift in the enforcement priorities of the Fair Trading Commission, towards an increased enforcement of the anti-competitive practices provisions of the Act; and
3. The necessity to build capacity in the FTC, the judiciary, the academia, the legal community and other sectors of the public in the area of antitrust law and economics.