

PERFORMANCE OF THE FAIR TRADING COMMISSION FOR FINANCIAL YEAR 2004/2005 AND FOCUS FOR FINANCIAL YEAR 2005/2006

1.0 Purpose of Ministry Paper

This Ministry Paper is intended to provide highlights of the performance of the Fair Trading Commission (FTC) during the 2004/2005 Financial Year and also to outline the main focus of the Agency for the 2005/2006 Financial Year.

2.0 Role and Function

Competition leads to optimal allocation of scarce resources while ensuring that the highest quality goods and services are offered for sale at the lowest prices. It also ensures that the greatest incentives exist for product innovation and development. The work of the FTC is critical to the achievement of these objectives. The FTC was established in 1993 to administer the Fair Competition Act (FCA). The FCA provides for the maintenance and encouragement of competition in the conduct of trade and business and in the provision of services in Jamaica.

3.0 Priority Programmes and Targets

For the Financial Year 2004/2005, the Commission set the following programmes as its main priorities:

- Investigate complaints and seek amicable resolutions where possible. Obtain fees where possible through the use of Consent Agreements, to cover expenses incurred in the investigation.
- Initiate legal action for those complaints for which out of Court settlements are not forthcoming and conclude legal matters before the courts.
- Closely monitor the furniture, appliance, and computer and motor vehicle sectors.
- Prepare and disseminate advisories, opinions and guidelines. Develop and execute media campaigns and organize seminars, workshops and meetings.
- Meet with business entities, trade groups and educational institutions. Educate the private sector (manufacturers and distributors) on the requirements of the FCA and the need to provide adequate information on products and services offered for sale, thereby reducing breaches of the Act.
- Continue to enforce provisions of the FCA as they relate to the Telecommunications Industry.
- Strengthen the Commission's understanding of the reasons for anti-competitive practices and undertake studies on anti-competitive activities.

- Participate in, and organize appropriate forums for policy makers within the Government. Hold meetings with various associations, educational institutions, Government agencies and technical advisors within the public sector.
- Spearhead competition advocacy – coordinate activities with the Consumer Affairs Commission, the Bureau of Standards of Jamaica and the Ministry of Education.
- Facilitate the training of the judiciary.
- Influence the Ministry of Foreign Affairs & Foreign Trade as it seeks to determine Jamaica's competition policy, thereby contributing to the formulation of FTAA, CARICOM and WTO Rules in the area of Competition Law and Policy.
- Participate in discussions with FTAA Negotiating Group on Competition Policy (NGCP).
- Participate in the CARICOM Inter-Governmental Task Force (IGTF) meetings on the finalization of Chapter VIII of the revised Treaty of Chaguaramas, relating to the Rules of Competition.
- Provide technical support in the development of the CARICOM Chapter IX on Disputes Resolution.

4.0 Highlights of Performance/Achievements

4.1 Cases Received and Investigated

Over the period April 1, 2004 to March 31, 2005, a total of one thousand two hundred and twenty-two (1,222) cases were investigated by the Commission with three hundred and one (301) being completed. This compares with one thousand and sixty-four (1,064) cases investigated and two hundred and forty-four (244) being completed in the equivalent period in the previous Financial Year.

A total of four hundred and three (403) cases were received during the period. Of that number, three hundred and nineteen (319) cases were classified as cases of 'Misleading Advertising' (MA). Similar to previous periods MA cases accounted for the majority of complaints received, comprising approximately seventy- nine percent (79%) of all cases dealt with. In the previous period eighty- two percent (82%) of all cases received were cases of MA. Of the one thousand two hundred and twenty-two (1,222) cases investigated during the period, one thousand and twenty-six (1,026) or eighty-four percent (84%) were classified as MA. The majority of MA cases were against used car dealers, furniture/appliance retailers and computer retailers who use marketing promotions that attract, but sometimes mislead consumers.

Cases deemed 'Not covered by the FCA' (NA) formed the second highest category of complaints received, accounting for approximately eight percent (8%) (33 of 403) of the cases received, compared with six percent (6%) in the previous period. There were twenty-four (24) cases (6%) in the category 'Other Offences Against Competition'.

In comparison to the above categories, each of the others represented a relatively small number of the cases received. One (1) case was received in the category "Failure to Supply at a Bargain Price", eighteen (18) in the category "Request for Information/Opinion", and six (6) in the category "Sale Above Advertised Price."

4.2 Resolution Rates

Overall, the Commission successfully completed about a quarter (approximately 25%) of the cases investigated during the Financial Year, compared with twenty-three percent (23%) in the previous year.

The increasing number of cases received in recent years is partly a result of increased awareness on the part of the public, of the Commission's role and function. Relatively high resolution rates were also recorded in the categories of "Not Covered by the FCA" (NA) and "Requests for Opinion" (48% and 43% respectively). NA cases were expeditiously processed in order to quickly direct the informants to the correct avenues through which they could obtain assistance; and "Requests for Opinion" were treated as high priority.

4.3 Major Cases Investigated

The Commission pursued a number of matters in the Courts during the 2004/2005 Financial Year and continued to enforce provisions of the FCA specifically as they relate to the telecommunications industry. Other matters investigated include specific complaints against an automobile dealer and a furniture establishment and more generally, the issue of incorrect representation of the model years of motor vehicles.

4.3.1 Out-of-Court Settlements

FTC v. Cable & Wireless Jamaica Ltd. (C&WJ)

In December 2003, the Respondent launched a promotional competition which purported to give its mobile telephone customers an opportunity to win a BMW X5 motor vehicle. The winner was to be chosen by way of a random drawing.

The Respondent advertised that the drawing of the winner would take place on January 16, 2004. On January 15, 2004, an article was published in the Daily Gleaner newspaper, advising the public that the draw had taken place, and the winner chosen. This was contrary to the Respondent's previous representation which stated that the date of the draw would be January 16, 2004.

By way of complaints to the FTC, several persons alleged that they were planning to purchase mobile telephones and/or mobile telephone service on January 15, 2004, which would have allowed them to qualify for entry into the competition. On that date

they discovered that the draw had already taken place, and consequently, were denied an opportunity to enter the competition.

Based on the complaints received, the Staff launched an investigation into the allegations of misleading advertisement on the part of the Respondent as prohibited under Section 37(1)(a) of the FCA. The Staff concluded that the Respondent's conduct constituted the offence of misleading representation under the FCA. Having acknowledged the breach, C&WJ agreed that it would:

- (i) conduct a second promotional campaign between August 16, 2004 and August 27, 2004; in respect of which advertisements would be placed in the Daily Gleaner, Observer and Star newspapers on Sundays, Mondays, Wednesdays and Fridays.
- (ii) enter into a Consent Agreement with the Commission, the specific terms to be agreed between the parties; and
- (iii) pay costs to the Commission in the sum of One Hundred and Eight Four Thousand dollars(\$184,000) pursuant to Regulation number 9 of the Fair Competition (Notices and Procedures) Regulations, 2000.

The signing of the Consent Agreement by C&WJ is pending.

Investigation into Gasoline Retailing

Pursuant to a directive issued by me, an investigation was carried out into the practices within the petroleum industry, with particular focus on gasoline retailing. The directive required that FTC prepare and later implement a Code of Conduct to govern the relationship between petroleum marketing companies and retailers. The mandate required that the focus of the Code be the protection of the Jamaican consumer. Given the mandate of the FTC, this was interpreted to mean that the ultimate outcome of the Code is to ensure the lowest possible automotive fuel prices and the widest possible choice of retail outlets for consumers.

An investigation was carried out within the context of the FCA, the objectives of which are to encourage competition in the conduct of trade and business in Jamaica and to ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy. These objectives, which are supported by the provisions of the FCA, are geared toward ensuring market efficiency, better goods and services and a wide range of product choices at the best possible prices. The focus of the FTC in this matter was therefore to ensure that competition is not being prevented or distorted by companies engaging in anticompetitive activities, which ultimately undermine consumer welfare.

Market conduct was investigated to determine whether there was evidence of predatory pricing, price discrimination, price fixing, resale price maintenance and exclusive dealing. The Findings were:

- (i) No evidence of predatory pricing, price fixing or resale price maintenance
- (ii) There is exclusive dealing and price discrimination in the sector. In relation to this practice, some contracts in respect of dealer-owned premises were for durations of up to fifteen (15) years. The Commission has recommended that such contracts be limited to a period of no more than five (5) years.
- (iii) Some retailers were not displaying fuel prices on display boards.

The FTC produced a Code of Conduct to govern the relationship between retailers and marketing companies and circulated it to all the relevant players in the industry. The aim of the Code is to stimulate more competition within the industry. The Code addresses ten (10) areas as follows:

- (i) Viability of business
- (ii) Duration of contract
- (iii) Disposal of property
- (iv) Compensation for termination
- (v) Notice of termination or non-renewal
- (vi) Display of pump prices
- (vii) Price discrimination
- (viii) Predatory pricing
- (ix) Obligation of wholesaler
- (x) Obligation of retailer

The provisions included in the Code are those that will stimulate greater competition in the industry. Thus for instance, efforts have been made to address price discrimination and predatory pricing; to shorten exclusive contracts with respect to retailer-owned property; and to circumscribe the marketing companies' attempts at reducing the number of retail outlets and in effect the level of competition.

The competitive process depends, *inter alia*, on consumers having adequate information to enable them to make rational choices. It was determined that in some cases consumers are deprived of information regarding fuel prices. A significant number of retailers do not display prices on their display boards, and although the prices are on the pumps consumers are prejudiced if they have to wait until they reach the pump to obtain this material piece of information. Given the nature of the products involved and the way in which they are sold, the non-display of fuel prices makes it difficult for consumers to carry out price comparisons in an efficient, convenient and meaningful way. It is for this reason that the Code requires that retailers prominently display fuel prices.

4.3.2 Court Matters

FTC v. Pyramid Roofing Systems

In 1998 an Informant alleged that she contracted the Respondent to install a new roof on her house, but the job was badly done, resulting in leaks and a generally poor appearance of the roof.

The FTC filed an Originating Motion in the Supreme Court in respect of the matter, seeking a declaration that the Respondent had breached Section 37 of the Fair Competition Act. On June 12, 2001, when the matter was heard, the Court granted the Declaration and made an Order that the Respondent pay a fine of seven hundred thousand dollars (\$700,000.00). The FTC is in the process of executing the Order. To date, the sum of approximately one hundred and two thousand two hundred and forty seven dollars eighty cents (\$102,247.80) has been paid by the Respondent. This sum has been paid to the Crown via the Accountant General.

FTC v The Warehouse Limited

During the period December 1993 to November 2003 the FTC received eighty-one (81) complaints against The Warehouse Ltd. The Informants claimed to have purchased various items of furniture from the Defendant and the required deposits ranging between eight thousand dollars (\$8,000) and thirty eight thousand dollars (\$38,000) were paid. At the various times of purchase, The Warehouse promised to deliver the items between seven (7) and fourteen (14) days.

In many instances the items were not delivered and in those instances in which the items were delivered, the delivery times went far beyond the dates agreed at the time of purchase. At the beginning of November 2002, The Warehouse continued to accept deposits and to make representations to the public regarding delivery times. On or about mid-November 2002, many of the Informants went to two (2) of the outlets and found that the entrances were padlocked. Most of the Informants have been unable to contact anyone who can assist them in either recovering their goods or their money.

As a result, some Informants submitted formal complaints. The FTC filed suit on December 2, 2003. The matter came up for hearing in the Supreme Court on March 23, 2004 and again on June 17, 2004. On the last occasion the FTC was asked to file a Notice of Application for the Court Order. The hearing date for the Notice of Application has been set for July 7, 2005.

FTC v Key Motors Limited

Between October 1999 and June 2003, the FTC received at least thirty-seven (37) complaints against the Respondent company. The Informants alleged that they purchased Hyundai motor vehicles of varying models from the Respondent at various times, for which they all obtained manufacturer's warranties. The dashboards of the vehicles all started cracking in a short time and it was proven to be a manufacturer's

defect. The Respondent has been tardy in replacing the dashboards (the average time for replacement has been up to 1 year from notification by the Informant) and the Staff continued to receive complaints.

On October 13, 2003 a suit was filed in the Supreme Court against the Respondent seeking, among other things, a declaration that the Respondent has breached Section 37 of the FCA. The matter came up for hearing on February 26, 2004, and was adjourned to May 4, 2004. On May 4, 2004 the Court referred the matter to mediation, which was held on October 27, 2004; and a settlement arrived at. The rules governing the mediation process prevent disclosure of the terms of settlement. The matter was scheduled to come up before the Supreme Court on April 26, 2005, when the question of endorsing the Court records would be heard.

4.4 Public Education Programmes and Media Campaigns

The FTC continued to inform and educate the public on issues related to competition law and policy. During the 2004/2005 Financial Year the Commission met with various associations and companies. These include the Trade Board Limited, Financial Investigation Division of the Ministry of Finance & Planning, Island Traffic Authority, Jamaica Customs, Registrar General's Department, Bureau of Standards, Office of Utilities Regulation, Jamaica Chamber of Commerce, and the Jamaica Manufacturers Association. Other avenues for public education activities took the form of press conferences, press releases and advisories, television and radio interviews, seminars/workshops and addresses presented by the FTC personnel to service clubs and tertiary level institutions.

The fifth lecture in the Shirley Playfair Lecture Series was held on November 18, 2004, at the Jamaica Pegasus Hotel. The Lecture was presented by Dr. William Bishop, an expert on the economics of Competition Law with over twenty (20) years experience as an advisor to companies worldwide.

Dr. Bishop's presentation was entitled "Antitrust lessons from the Microsoft wars: economics of dominance, regulation and intellectual property". Persons in attendance included members of the business community, the legal fraternity, academia; journalists and representatives of some Ministries and Government Agencies.

On September 2nd to 4th, 2004, the Commission hosted a Capacity Building Workshop for the judiciary. The workshop was conducted by Judge Diane P. Wood, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit; and Senior Lecturer in Law at the University of Chicago Law School. Five (5) Judges attended the Workshop. In addition, copies of the presentation were sent to the Chief Justice, the Supreme Court Library, the Norman Manley Law School, the Sir Arthur Lewis Institute of Social and Economic Studies, and the Solicitor General. The Workshop was funded by the Inter-American Development Bank (IADB) through its Hemispheric Cooperation Programme.

The FTC also participated in the Consumer Affairs Commission's World Consumer Rights Week Symposium by way of a presentation on the implications of deregulation in Jamaica.

FTC personnel participated in the radio talk shows Nationwide, Independent Talk, Drive Time Live, Straight Talk and First Edition. A wide-ranging number of competition and consumer related issues were discussed. The FTC also made presentations to students of various secondary and tertiary level institutions. The December 2004 issue of the Commission's annual Newsletter was published and circulated to various interest groups.

The Commission maintained its high level of public education and continued to participate in both local and international events. The events, activities and programmes during the year were well received by the target audiences.

4.5 Economic Studies

Currently, investigations are being conducted into the markets for electronic money transmission and cambio services, to determine specifically whether the practice of tied selling exists in these markets. The Telecommunications sector also continues to receive FTC attention.

5.0 Participation in Development of Trade Policies

During the Financial Year 2004/2005, the FTC participated in meetings of the Jamaica Trade and Adjustment Team (JTAT), the CARICOM Community Secretariat meeting to review the Draft Model Law on Competition Policy, and the CARICOM pre-Cancun meeting on WTO issues in Competition.

The Commission participated in and or presented at international seminars or workshops hosted by the Commonwealth Secretariat, International Competition Network (ICN), Organisation for Economic Co-operation and Development (OECD), and the United Nations Conference on Trade & Development (UNCTAD).

The subjects/themes of these seminars included "Commonwealth Expert Group Meeting on the Draft Model Bill on Competition for the Asia Region" (hosted by the Commonwealth Secretariat), "Third Annual ICN Conference" (hosted by ICN), "Global Forum on Competition" and "Seminar on Prosecuting Hard Core Cartels and Competition Advocacy" (hosted by OECD), Intergovernmental Group of Experts on Competition Law and Policy (hosted by UNCTAD).

Papers entitled "An Overview of the Draft Model Law on Competition – Asia Region"; "Jamaica's Case Study – Refusal of Access to Port Facilities"; "Advocacy in Promoting Awareness of Competition Policy in Developing Countries."

FTC participation at these seminars and conferences was fully funded by the hosting entity, an international funding agency or the participants themselves.

6.0 Legislative Processes

As set out in the FTC submission for the Ministry Paper of March 2002, drafting instructions for regulations to be established under Section 40 of the FCA were prepared.

Progress work on the enactment of the regulations referred to above as well as on amendments to the Fair Competition (Notices and Procedures) Regulations, 2000, was deferred so as to be dealt with simultaneously with amendments to the Act. The FCA (Notices and Procedures) Regulations is also being amended. Drafting instructions for procedural guidelines which would lend certainty and transparency to the Commission's investigative procedures were in July 2001. However, the process was delayed, pending amendments to the Act.

7.0 Other Issues

For April to December 2004, three hundred and twenty six (326) complaints were received. This volume has reflected negatively on the resolution rate indicator which decreased from sixty seven percent (67%) in 1999 to twenty six percent (26%) in 2004. One reason for the growth in volume of complaints is that since 2001 a number of complaints which would previously have been channeled elsewhere are being investigated by the FTC. Even with the streamlining of investigative procedures, it is expected that the resolution rate will continue to decrease if the number of complaints received continues to increase and resource constraints are not relaxed.

Weaknesses in the FCA, which were highlighted by the Court of Appeal in the Jamaica Stock Exchange v Fair Trading Commission case, prohibited the Commission from taking matters through to a hearing by the Commission. Steps are being taken to amend the legislation.

The FTC continued to work with the Trade Board Ltd., the Customs Department, and the Island Traffic Authority to establish standards in the motor vehicle sector and have the Motor Vehicle Import Policy amended to deal effectively with a variety of problems that plague the sector. The policy was amended and launched in 2004.

8.0 Summary of Main Programmes For the 2005/2006 Financial Year

The Commission has established its prime goals as:

- Competition Advocacy; coordinating activities with the Consumer Affairs Commission, the Bureau of Standards Jamaica and the Ministry of Education, Youth and Culture.

- Facilitating the training of the Judiciary.
- Influencing innovation and encouraging improvements in services provided to consumers thereby improving competitiveness among all players in the market.
- Educating manufacturers and distributors as to the need to provide adequate and relevant information on products and services offered for sale.
- Achieving a wider level of understanding of the FTC and the FCA by consumers, the business community, the media and policy makers within Government thereby improving competitiveness among players in various sectors. Focusing on the business community, to educate it on its responsibilities under the FCA, thereby reducing breaches of the Act.
- Influencing decisions by the Ministry of Foreign Affairs & Foreign Trade as it seeks to keep Jamaica's competition policy relevant, thereby contributing to the formulation of FTAA, CARICOM and WTO Rules in the area of Competition Law and Policy.

9.0 Strategic Focus for the Medium to Long Term

Strategies to be employed include:

- (a) Initiating investigation into complaints within fifteen (15) working days;
- (b) Monitoring the market by keeping abreast of developments so that investigations can be initiated in the absence of complaints;
- (c) Prosecuting breaches of the FCA in accordance with in-house rules and procedures;
- (d) Increasing public awareness through public education with specific emphasis on the media;
- (e) Undertaking industry studies as resources allow, to determine competitiveness;
- (f) Disseminating information on the FTC directly to Government ministries and also in the print and electronic media;
- (g) Participating in seminars, workshops and meetings with Government policy makers, various associations, community groups and educational institutions;
- (h) Focusing on the business community to educate merchants on their responsibilities under the FCA, thereby reducing breaches of the Act;
- (i) Attending Free Trade Area of the Americas (FTAA) and CARICOM Inter-Governmental Task Force (IGTF) Meetings;
- (j) Financial assistance being available, attending international seminars, specifically those hosted by other competition agencies, the International Competition Network (ICN), the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Co-operation and Development (OECD).;
- (k) Providing timely opinions to the Ministry of Foreign Affairs and Foreign Trade or various other ministries, on sundry matters.

10.0 Budgetary Allocation

The following table summarises the budgetary figures for the Commission.

Budgetary Allocation (2002/03 – 2005/06)

Object	2005/2006 Approved (\$)	2004/2005 Actual (\$)	2003/2004 Actual (\$)	2002/2003 Actual (\$)
Compensation of Employees	32,854,000	32,078,091	29,150,484	24,652,702
Travel Expense & Subsistence	3,127,000	2,738,603	2,154,431	1,632,161
Rental Of Bldg., Machinery & Equip.	4,091,000	2,570,760	3,105,670	2,866,196
Public Utility Services	1,757,000	1,134,866	899,231	769,195
Purchase of other Goods & Services	1,847,000	2,927,184	3,042,661	2,469,565
Asset Purchases	331,000	199,399	534,231	76,623
Total	44,007,000	41,648,903	38,886,708	32,466,442

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