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## Application of the FCA to a Regulated Telecoms Sector <sup>1</sup>



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Good afternoon ladies and gentlemen and thank you Professor Dunn and your team for affording the Fair Trading Commission (FTC), the opportunity of participating in this conference.

### **Introduction**

We can all agree that efficient and innovative industries are critical to a country's economic growth and development; and that the telecoms industry is among those few which facilitate and enable development in other sectors. For this reason it is of critical importance that the governing policies are well designed and effectively implemented to ensure that consumers benefit from the full potential of the sector. And we, in our various capacities as policy makers, public authorities and academics, ought to work together to ensure that that this potential is realized. To ensure that consumers get the maximum benefits, it is necessary for there to be unbridled competition among providers; and where competition is infeasible or unworkable, regulatory intervention

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becomes necessary. It goes without saying therefore, that effective competition must work hand-in-hand with smart regulation.

### **Special Characteristics of the telecoms sector**

In the telecoms sector, for the most part, the value of the service provided increases as more individuals subscribe to that service. If consumers find communicating across networks to be prohibitive, there will be a natural tendency for the market to be highly concentrated as at some point, most new customers will simply select the network operator with the largest number of subscribers. When a supplier reaches some critical mass of subscribers it would be largely insulated from competitive pressures from current or potential rivals.

The most obvious means of promoting competition among suppliers is to lower the costs associated with subscribers communicating across networks. Interconnectivity among competing networks is of paramount importance in creating the proper incentives for suppliers to offer affordable services.

### **Competition Policy**

Competition policy is aimed at securing efficient outcomes in the form of increased consumer choice, improved quality of service, lower prices and innovative products. In most countries competition law applies fully to the telecoms sector. Jamaica is no different; the Fair Competition Act (FCA), which is one of general application, applies to all sectors in Jamaica, including the telecoms sector. While the FCA does not contain telecoms-specific provisions, it has general provisions that address competition related issues. Competition cases specific to the telecommunications sector generally relate to agreements among suppliers that have the potential to lessen competition, as well as to different forms of abuse of dominance associated with frustrating or outright denial of access to essential facilities.

The telecoms sector, in addition to being subject to competition law, is regulated by the Office of Utilities Regulation (OUR). This construct results in the regulator and the competition authority sharing jurisdiction; and therefore calls for a close working relationship between the FTC and the OUR. In the telecoms sector regulation and competition are parallel processes that require strong and consistent application of both sets of rules. One cannot operate independently of the other.

The basis for policy concern in telecoms, as in any other sector, is market power, where there is potential to harm consumer welfare through less than efficient pricing and limited innovation. These issues are examinable under the abuse of dominance provisions of the FCA. Given the nature of telecoms services, each network operator has a monopoly over calls terminated on its network, but there must also exist a significant level of cooperation between rivals, with respect to access. Anti-competitive behavior therefore stems from matters concerning access as small network operators always seek to interconnect to the largest network in order to increase the value of their own network. The terms and conditions for such access are crucial for the viability of networks. This means that the manner in which access is granted and the price at which it is granted are important issues for the industry.

### **Competition issues**

In a sector where access is essential to the proper functioning of the sector, the main competition issue in telecoms relates to the terms and conditions of access. In general, operators who want their subscribers to communicate with subscribers on other networks must incur termination charges. Since termination services are essential for interconnection, operators who wish to shield themselves from direct competition may do so by raising termination charges.

1. Competition concerns have been raised when network operators charge higher prices to call rival networks, coupled with high interconnection rates. Such pricing strategies may be used to unduly reinforce or extend market dominance which may, in effect, stifle competition and innovation to the detriment of consumers. This is a double whammy as it prevents smaller network operators from generating revenue from a significant segment of the market. To explain, high cross-net charges leads to a reduction in revenue that smaller

network operators would earn from termination services. Further, high interconnection charges reduce revenue that smaller network operators could earn from origination services.

Should network operators be allowed to charge higher prices for calls to other networks, whether by way of high retail cross-net prices or discounts for on-network calls? When such pricing strategy is allowed, larger networks have an incentive to insist on high interconnection charges. Implicitly, this raises the price that rival operators charge for off-net calls. Smaller network operators have relatively more off-net calls than larger operators; and so its customers are disadvantaged because of the greater volume of traffic that is already on the larger network.

2. A second issue that we have had to address is price discrimination where one network operator charges one or more of its competitors a lower interconnection fee than it charges its other competitors.

Another form of price discrimination that could be anti-competitive, is where a vertically integrated operator charges an affiliated entity a lower price relative to what it charges a competing operator. A provocative question is therefore, to what extent would a larger network operator benefit by charging a smaller network operator the same price that it charges its affiliate? Put another way, what incentive does a larger network operator have, to facilitate a smaller operator. I would say none or may be very little. Therefore mandatory and non-discriminatory access is required to stimulate competition through regulation.

3. The non-uniformity in regulation among competing services is a third issue. As it stands, regulations govern interconnectivity on the part of the dominant fixed-line provider only.<sup>2</sup> *It is widely recognized that it is essential to regulate termination charges on fixed networks*

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<sup>2</sup> Neelie Kroes (April 2009), [The Interface between Regulation and Competition Law](#). “In these cases the old monopolist usually controls an infrastructure that itself was built with state finance, and which is necessary for competing downstream. It might completely refuse access or, when forced, grant access in such a way that no room for competition is left; this amounts to refusal to supply.”

*to prevent dominant fixed network operators from using high interconnection charges to stifle competition.* A point of note is that there is no similar recognition for regulation of mobile operators. This position has served to provide mobile service providers with an unjustifiable advantage over fixed line service providers. The FTC's work in the area demonstrates that fixed and mobile telephone services are in the same relevant market, with mobile services accounting for at least 60% of call volume; and therefore, the question arises, why should the dominant fixed-line provider be regulated, while mobile operators are not regulated?

Under the current regulatory regime where the dominant fixed line operator is regulated and mobile operators are not regulated, a distortion in the pricing mechanisms is created; and this results in a reduction in traffic originating on fixed lines and terminating on mobile networks. A fixed-line subscriber will choose to use his mobile service instead of his fixed line, when calling another mobile subscriber, because it costs him less.<sup>3</sup>

4. Another important issue relates to costs determination in the assessment of allegations such as predatory pricing and margin squeeze. This can be challenging especially given that the industry is characterized by very high fixed costs in relation to variable costs; as well as the bundling of several inter-related services that are provided on the same platform.
5. The innovation and price competition that will come from the expansion of internet based services, especially given the expected roll-out of high speed broadband networks, the implementation and/or expansion of fibre networks; and the need to ensure that these networks remain open in that access at all levels is kept unlimited.

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<sup>3</sup> OECD (February 2002), Policy Roundtables: Competition & Regulation Issues in Telecommunications 2001, "Under the convention that the calling party pays, mobile callers indirectly pay the termination charges on fixed networks, but do not pay the charges for fixed-to-mobile termination. If it is assumed that mobile subscribers care primarily about the price of the calls they make and not the price of calls they receive, mobile subscribers will pay little attention to the price of fixed-to-mobile calls at the time they make their choice as to which mobile network to subscribe. As a result, there will be little competitive pressure on fixed-to-mobile termination charges."

6. Given the high degree of concentration in the telecoms sector, the issue of consolidation among competing network operators raises significant competition concerns. The effects may be more problematic when direct competitors are involved as opposed to the involvement of operators at different levels of the market.

There are critical and valuable roles for the FTC and the OUR in ensuring that the telecoms sector works well. At some point there will be little need for regulation and also at some point competition enforcement might not be sufficient to stem anti-competitive practices. We have to get the correct balance between regulation and competition; and this requires an effective working relationship and clearly defined roles of both authorities.

Some countries have removed or reduced retail price controls for services in which there is sufficient competition. At what point will we be comfortable that there is little or no need for regulating specific services? This is an issue that the practitioners and policymakers must consider.

### **Concluding Comments**

Jamaica's telecoms industry has come a very far way. Since it was liberalized in 2000, we have moved from a single provider, to multiple providers; and from a fixed-line only landscape to one in which there are several competing innovative products and services; and there has been a gradual improvement in the technology provided to consumers. Even though competition has developed impressively during the last decade, creating an environment of seamless interconnectivity has eluded us to date. There is still room for increased competition and this may be achieved by (i) improving the regulation of mobile termination rates; and (ii) reducing consumer switching costs through, for example, number portability and encouraging technological developments. And very importantly, in order reach this stage, it requires that the industry players, policy makers, regulator and us, the competition authority, work together to ensure that the industry delivers new and innovative services, ultimately for the benefit of consumers.

Thank you.