



Comments on the Proposed Amendments and the Existing Subscriber Television Operator (STVO) Licence

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1. Introduction

The principal issue facing sector regulators and competition authorities in a communications sector is how to ensure effective competition in downstream markets when dominant firms control the access to bottleneck network facilities. This position provides dominant carriers with significant competitive advantage and the incentive and opportunity to engage in anti-competitive conduct. The Fair Trading Commission (FTC) therefore agrees that it is necessary to establish and include competitive safeguards provisions in the STVO Licence. The Staff of the FTC wants to caution however, against the imposition of regulatory constraints that are so onerous that they erode the benefits of competition.

2. Comments on Proposed Amendments

The FTC would like to see the inclusion of a Provision which requires all STVOs to have written contracts with their subscribers.

Provision 2:

- The primary objective of competition law is to ensure that competition in a market is not distorted and while competitors may be protected in the enforcement of a competition legislation, this is an indirect outcome and is generally not an explicit objective. In fact, the protection of competitors runs counter to best practice.
- A new provision should be added to this section that would forbid a licensee to engage in mergers or acquisitions that would substantially lessen competition. It has been the experience globally that application of behavioral rules is not as effective as having a market structure with multiple significant suppliers in protecting consumer interests. In this instance, convergence of communications technologies presents a rare opportunity for vigorous competition between several networks that were monopolies or near monopolies prior to convergence. Convergence is an opportunity that should not be squandered by allowing anticompetitive mergers between these networks.

- For consistency, the words “or distorted” should be inserted after the word “restricted” in Provision 2(c).

Provision (3):

- A key consideration in dominance determination is the definition of the relevant market and when convergence is at issue this can be a technically challenging analysis. In order to take advantage of core competencies the determination of whether a Licensee is dominant should be conducted in consultation with the Fair Trading Commission (FTC). The FTC routinely makes such determinations and in the interest of consistency, its expertise should be utilized.
- The definition of dominance in 3(i) is not generally utilized in competition assessments. Moreover, there should be a single definition of dominance. The use of more than one definition could result in a scenario where an entity is found to be dominant based on one definition and non-dominant based on another. This is an undesirable outcome. In addition, if the dominance considerations under the STVO licence differ from those established under the FCA and its corresponding guidelines then it is likely that a dominance determination made by the Broadcasting Commission (BC) will differ from one which may be arrived at by the FTC and the Office of Utilities Regulation (OUR), both of which apply the same criteria in their determinations. For instance, the FCA makes no reference to “appreciable extent”. Where an entity falls under the jurisdiction of sector-specific regulators (in this case the OUR and the BC) and a competition agency, it is international best practice for the agencies to apply a “significantly similar” if not an exact set of criteria to the determination of dominance. This will result in an entity receiving a similar regulatory treatment by all agencies. Also, if as is stated in the provision, an entity is to be regulated in accordance with the Fair Competition Act (FCA) then it is recommended that the definition of dominance found in Section 19 be applied.
- The market share safe harbor identified in Provision 3 should be 35% rather than 50%. Since the presumption of dominance is rebuttable under Provision 6, the safe harbor provision should be narrower. A 50% safe harbor could allow a market participant with significant market power to avoid regulatory oversight. This is less likely with a lower threshold and is consistent with international competition agency law enforcement practices.¹
- Reference is made to “applicable regulation” in Provision 3, under which Act will these regulations be established? Is it being contemplated that the Broadcasting Commission will have concurrent jurisdiction with the FTC?

Provision 4:

- The conditions listed therein are features of a market in which collusion or joint dominance is likely to occur. In the case of dominance determination, all the factors listed are generally assessed along with an entity’s market share to determine whether it

¹ For example, 35% is the market share safe harbor for unilateral market power in the U.S. Horizontal Merger Guidelines.

is indeed dominant. Therefore making an individual dominance determination based solely on any two/three/four of these factors could result in a flawed determination.

- Item 4 (ix) should include “barriers or impediments to entry.” This rewording will help to avoid a narrow and restrictive interpretation of the term “barriers to entry”, that some parties might seek to apply. Under this narrow definition of barriers to entry, conditions that delay entry for many years might not qualify as one of the listed conditions.

Provision 5:

- While an STVO may provide telecommunications services, regulatory best practice requires that the regulation of retail telecommunications rates be carried out by a single entity, regardless of type of network (technology) being used to provide these telecommunications services. It is therefore recommended that the OUR retain jurisdiction for the regulation of retail telecommunications services. It should be noted that an entity which is dominant in the provision of cable TV services is not necessarily dominant in the provision of telecommunications services. Therefore a determination that an entity is dominant in the Cable TV market(s) should not automatically result in the regulation of this entity’s retail telecommunications rates.

Provision 6:

- The factors listed herein are not informative. In addition, factor (iv) should be amended to read “the power of the provider to increase and sustain retail prices significantly above competitive levels”. Every entity regardless of the position of economic strength which it occupies has the power to set prices. The outcome of a non-dominance declaration rests on the inability of a provider to “increase and sustain retail prices significantly above competitive levels” and factors (i), (ii), (iii), (v) and (vi) all are criteria which are used to make this determination.

Provision 7:

- A clause which addresses the handling of competitively sensitive information should be included under this provision.
- In this provision reference is made to “affiliates or connected company” but in an earlier provision (2c), reference was made to “associated or affiliated company”. The terminology used should be consistent through out all Provisions.
- The words “delivery of products and service” should be inserted before “within” in 7(c) as per 7(b).

Provisions 8-9:

- A dominant Licensee should be required to submit to independent regulatory audit and the separation of accounts should be such that the costs and revenues associated with each of the entity’s businesses and the transfer payments between them are clearly identified and properly allocated. The Licensee should have a clear rationale for its transfer payments and each of these charges should be supportable.

3. Comments on Existing Licence

Provision 3.4: Due diligence should be carried out to ensure that the terms of the licence do not conflict with any other law or regulation in Jamaica. If however, the term of the licence which is in conflict is absolutely necessary, then this should be dealt with as an exception.

Provision 12: The meaning of the term “non-discriminatory access and service” should be expanded to include access for commercial use and this Provision should be made applicable to the provisioning of wholesale facilities. It should be noted that the pricing strategies mentioned in 12(ii)(a), (b) and (c) can be used in an anti-competitive manner (e.g. predatory pricing and price discrimination). Safeguard provisions should therefore be included to prevent any abuse of a dominant position. For instance, prior to engaging in any form of promotional campaigns a dominant STVO should seek the approval of the Broadcasting Commission. Promotions should be for a specific period (preferably no longer than 8 weeks) and there should be no back-to-back campaign offered to the same class of customers.