STAFF REPORT

Investigation of Canopy Insurance Limited's conduct involving optical service providers

Case No. 8183-21
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FINAL

FAIR TRADING COMMISSION
30 Dominica Drive
Unit 42A, New Kingston Business Centre
Kingston 5, Jamaica
Tel: (876) 960 0120 – 4
Fax: (876) 960 0763
Email: ftc@cwjamaica.com
Website: www.jftc.gov.jm

Team of Investigating Officers

Legal Department

Venessa Hall, Legal Officer

Competition Bureau

Desroy Reid, Competition Analyst

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I. THE PARTIES

Canopy Insurance Limited

1. Canopy Insurance Limited ("Canopy") is registered under the laws of Jamaica with registered offices at Half Way Tree Road in the parish of Saint Andrew. Canopy's core activity was carrying on business as insurance agents and was incorporated on the 23rd day of March 2018.

Jamaica Optometric Association

2. Jamaica Optometric Association ("Optometric Association") is a non-profit organization whose members consist of persons engaged in the practice of optometry.

II. THE CHALLENGED CONDUCT

3. Canopy is coercing optical service providers (OSPs) to offer substantial discounts to its customers.

Canopy has several product offerings, such as group health insurance, group life with accidental death and dismemberment, overseas emergency medical, personal accident, and critical Illness plans. Canopy offers a health insurance product customizable by employers who purchase plans for their employees. The employer is permitted to determine the key features of this plan. The employer is permitted to select the benefit structure, benefit levels, and deductible levels. In addition, the employer is given the option to select a preferred optical provider arrangement. This arrangement between Canopy and the OSPs grants the insured employees a predetermined discount on the cost of frames and lenses from OSPs who are part of the preferred provider network (PPN) of OSPs.

Not all OSPs registered to accept Canopy's swipe cards are part of the PPNs. In parishes with PPNs, Canopy limits its use of its swipe cards to PPNs, even if other non-PPN members are registered with Canopy to accept its swipe card. In parishes where there are no PPNs, but there are OSPs that are registered to accept Canopy cards, insured employees are able to use the swipe card.

III. NATURE OF THE INVESTIGATION

4. Consumers access optical services from OSPs. Most consumers with health insurance access the services of OSPs using their health cards. If for whatever reason, insured consumers are unable to swipe their card at an OSP, they can fill out a claim form for reimbursement after paying for the visit to the OSP from out of pocket. Health plans are

usually either a fixed dollar amount or a percentage of the value of the service. Persons who are not part of a health plan will have to pay the full cost out of pocket for optical services.

5. The subject of this complaint is that the Respondent has established a preferred provider network (PPN) of OSPs. The Respondent indicated that it is now limiting the use of its health card to members of the PPN only. Parties wishing to join the PPN are required to sign a non-disclosure agreement, and in return, they would be told about the size of the discount(s) they would need to offer. One concern of OSPs that are not a party to the PPN (non-members) is that discounts should be decided by the OSP and not the health insurance provider (Canopy). There is also the concern that the challenged conduct could negatively impact the quality of services offered by OSPs as well as reduce consumer choice.

IV. BACKGROUND

6. Eye care is an important component of maintaining a decent quality of life. Protection of the eyes by ensuring good eye health and all related services, including, but not limited to, the routine testing of the eyes, getting the correct lenses and frames to assist in seeing, and eating foods that enhance vision, are critical to avoiding vision loss and blindness. Protecting the eyes also assists in avoiding the development of eye diseases such as cataracts and glaucoma.

7. There are three broad categories of optical service providers: Opticians, Optometrists, and Ophthalmologists. Opticians are technicians who fit the respective vision-correcting devices such as eyeglasses and contact lenses. The Optometrist examines, diagnoses, and treats patients' eyes for general vision-related conditions, including prescription of glasses and other visual aids, diagnosis of eye conditions, eye care after surgery, and routine eye examinations. The Ophthalmologist is a trained full-service eye doctor that is trained to provide medical and surgical treatments for eye conditions.

8. The complexity of the respective jobs implies that they require different levels of training. The Ophthalmologist is the most technical of the three, requiring the most extended training period. The Optometrist is required to train for a shorter period than the Ophthalmologist but longer than the Optician. Opticians require the least training to perform their tasks.

9. In Jamaica, the monitoring of optical services falls within the Ministry of Health and Wellness and is guided by the Opticians Act (1926) (the Act). The Act speaks specifically

to optometrists without any reference to ophthalmologists or opticians as defined above. An Optometrist is required to be qualified in the practice of optometry and must be registered at the Registrar-General of Births and Deaths.

10. Failure to satisfy these requirements while practicing optometry is a breach of the Act, and the guilty party will be "liable to a penalty not exceeding forty dollars, or to be imprisoned, with or without hard labour, for a term not exceeding six months[1]"

11. There are many players in the optical services market. In the local telephone Directory,[2] 40 companies advertise that they offer optical services: 23 ophthalmologists, 21 opticians, and eight optometrists. The same source also indicated that there are three private enterprises: Sagicor Jamaica Limited (SJL), Guardian Holdings Limited (GHL); Canopy, and one public enterprise: National Health Fund, which supplies general health insurance to all Jamaicans.

12. Canopy is the most recent entrant in the health insurance services market, having entered the market in January 2020. However, its competitors, SJL and GHL, have been operating in the market for over 50 years and 20 years, respectively.

13. In 2020, the health care industry paid out JMD20.15 billion in claims.[3] Of this amount, the two largest players in the health care services market (SJL and GHL) paid out 14.28 billion in claims while collecting JMD17.92 billion in premiums.[4]

THEORIES OF HARM

14. Canopy provides health insurance services to its customers. Previously, these customers had the option to use their swipe cards at any OSP, that is, registered with Canopy. Recently, however, Canopy has instituted a preferred provider network (PPN), which limits its customers' use of their swipe cards to OSPs that are members of the PPN or at OSPs registered with Canopy that do not operate in a parish that has a PPN member. If Canopy's customers opt to use a non-PPN member, they must pay the full cost of the optical service out of pocket and make a claim to Canopy to recover the insured portion of the payment at a later date.

[1] Opticians Act, section 15
[2] Yello Pages 2022
[3] IAJ Year Book, 2021
[4] The Staff was unable to locate the data for total premiums collected

15. For competition to be harmed both rivals and consumers will have to be harmed. Below, the Staff examines how rivals and consumers are likely to be harmed by the challenged conduct.

a. Harm to Rival

16. The payment for optical services for those with health insurance involves swiping the health card to complete the transaction. Where this process becomes burdensome, for example, the requirement to complete a claim form and submit it to the insurer for reimbursement, could encourage customers to switch from the non-PPN members to the members of the PPN due to the lack of the swipe option for non-PPN members.

17. The challenged conduct would harm rival suppliers of optical services by diverting revenue from non-network rivals and/or raising rivals' costs to do business. Revenue from rivals would be diverted from customers who, but for the challenged conduct, would have used the optical services of rivals. To avoid losing revenue, rivals would be forced to incur the additional costs associated with discounts associated with the PPN.

b. Harm to Consumers

18. On the one hand, the challenged conduct would also harm final consumers of optical services by forcing them to go to OSPs that are members of the PPN. For example, 1) if they cannot find the money out of pocket to pay for the service and then submit a claim to the Respondent for reimbursement at a later date, or 2) If the claim process is tedious and/or the reimbursement process unduly long, and/or the amount of monies to pay for the service out of pocket is exorbitant, then consumers will eventually limit their choices to OSPs who are members of the PPN. This action would result in consumers' choices of OSPs being limited to PPN members.

19. On the other hand, consumers of optical services are likely to benefit from the challenged conduct since they will be the primary beneficiaries of the steeper than normal discounts that Canopy is requesting PPN members to offer. Currently, a sample of 10 optical service providers revealed that standard discounts ranged from 0-15%, on average, with two optical service providers having a seasonal promotion on lenses of 50%. PPN members are required to offer a standard predetermined discount on all optical services. For this discount to be effective, the amount must be higher than the standard discount range outlined above. The difference in the standard discount rates offered by PPN members and non-PPN members will represent the additional benefit that members will get as a result of the challenged conduct. The higher the differential, the more consumers will

stand to benefit from the challenged conduct, given that the cost of glasses and lenses often exceeds JMD100,000.

RELEVANT MARKET

Relevant Product Market

20. The relevant product market defines the product boundaries within which competition exists between the parties to the challenged conduct and includes only those products that are reasonably interchangeable by consumers for the same purpose. The parties impacted by the challenged conduct are:
    a. The Respondent – Canopy Insurance Limited;
    b. The Informant – Jamaica Optometric Association and, by extension, optical service providers; and
    c. Customers of the Respondent, specifically Digicel Jamaica Limited's (Digicel) Staff and, by extension, employees of employers who engage the services of Canopy.

    In examining the relationship between the parties, the Staff is better able to determine the product(s) that are impacted by the challenged conduct.

21. The relationship between the parties is outlined below:
    a. Canopy sells health insurance to Digicel's Staff;
    b. OSPs provide optical services to Digicel's Staff;
    c. There is no direct relationship between Canopy and the OSPs. However, it is worth noting that Digicel Staff pays a premium to Canopy for insurance. Canopy then pays out a portion of this premium to OSPs when its customers use the service of OSPs. Canopy, therefore, benefits when customers are charged a lower price for optical services.

22. From the above relationship, there are two candidate product markets: the health insurance market and the optical services market.

23. The health insurance market comprises health insurance companies, namely SJL, GHL, and Canopy. The nature of the challenged conduct is such that it is unlikely to harm the health insurance service providers as the rivals of health insurance providers are not impacted by the challenged conduct. Canopy is the smallest of the three players; the challenged conduct is their attempt to get a foothold in the market to compete with the more established players, SJL and GHL. Canopy's action is likely to have little to no impact on rivals, who can easily adopt said strategy with more impact given their larger market share. In fact, the conduct is likely to benefit Canopy's rivals in the insurance market should they too seek to adopt the strategy. It is noted that the health insurance providers

are likely to benefit from adopting the strategy because the strategy lowers the total amount of premiums that they would pay out to OSPs.

24. Given that there is likely to be no harm to rivals in the health insurance market, the Staff concludes that the health insurance market is not a relevant market. Previously the impact of the challenged conduct on consumers was examined in the theories of harm. Further analysis was done below to determine whether the other candidate market, the provision of optical services, constitutes a relevant market.

25. The optical services market comprises primarily opticians, optometrists, and ophthalmologists. In the optical services market, the impact is clear, as outlined in the theories of harm: both rivals (OSPs) and consumers are likely to be harmed by the challenged conduct. However, there are clear benefits to be derived by the consumers as well. The extent of the harm to the consumers is examined further in the Competition Analysis section below.

26. The nature of optical services means that there is no reasonable close substitute to this service. Accordingly, the FTC concludes that the relevant product market comprises optical services.

Relevant Geographic Market

27. Having identified the relevant product market, the relevant geographic market is now defined. This comprises the area in which the enterprises concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently similar. This area is a geographical territory that can be distinguished from neighbouring areas, in which competition conditions in a relevant market for a product are sufficiently the same for all participants in such a market. For each relevant product market in which Canopy participates, the geographic market must be defined.

28. Optical services are generally provided in densely populated locations such as parish capitals and other town centers. The service is provided from an office where clients are able to visit to get the services administered by a qualified professional.

29. Optical services are available to clients in all parishes in Jamaica through several optical service providers. Clients generally visit an OSP that is sufficiently close to them. However, the cost of optical services is such that clients could be incentivized to travel over long distances if they are guaranteed a significant discount by an OSP in another parish if the service is significantly cheaper than rivals that are in close proximity.

30. The FTC, therefore, concludes that the relevant geographic markets comprise multiple geographic areas throughout Jamaica.

Conclusion

31. Accordingly, the FTC concludes that the relevant market for assessing the competitive effects of the Respondent's conduct is the market for optical services provided in multiple geographic areas throughout Jamaica.

LEGAL REVIEW

a. Analytic Framework

32. The FTC's jurisdiction to investigate matters concerning the conduct of business in Jamaica is grounded in section 5(1)(a) of the Fair Competition Act ("**FCA**"). In *Fair Trading Commission v. Digicel & Anor,*[5] the Privy Council confirmed this jurisdiction and stated additionally that the FTC is not precluded from investigating and/or intervening in any particular sector of the market, subject to any legislation that expressly excludes that particular sector.

33. Based on the foregoing, the FTC has the jurisdiction to investigate the challenged conduct to determine whether the same has breached the provisions of the FCA.

Relevant Section of the FCA

34. The FCA prohibits the abuse of dominance if it is found that such abuse had, is having, or is likely to have the effect of lessening competition substantially in a market. Sections 19 – 21 of the Act address the abuse of a dominant position.

Dominance

35. Section 19 defines the concept of dominant position and 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.*"

In economic terms, an enterprise in a dominant position has a reasonably large degree of market power.

[5] *Fair Trading Commission v. Digicel & Another* [2017] UKPC 28 per Lord Sumption at paragraph 22

36. The European Union has developed significant competition law jurisprudence, which has been facilitated by the Treaty on the Functioning of the European Union (TFEU). In particular, Article 102 of the TFEU has a similar objective as sections 19- 21 of the FCA. Article 102 *prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, as incompatible with the internal market in so far as it may affect trade between EU member states*.

37. The constituents of Article 102 have been examined by the European Court of Justice (ECJ). In the cases of *United Brands Co and United Brands Continental BV v Commission*[6] and *Hoffman-La Roche & Co. AG v Commission*[7], the ECJ provided a definition of dominance that has remained applicable. The ECJ reasoned that a dominant position is a position of economic strength that enables a firm to prevent effective competition in the relevant market; a firm with a dominant position has the power *"to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers*.[8]"

38. In addition, the ECJ has stated that dominance can be presumed, in the absence of evidence to the contrary, if a business has a market share persistently above 50 percent. Furthermore, determining whether a firm occupies a dominant position should include an examination of entry barriers. This assessment of dominance is a matter for an economic analysis.

Abuse

39. Should there be a determination of dominance, the economic analysis will evaluate whether the alleged conduct is an abuse of that dominance. An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market. Section 20(1) of the FCA provides examples of the practices and arrangements that are categorized as abuse of dominant position. The list is not exhaustive and includes the following:
    - Restrict the entry of any person into that or any other market;
    - Prevent or deter any person from engaging in competitive conduct in that or any other market.
    - Eliminate or remove any person from that or any other market; directly or indirectly imposing unfair purchase or selling prices or other uncompetitive practices;
    - Limit production of goods or services to the prejudice of consumers;

[6] Case 27/76, United Brands Co. and United Brands Continental BV v. Commission [1978] ECR 207, [1978] 1 CMLR 429
[7] Case 35/76, Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, [1979] 3 CMLR 211
[8]Case 27/76, United Brands Co. and United Brands Continental BV v. Commission [1978] ECR 207, [1978] 1 CMLR 429, para 65

- Conclude 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, the section does not forbid certain types of behaviour per se; only that dominant firms are forbidden from engaging in these behaviours.

40. The question of what constitutes abuse can also be garnered from the Hoffmann-La Roche[9]. The ECJ, in paragraph 91, stated that:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market, where as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from whose which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

41. Accordingly, abuse refers to the anticompetitive behaviour of a dominant firm that is intended to maintain or increase its position. The abuse of a dominant position is prohibited by competition law because it damages true competition between firms; exploits consumers and makes it unnecessary for dominant firms to compete with other firms on the merits. An examination of the case law reveals that abusive behaviour consists mainly of exclusionary practices, such as predatory pricing[10], exclusive dealing, refusal to supply[11], and tying[12].

Substantial Lessening of Competition

42. According to section 21 of the FCA, the abuse of dominant position must either have had, is having, or is likely to have the effect of lessening competition substantially in the market. This section establishes the legal basis on which action may be taken against the Respondent if their conduct is found to be an abuse.

43. The FCA does not define the term "lessening competition substantially". However, section 2(4) of the FCA states that references to the lessening of competition shall include

[9] Case 35/76, Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, [1979] 3 CMLR 211
[10] Case C62/86, AKZO v Commission, and Tetra Pak v Commission [1997] 4 CLMR 662
[11] Cases 6/74, Commercial Solvents v Commission [1974] ECR, 223, [1974] 1 CMLR 309
[12] Case C-333/94P Tetra Pak International SA v Commission [1996] ECR I-5951, [1997] 4 CMLR 662

references to hindering or preventing competition. Further, in *Stirling Harbour Services Pty Limited v Bunbury Port Authority* the Federal Court of Australia explained that:

"*Conduct has the effect of lessening competition in a market only if it involves the reduction in the level of competition which would otherwise have existed in that market but for the conduct in question.*[13]"

44. In regard to substantially lessening of competition, the High Court of New Zealand in *Commerce Commission v Port Nelson Ltd* stated that:

"....[the] reference in s 27(1) to 'substantially lessening competition' is taken as meaning 'lessening competition in a way which is more than insubstantial or nominal.'"

45. It is instructive that an assessment of an alleged abuse of dominance requires the sequential examination of the following:
    a. Whether the enterprise is dominant in the relevant market;
    b. Whether the alleged conduct constitutes an abuse?
    c. Whether the alleged conduct substantially lessens competition?
    d. Whether the alleged conduct has any efficiency justification?
    e. Whether the alleged conduct has any defense?

46. For liability to be satisfied under sections 19–21, these requirements must be established; a failure to establish a criterion in particular (a) or (b) or (c) would demonstrate that there has been no breach of sections 19-21.

b. Discussion

47. In the analysis of whether a conduct has contravened sections 19 – 21, the Staff has to evaluate the different elements as required by the FCA. The first element is to determine whether the Respondent is dominant in the relevant market. As noted in the *Legal Review*, section 19 of the FCA defines dominance. A close examination of this definition reveals that an enterprise is considered dominant only if it is a supplier in the relevant market.

48. To the extent that the Respondent does not participate as a seller in the relevant market, the Staff concludes that Canopy's conduct could not breach the FCA.

[13] *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 1381 at para 66

CONCLUSION

49. In the circumstances, Canopy's conduct does not fall within the purview of the FCA and therefore does not constitute a breach of sections 19-21.

RECOMMENDATION

50. The Staff recommends that the investigation be closed without any further action on the part of the Commission.