



STAFF REPORT ON ASSESSMENT OF ALLEGATION BY VERTICAST AGAINST DIGICEL (JAMAICA) LIMITED & COLUMBUS COMMUNICATIONS JAMAICA LIMITED

FAIR TRADING COMMISSION

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I. The Respondents

1. Digicel (Jamaica) Limited is a company registered on April 9, 1999, under the Companies Act of Jamaica with its registered offices at Ocean Boulevard in the parish of Kingston. Digicel offers landline and mobile telecommunications, cable TV and broadband-speed internet services and ICT services in Jamaica.
2. Columbus Communications Jamaica Limited is a company registered on March 26, 2002, under the Companies Act of Jamaica. Its registered offices are at 2-6 Carlton Crescent, Kingston 10 in the parish of St. Andrew. The company operates under the tradename *Flow* and provides cable television, landline and mobile telephone, and broadband-speed internet services in Jamaica.

II. The Informant

3. Verticast Media Group Limited is a company registered pursuant to the Companies Act of Saint Lucia with its registered offices at Bourbon House, Bourbon Street, Castries, St. Lucia. The company creates cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators. Verticast obtained the rights from the English Premier League to broadcast their matches for the 2022/23 to 2024/2025 football seasons.

III. The Alleged Conduct

4. Verticast stated that the Defendants have directly and/or indirectly conspired and/or colluded or have engaged in a concerted practice with each other which has had and is having the effect of substantially lessening competition or an exclusionary effect in the market for providing live broadcast of elite sports competitions, on multi-subscriber cable television platforms.
5. The Alleged Conduct concerns the Respondents' refusal to enter an agreement with the Informant in which the Respondents would distribute the content from the Informant's sports channels – CSports and CSports2.
6. The issue that arose was whether the Respondents' refusal to enter an agreement with the Informant was based on a conspiracy to hinder the Informant's expansion into the market for multi-subscriber cable networks.

IV. Theory of Harm

7. The alleged agreement between Digicel and Flow raises concerns under section 17 of the FCA that prohibits agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market. Also, Part VII of the Fair Competition Act (FCA) speaks to “*Offences against Competition*” and section 35 of the Act speaks to the offence of conspiracy.
8. Conspiracy refers to a covert or secret arrangement between competing firms to earn higher profits by entering into an agreement to fix prices and restrict output. Conspiracy is often used interchangeably with the terms: combination, agreement, and collusion¹. The FTC will, therefore, assess whether the Respondents were involved in an agreement and/or conspired to harm the free flow of commerce and trade in the multi-subscriber cable networks market, specifically as it relates to the distribution of English Premier League matches.
9. In particular, the FTC will assess whether there existed an agreement or arrangement between the Respondents that sought to unduly limit competition in the market for multi-subscriber cable networks. The assessment will also focus on whether the Respondents’ conduct has resulted in restricting, preventing, deterring and limiting the Informant from entering the market for multi-subscriber cable networks.
10. Notably, harm to consumers may arise from the reduction of choices for customers regarding sports channels that they can view. Verticast alleged that the Respondents’ conduct may exclude/prevent/limit the broadcast of live elite sport competitions on cable television channels for distribution on multi-subscriber cable television networks in Jamaica. This alleged conduct/exclusionary practice is likely to have the effect of stifling innovation.

V. Industry Background

11. The Jamaican telecommunications sector includes radio, television, fixed and mobile telephones, and the Internet.² The Office of Utilities Regulation (OUR) and the Spectrum Management Authority (SMA)

¹ Glossary of Industrial Organisation Economics and Competition Law, OECD

² <https://jamaicabusinessgateway.com/telecoms-operation>

regulate the telecommunications sector in Jamaica through the Telecommunications Act, 2000.³ The Broadcasting Commission of Jamaica (BCJ) also plays a role in regulating the telecommunications sector, by regulating content.

12. The telecommunication sector consists of major players such as Digicel (Jamaica) Limited and Columbus Communications Jamaica Limited. The sector also includes several small cable providers, operating mostly in the rural parts of the island. It is worth noting that the services provided by the players in the telecommunication services vary. Some players offer only a single service, while others offer a broad range of services, including voice calls, SMS, internet access, TV services, and other data services. Additionally, some players operate only in specific geographical areas within Jamaica. However, the major players have operations in all 14 parishes.

VI. Legal Analysis

Jurisdiction to review the challenged conduct

13. Before commencing an in-depth investigation, the FTC must ascertain whether the challenged conduct can be the subject of a review under the FCA. The matter of jurisdiction must be settled from the onset.
14. The FCA is applicable to any trade or business carried on in Jamaica. In **The Fair Trading Commission v SBH Holdings Ltd & Anor**⁴, the Court reasoned that the Fair Competition Act (“the Act”) which came into force on March 9, 1993, had as its main purpose the supervision of conduct and practices of persons engaged in the provision of goods or services in any trade or business, and the detection and punishment of such persons for unfair conduct and practices in protection of the public in general.”
15. However, it is noteworthy that the Informant, in this case, is not an enterprise registered in Jamaica. Further, there is no evidence that the Informant has any real and substantial connection to the jurisdiction or that any element of the alleged challenged conduct took place within the jurisdiction.
16. Information provided by the Respondent (Flow) indicates that the proposed agreement was made to Cable & Wireless Communications PLC (C&W), an enterprise registered in another jurisdiction. Flow and

³ https://www.sma.gov.jm/sites/default/files/Telecommunications_in_Jamaica_and_the_Caribbean.pdf

⁴ S.C.C.A 92/2002, Judgment Delivered March 30, 2004, per Harrison J.A.

C&W are Liberty Global's subsidiaries. However, the Informant and Flow were not engaged in any business transaction; more so a business transaction that occurred within the territory of Jamaica.

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18. However, the FCA refers to interconnected company which is detailed in subsection 2(a). It states that:

(2) For the purposes of this Act –

(a) any two companies are to be treated as interconnected companies if one of them is a company of which the other is a subsidiary or if both of them are subsidiaries of the same company;

(b) a group of interconnected companies shall be treated as a single enterprise.

19. [REDACTED] Flow is an interconnected company with C&W. It has become settled case law that the conduct of a subsidiary may be imputed to the parent company⁵ where the parent company has decisive influence or control over the subsidiary. Accordingly, even though the subsidiary has its separate legal personality, it implements in all material respects the instructions sent by the parent company. The parent company may be described as having a decisive influence where for example, the parent company has full ownership of the share capital in the subsidiary.

20. Similarly, it has been held that a subsidiary company may in specific circumstances be liable for the conduct of its sister company where it is found that it has decisive influence or control over it. In the instant case, the Respondents are subsidiaries, and they do not have decisive influence over the operations of any other subsidiary. Therefore, the Respondents cannot be held jointly and severally liable for the conduct of its sister company.

⁵ Akzo Nobel NV and Others v Commission of the European Communities ECLI:EU:C:2009:536, September 10, 2009

Preliminary Examination of the Alleged Conduct

21. Of note, enterprises have, in principle, the freedom to choose their economic partners. The Informant made an offer, and the Respondent claimed that the offer was not accepted for economic reasons specific to each Respondent's sister company.

Assessment of Legal Harm

Section 17 is found in Part III of the FCA, which speaks to the Control of Uncompetitive Practice and states as follows:

- 1) *This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.*
- 2) *Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that –*
 - a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
 - b) limit or control production, markets, technical development, or investment;*
 - c) share markets or sources of supply;*
 - d) affect tenders to be submitted in response to a request for bids;*
 - e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
 - f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, being provisions, which have or are likely to have the effect referred to in subsection (1).*
- 3) *Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.*
- 4) *Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied-*
 - (a) contributes to-*
 - i. the improvement of production or distribution of goods and services;*
 - or*
 - ii. the promotion of technical or economic progress, 10 while allowing consumers a fair share of the resulting benefit;*

- (b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or*
- (c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.*

22. For a claim to succeed and liability to be established under section 17 of the FCA, the following must be established:

- (i) There is an agreement:*
- (ii) The agreement contains provisions that:*
 - a. have as their purpose the substantial lessening of competition in a market;*
 - b. have the effect of substantially lessening competition in a market; or*
 - c. are likely to have the effect of substantially lessening competition in a market.*
- (iii) The Agreement does not fall within the exemptions listed in section 17(4) of the FCA.*

23. The requirements to establish a breach under section 17 of the FCA are disjunctive; specifically, the provisions of The Agreement need to have (i) the purpose, or (ii) the effect, or (iii) the likely effect of substantially lessening competition in a market. Provided that any of these limbs of the test stated above are satisfied, then section 17 would be breached subject to the exemptions provided in subsection 4 of this section.

24. From the investigation, the FTC concludes that there is no evidence of any oral and/or written agreement between the Respondents and the Informant. Specifically, there is no indication that the Respondents refused to enter into an agreement with the Informant whereby the Respondents would obtain the rights to distribute the content from the Informant's sports channels – CSports and CSports2.

Conspiracy

25. It is of note that the term "conspiracy" refers to an agreement between competitors to undertake some activity prohibited by competition law. Conspiracy between competitors goes against the very grain of the principles of free and open competition. Section 35 of the FCA speaks to the offence of conspiracy and *prima facie* subsections 35(1)(a) and (1)(d) may be applicable to the competition concerns raised in this matter. The subsection states:

35.-(1) No person shall conspire, combine, agree or arrange with another person to -

- (a) *limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;*
- (b) ...
- (c) ...
- (d) *otherwise, restrain or injure competition unduly.*

26. An agreement to carry out the prohibited act is the essential element of the offence of conspiracy. In other jurisdictions, a conspiracy between competitors is referred to as concerted practices. Per European laws, concerted practices are prohibited under Article 101. In the case of *Suiker Unie v Commission (1975)*⁶, the European Court of Justice reasoned that Article 101 strictly precluded:

*any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*⁷.”

27. The legal test derived from the case law regarding what constitutes a concerted practice for the purpose of Article 101 is there must be a mental consensus whereby practical cooperation is knowingly substituted for competition; however, the consensus need not be achieved verbally and can come about by direct or indirect contact between the parties⁸ A conspiracy indicates that there will be common conduct on the market but there is also the presumption that competitors contacting each other may result in collusive practices.

28. Additionally, reference can be made to the Competition Act 1985 of Canada and the case law generated to interpret its provisions. Section 35 of the FCA was drafted in largely identical terms as that of section 45 of the Competition Act which speaks to conspiracy. Section 45 of the Competition Act stated that anyone who conspires, combines agrees or arranges with another person to restrain or injure competition unduly is guilty of an offence and will be subject to imprisonment for up to five years or a fine of CDN\$10 million or both.

29. The similarity in the description of the offence fosters the drawing of parallels in the analysis of the offence within the Jamaican landscape. Jurisprudence has indicated that conspiracy may be inferred

⁶ ECLI:EU:C:1975:174

⁷ Ibid, para 4

⁸ *Competition Law*, 9th Edition, Richard Whish & David Bailey, page 116

from circumstantial evidence. Direct evidence of communication between the parties to the agreement is not required; however, it must be proven (in the case of the FCA) on a balance of probability the existence of an agreement. From the evidence uncovered from the investigation, we are not satisfied that there was or is a written or oral agreement between the Respondents.

30. Notably, the case of *R v. Nova Scotia Pharmaceutical Society*⁹ is a decision by the Supreme Court of Canada which attempted to clarify the elements of the conspiracy offence. The Supreme Court reasoned that there were elements to establish that a conspiracy had occurred. First, it must be established that there is the existence of an agreement or arrangement to which the accused is a party. Second, the agreement, if implemented, must be likely to prevent or lessen competition unduly.

Unduly lessens competition

31. Section 35 requires that upon identifying that an agreement exists, the agreement also limits unduly, the occurrence of trade. The FCA does not define the concept of “to limit unduly,” and as a result, guidance can be obtained from case law. In *R v. Nova Scotia Pharmaceutical Society*, the Supreme Court defined the word “unduly” to mean “of seriousness or significance”. The Supreme Court reasoned that analysis of an undue effect on competition had two components: the applicable market structure (a prerequisite of which was the definition of the relevant market) and the behaviour of the accused¹⁰. In the Court’s view, a conviction required proof of some market power and some behaviour likely to injure competition, and it is the combination of the two that makes the lessening of competition undue.

Exception

32. However, section 35(2) of the FCA provides for exceptions where satisfied enterprises would not be found to have committed the offence of conspiracy. The section states that:

Nothing in subsection (1) applies to a conspiracy, combination, agreement or arrangement which relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public –

(a) In the practice of a trade or profession relating to the service; or

(b) In the collection and dissemination of information relating to the service.

⁹ (1992), 43 C.P.R. (3d) 1 (SCC)

¹⁰ Competitor Agreements: Interpreting Criminal Conspiracy in a Blended Criminal-Civil Regime, Randal T. Hughes and Emrys Davis, 1 November 2012. Accessed from <https://www.mondaq.com/canada/antitrust-eu-competition/204192/competitor-agreements-interpreting-criminal-conspiracy-in-a-blended-criminal-civil-regime>

33. In cases involving conspiracy, it is imperative to identify whether the parties agreed, and that agreement had the effect of harming competition. The conduct of the parties should be scrutinized as enterprises' conduct may be a normal outcome of rational economic behaviour in a market with few sellers and homogenous products. As a result, investigating conspiracy requires the input of economic analysis to evaluate.
34. However, based on the particular facts of the matter, the FTC's standing to investigate the matter is not satisfied.

VII. Conclusion

35. Given the following:
- That the Respondents had no decisive influence or control over the alleged conduct. It appeared that this alleged conduct occurred outside the jurisdiction, where the FTC has no jurisdiction;
 - That there is no evidence of a written or oral agreement between the Respondents to lessen competition in the market for multi-subscriber cable networks substantially, then there is no breach of section 17 of the FCA; and
 - If there is no written or oral agreement between the Respondents to conspire, combine, agree, or arrange to restrict/prevent the Informant from entering the market for multi-subscriber cable networks, then there is no breach of section 35 of the FCA;

It is recommended that the matter be closed.