The Legal and Socio-Economic Impact of the Liberalization of the Telecommunications Sector – the Jamaican Experience

Completed Research Paper

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ABSTRACT

During the late 1990s, Jamaica’s telecommunications industry was poised for growth with an increased demand for new telecommunication services. At this time however, there was only one player, Cable and Wireless Ja. Ltd, which had a monopoly licence until the year 2013. However, this licence was revoked in 1999, bringing new players to the market, such as Digicel and Claro which revolutionised the telecommunications market. The paper examines how liberalization and regulation of the telecommunications sector in Jamaica with the passing of the Telecommunications Act in 2000, has contributed to the development of Jamaica alongside the social and economic benefits derived by both consumers and the Government of Jamaica over the past ten years. It further looks at the merger of Digicel and Claro in 2011 and the possibility of there being the emergence of a new monopoly provider in the mobile market.

KEY WORDS

Telecommunications, Liberalization, Interconnection, Universal Access, Independent Regulator, Merger, Network

INTRODUCTION

Jamaica as a developing economy and a member of the World Trade Organisation has committed to the Basic Agreement on Trade in Telecommunication Services (BATS), with one of its obligations being to provide foreign suppliers with the opportunity to build network infrastructures, be issued licences, and compete in the national market through the “most favoured nation principle” (MFN) which is on a non-discriminatory basis. In keeping with the Agreement, members must have a licensing regime which ought to grant market access to operators from a WTO member country on terms “no less favourable” than the terms applicable to operators from “any other country” and must appoint an Independent Regulator. This body has to be impartial, separate and not accountable to any supplier of basic telecommunications services. Signatories to the BATS must bring their regulatory practices into compliance with WTO trade rules which state clearly that domestic regulation measures must be administered in a reasonable objective and impartial manner.

Jamaica in 1997 stated in its Schedule of Commitments of Telecommunications Services in WTO DOC. No. 97-1453 that the Government would submit to Parliament a new draft law on Telecommunications to provide the legislative framework for the provision of telecommunication services and reflect technological advances and pro-competitive practices in the sector. This was done in the year 2000 when a new Telecommunications Act was passed and the telecommunications sector was on its way to being liberalized.

The objective of this paper is to examine how liberalization of the telecommunications market has brought competition and investment capital to Jamaica as a developing country, with a radical shift from land line and postpaid customers with very limited access to telecommunications services to that of an overwhelmingly majority of two million pre-paid mobile customers on the way to achieving universal access.

THE PRE-LIBERALIZED TELECOMMUNICATIONS MARKET IN JAMAICA

In 1997, telecommunication was provided by a monopoly provider, Cable & Wireless Jamaica Ltd. (C&WJ). At this time, Jamaica’s telecommunications industry was poised for growth as the demand for new telecommunication services was great. There had also been the enactment of Office of Utilities Regulation Act establishing the Office of Utilities Regulation (OUR)
in 1995 which was the first independent telecommunications regulator within the English-speaking Caribbean countries. This regulator however lacked experience and had no teeth so decisions were rarely made for the benefit of the consumer.

The use of the Internet was also growing with Internet Service providers bypassing the C&WJ network in providing Internet phone calls. This did not sit well with C&WJ which took the Government to court for breaching the 1988 Agreement. It asserted that the licenses granted were for monopoly services for all telecommunications services. The Government’s position was that this agreement gave a monopoly on fixed wire telephone services and not wireless telecommunications services. The parties agreed to an out of court settlement in September 1999. Aspects of the Agreement between the two parties included the issuing of new licenses to C&WJ, the phased approach of the liberalization process over a three year period commencing March 2000, which would be reflected in the passing of a modern pro-competitive Telecommunications Act. (Foga and Newman 2004).

The impact of this was that Jamaica’s commitment to a restricted market under BATS until 2013 was brought forward by ten years and with it, significant increase in foreign investment, far reaching-benefits to the people of Jamaica and a competitive telecommunications sector.

LIBERALIZATION AND THE TELECOMMUNICATIONS ACT, 2000

This phased liberalization began on March 1, 2000, when the Telecommunications Act 2000 (The Telecoms Act) became effective. This is the principal legislation governing telecommunications in the Island. Its overriding concern was the development of the telecommunications industry whilst simultaneously ensuring that there was consumer protection. The objectives of this Act included the promotion and protecting of the interest of the public, protection of customers, purchasers and other users including the disabled and the elderly, whilst ensuring fair and open competition and promoting universal access to specified services. It also contained provisions on licensing, interconnection, and universal services. This phased approach would give the Government the time to ensure that the necessary legal and regulatory framework would be put in place to manage the build-out of networks and the introduction of new services. Phase 3 was the commencement of full liberalization. At this time, the market became fully liberalized and all telecommunications facilities, including international voice and data services were opened to competition.

FOREIGN INVESTORS IN THE LIBERALIZED MARKET

Two new carrier licenses for the provision of domestic mobile voice, data and information services were awarded in December 1999 and January 2000. Each new entrant used a different technology for its mobile network. Mossel trading as Digicel commenced service in April 2001 using the Global system of Mobile (GSM) Communications and Oceanic Digital Jamaica Limited trading as Centennial, later known as Miphone and then Claro, commenced operation using the Code Division Multi Access (CDMA). CW&J, the previous monopoly was offering mobile services in Jamaica since 1991, employing the Time Division Multi Access (TDMA). It subsequently switched from TDMA to GSM. (Golding and Tenant). Seamus Lynch, Digicel Jamaica’s first CEO, in an article in the Jamaica Observer newspaper in 2011, stated that persons had scoffed at Digicel’s plan to have 100,000 customers on the network in its first twelve months of operation, however to everyone’s surprise, in the first 100 days, Digicel had 100,000 customers. By 2002, the number of Digicel subscribers had surpassed the number of C&WJ mobile subscribers. In a paper prepared by the Fair Trading Commission and the Office of Utilities Regulation dated August 2, 2007, it is stated that the end of 2006, Digicel had a mobile subscriber market share of 76.1% compared to C&WJ’s 19.7%. Miphone had approximately 103,649 subscribers at the end of 2006 which represents a market share of 4.2%. This evidence shows that Jamaican consumers had no loyalty to C&WJ and responded to the competition in favour of the new entrants in the market.

INTERCONNECTION

Interconnection has been defined in Section 2 of the Telecoms Act as “the physical or logical connection of public voice networks of different carriers.” Interconnection is of extreme importance in a liberalized telecoms sector as monopoly providers would have previously controlled the network and equipment in their geographic serving areas. This interconnection became key upon the liberalization of the telecoms markets, as the services moved from basic voice telephony to high speed internet connectivity, mobile and satellite services. Jamaica had to ensure that it fulfilled its regulatory requirements to BATS as set out in the WTO/GATS Regulatory Principle Reference Paper (Reference Paper) which requires that interconnection with a major supplier by another supplier is to be provided at any technically feasible point in the network under non discriminatory terms, conditions and rates and in a timely fashion. There had to be in place an independent regulator to monitor the market and the service providers. The (OUR) was appointed as the main independent
regulator in accordance with Section 4 of the Telecoms Act. It has the legal and structural underpinning to regulate the Telecommunications Sector.

Whilst the Telecoms Act’s current provisions had satisfied the criteria of a fair, non-discriminating, transparent and cost based interconnection regime, these fundamental provisions were not supplemented by interconnection regulations. The effect of this weakness in the law meant that the prices consumers had to pay varied as this was dependent on whether the call was to someone on the same network or not. The termination charge to be paid by the network could not be regulated by the independent regulator. In Jamaica, this charge varied prior to July 2012. LIME and Claro when it was in operation charged $12 for cross-network calls while Digicel’s range was as high as $17.70 (US$.21).

In the summer of 2010, the OUR was successful in a legal battle brought against it by Digicel over its regulatory control of interconnection/termination rates between mobile network operators. Digicel’s argument before the courts was that the OUR lacked the authority to regulate the termination rates. This was rejected by the Court of Appeal as well as the Judicial Committee of the Privy Council, which is Jamaica’s highest Appellate Court based in London, England. The Judges upheld the previous court’s ruling and found that under the Telecommunications Act of 2000, each operator is obliged to offer interconnection with the other networks. However the weakness in the Act was that lack of price regulation meant that an operator could de facto block interconnection by imposing excessive pricing. The OUR wanted this weakness to be addressed urgently as its hands were tied.

**TOWER SHARING AND CO-LOCATION**

Since liberalization, there has been a proliferation of cell towers across Jamaica; however service operators were not sharing premises and other essential facilities to take advantage of unbundling. This has shown the urgent need to implement a new co-location policy to resolve these issues as co-location, will provide new entrants with cost effective access to existing infrastructure in order to reach potential customers. The Government of Jamaica in its 2011 ICT Policy also agrees that this is the way forward as the sharing of infrastructure, with location of telephone equipment in central and other locations would significantly decrease barriers to competitive entry.

**UNIVERSAL ACCESS AND SERVICE**

Universal access has been stated as one of the primary objects of the Telecoms Act. Universal service is required to ensure that all citizens have access to basic telecommunications services at an affordable rate. This therefore means that all telecommunications services should be available throughout the island to all its residents at affordable prices and high quality. The Act provides a financing methodology by way of a Universal Service levy to be paid by Universal Service Providers. Since the implementation of this levy however, there has been continuous pressure on this funding base which has led to a rapid decline of the revenue over the years. Also no provision was made in the Telecoms Act for any service carrier to have the responsibility to meet this Universal Service Obligation (USO). The definition of Universal Service under the Telecoms Act was restrictive as it needed to include more than physical access to the networks and should encompass information literacy and financing. The Telecommunications Act of 2012 addressed this weakness.

As at June 2009, there existed a mobile penetration rate of approximately 104.66%. in Jamaica. This is in stark contrast to fixed line access which is approximately 11.53%. Internet penetration also remained low at 4%. Both Jamaica and India have shown that cellular phones are no longer a status symbol, but is being used more for information exchange, both voice and data by traders, farmers, students and fishermen. (Financial Express, 2002)

The data for Jamaica suggests that while voice telephony, through wire line and wireless transport penetrates extensive areas of the Island, indicating near universal access there is still a challenge in respect of high capacity networks for internet access. (2011 ICT Policy). The consequence of this being that persons within rural communities and sparsely populated geographical regions, have had little or restricted access to ICT based education, access to information and the deployment of electronic services (e-services) and entrepreneurial opportunities. The digital divide is still a problem today (Marcelle 2004). This still needs to be addressed as the poor and underserved citizens are unable to take advantage of the technology to improve their standard of living. Even in a country like India, which has one of the world’s fastest growing cellular telephone service markets, cellular phones continue to be beyond the reach of the majority of India’s rural residents (Greene 2004). The rural tele-density in 2007 in India was less than 10% and the Overall tele-density was only 24% with very limited broadband penetration. (Goyal 2007)

The 2011 ICT Policy of Jamaica also made reference to data from the OUR which showed that at the end of the second quarter of the financial year 2009, the total subscriber base of the mobile telecoms sector was 2,820,442 of which 2,734,418 represented prepaid customers with the remainder comprising postpaid subscribers. With the deployment of Broadband
Wireless access (BWA) technologies, which include 3G and WiMax, and soon to come on stream 4G, it is expected that there will be less fixed line networks. With this high penetration, the majority of persons still use the mobile service for talking and not for use of data. This has resulted in the Government of Jamaica implementing a talk tax in recent years to supplement the national budget. The service providers must find ways to have the consumers use the data services and shift from being so heavily a voice service, so that the country can take advantage globally of ICT related services for both businesses and individuals.

With the advancement of technology and cheaper ways to communicate, for example skype, the mobile service providers may soon see a reduction in the purchase of new instruments as the technological advances that have been made to talk via skype may make owning a cellular phone only necessary for the connection to obtain the service.

TELECOMMUNICATIONS LICENSING

Jamaica has extensive provision in the Telecoms Act dealing with the licensing criteria. Licences are important as they provide the certainty and confidence in the market to enable monitoring. A licence is a legal document granted or approved by a regulator or other government authority that defines the rights and obligations of a telecommunications service provider. Procedural transparency is one of the fundamental requirements of a successful licensing process. By the year 2006, 426 licences had been granted.

INVESTMENT AND TELECOMMUNICATION

The liberalization of the telecommunications sector in Jamaica led to foreign investors establishing commercial presence and investing billions of dollars on the purchase of computers, data storage, network equipment and infrastructure build out, which led to job creations and opening of call centers and other ICT related business and services.

Under Phase 1 of the liberalization programme, cellular licences to Digicel and Centennial raised US$92million. By Phase 2, Digicel had spent over US$272 million for licence and cell sites and would spend another US$17million to expand its network. By Phase 3, the subscriber base for Digicel was over 2.1 million customers with over 1000 cell towers spread over the 14 parishes of Jamaica. Table 1 shows the Capital expenditure in the Mobile sector between 2001 and 2005.

<table>
<thead>
<tr>
<th>Year</th>
<th>Investment (US$ M)</th>
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<tr>
<td>2001</td>
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<td>2002</td>
<td>254.7</td>
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<td>309.2</td>
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<td>2004</td>
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<td>2005</td>
<td>172.8</td>
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Table 1: Capital Expenditure in the Mobile Segment 2001-2005

Source of Data: OUR

In 2002, Centennial Communications which was fully owned by Oceanic Digital Jamaica, having secured a loan of US $30million, proceeded to build out its network island wide. However due to problems with cost overruns and unavailability of cell towers, the company which had rebranded as Miphone was unable to make any major impact outside of the main urban areas. Five years later in 2007, Oceanic Digital Jamaica sold its operations in Jamaica to America Movil, the parent company of Claro for US$70 million. America Movil is the fourth largest network operator in the world and the largest corporation in Latin America.

Claro immediately hit the ground running, with an aggressive network expansion plan which included switching to GSM platform as well as increasing its cell sites. In 2009, Claro claimed that it had overtaken LIME as the second major cellular company and in June 2010 Claro announced it would be investing US$300 million, approximately JS$26 billion dollars over a 12 month period to boost its network capacity. Here began a period of consumer’s paradise and a fierce marketing competition particularly between Digicel and Claro, which only brought joy to the Jamaican consumers. Millions of dollars
were spent on promotional activities, such as free nights and cheaper handsets as well as outdoor advertisements and television commercials. Claro’s approach was aggressive as they directly campaigned against Digicel which it saw as its only competitor in the market. There was also sponsorships for sporting activities and community based programmes. The price to talk and to text also fell considerably during this time.

When Claro rolled out its 3G platform in October 2008, this brought new cutting edge technology including video live streaming to the consumers. Not wanting to be left out in the cold, C&WJ decided to rebrand and change its name to LIME throughout the Caribbean region in October 2008, to project a new image of freshness. LIME also rolled out its 3G platform in 2009 and the cost attached to this build out of infrastructure was US$40 million dollars.

The direct impact of investment in this sector has resulted in Call Centres being established in Jamaica, which support global business process and customer service operations. With India’s huge population of greater than 1 billion people, investors have been attracted by India’s low tele-density and its highly skilled, low cost work force. Thousands of persons have obtained employment through this service both there and in Jamaica. By 2011, Digicel was employing 1,200 persons and had invested in Jamaica in its first decade over US$850 million. They have also built in downtown Kingston which will serve as their flagship world corporate offices of twelve stories high and two hundred and twenty thousand square feet at a cost of approximately US$65,000,000. In 2011, LIME had in its employ approximately 1,400 persons.

Both LIME Jamaica and Digicel have been good corporate citizens. They have both invested heavily in the social and economic improvement of the lives of Jamaicans by implementing projects that drive sustainable development across the island. These projects have impacted over two million persons, which include persons with special needs, youth at risk, the homeless and less fortunate persons in shelters and facilities across the island. They have rehabilitated some 200 educational institutions, 16 libraries and refurbished community centers and reconstruct sports facilities. They have provided not just cash but computer equipment, internet access with Digicel providing sponsorship of a chair in Telecommunication Policy and Management at the University of the West Indies (UWI) Mona.

This has helped to reduce the digital divide as many persons who would have previously been either underserved, or unserved, because of location and from poverty-stricken communities have been given a helping hand to become self-sufficient and/or educated.

CHALLENGES TO THE TELECOMMUNICATIONS SECTOR

The Claro-Digicel Merger

In a surprising and unexpected move on March 11, 2011, Jamaica woke up to the news that Digicel Jamaica had signed an agreement with rival American Movil to acquire Claro Jamaica and in return American Movil would purchase Digicel’s businesses in El Salvador, and Honduras. This deal would take effect on November 30, 2011, leaving two players in the market.

The Jamaican regulatory bodies, OUR and the Fair Trading Commission (FTC) both viewed the merger as possibly the emergence of a monopoly and would therefore restrict competition and the benefits to consumers. The OUR had no jurisdiction over this matter as section 4 of the Telecoms Act had placed limitations on its functions and further, section 5 stated that issues of substantial competitive significance fell squarely in the lap of the FTC under the Fair Competition Act (FCA). However, the FTC was constrained as section 20 of the FCA did not include mergers, acquisitions and monopoly in its list of activities that would constitute dominant position. This was not a duopoly being operated as Digicel was the dominant telecommunication service provider in the mobile market. Approval was obtained from the then Prime Minister, the Hon. Bruce Golding of Digicel’s acquisition of Claro Jamaica.

The FTC’s executive director, David Miller in an article titled ‘The Merger of Digicel and Claro is likely to hurt Mobile Phone Customers’ (2012), stated that the Telecoms Act was inconsistent in its application. This had become apparent in the agreement between Digicel and Claro in the scenario where the holder of a telecommunications license could transfer its license and operation to an existing operator and eliminate an effective competitor from the market without a replacement. Further, it allowed for the participant with the largest market share, Digicel, to acquire a significant competitor as Claro was. Prior to Claro’s entry into the market in 2007, Digicel was the dominant player. On the other hand, LIME was not a significant competitor, as on average, between the periods 2006 to 2009, its subscriber base remained unchanged.

The FTC’s position was that Digicel’s control of an effective competitor would eventually result in higher prices to subscribers, fewer product choices and slower rates of technological innovation and adoption. The consequence of FTC’s conclusion based on its investigations was the commencement of an action in the Supreme Court of Jamaica seeking a declaration from the Court that the underlying agreement between Digicel and Claro would have the effect or is likely to have
the effect of lessening competition substantially in the telecommunications market. This was challenged by Digicel and Claro on the basis that the FTC had no jurisdiction over the Agreement. This application was heard and the Supreme Court ruled that FTC had jurisdiction over the agreement. This decision has been appealed by Digicel and Claro. The trial of substantive application by the FTC has been set for hearing from May 13 to May 24, 2013. The judgment is eagerly awaited.

The Dumb Pipe Syndrome

With the advent of Skype, Google Talk, the I-phone and the Apple TV and other new technological advances, telecommunication providers worldwide must be terrified that their voice and text services will become obsolete. Will they watch their revenues being eroded as a result of the dumb pipe syndrome? All consumers will need in a few years is access to an instrument and interconnection, thus making regulation of the sector irrelevant.

The Amendment to the Telecommunications Act

The Telecoms Act had achieved some of its stated objectives. However, same had always been seen as a “Transitory Act” due to the phased liberalization of the telecommunications market in Jamaica. A revised Act was critical to boost investor confidence in the market. In particular, the implementation of the amendments for the independent regulator were of utmost importance, which became extremely urgent with the Digicel/Claro deal as there was immediate need to have efficient regulation of the Telecommunications Industry. In 2011, when then Prime Minister, Hon. Bruce Golding disclosed the government’s approval of the acquisition of Claro by Digicel, he stated that efforts were being made to fast track amendments to the Telecommunications Act to inter alia, empower OUR to discharge its functions more effectively and apply the provisions of the Act regarding interconnection to not only voice but also data and other services.

May 2012, saw the enactment of the Telecommunications (Amendment) Act 2012, (Amendment Act). The principal Act has been amended by section 11 of the Amendment Act to define a “dominant public telecommunications carrier” to correspond with the meaning stated in section 19 of the FCA. Section 21 of the Amendment Act provides for the Minister to make rules imposing on any public telecommunications carrier the responsibility to offer number portability. Only time will tell if consumers will take advantage of this by switching networks.

The provisions that may have the greatest impact on how the telecommunications market will operate in the future are set out in sections 13 and 22 of the Amendment Act which gives the OUR the power to set interim interconnection charges and an interim price cap for retail rates for telecommunication services. Almost immediately the OUR implemented this provision.

On June 4, 2012, the OUR in keeping with its new powers published a Mobile Termination Rate Determination Notice which established an interim mobile termination rate of J$5.00 (US 0.06) for the Jamaican mobile sector. This led to an immediate price war as on Friday June 15, 2012; LIME Jamaica introduced its TALK EZ plan which offers significantly lower mobile rates to both prepaid and postpaid customers. This resulted in as much as 63% reductions for prepaid calls. (Maurius 2012) The consumers had immediately started to reap benefits from the amendments to the Telecoms Act.

On June 13, 2012, the day before LIME’S press launch of its TALK EZ plan, Digicel filed an application in the Supreme Court of Jamaica seeking leave to proceed with a claim for Judicial Review of the OUR’s determination. This application was refused by the Supreme Court. This was indeed a victory for the OUR as it was no longer a toothless tiger. Another power given to the OUR includes the power to impose an infrastructure sharing obligation on a licensee in accordance with section 14 of the Amended Act. This Independent Regulator now can bite.

CONCLUSION

Over the past decade, there has been the full liberalization of its Telecommunications Sector with the passage of a new Telecommunication Act in the year 2000 and the amendment to same in May 2012. Jamaica’s legislative, social and economic landscape has undergone a tremendous transformation within the last ten years. This has been largely driven by the liberalization process and the entry of foreign investors in same. We have moved from a Monopoly to full liberalization and it is yet to be seen if the Digicel/Claro merger will result once more in the creation of a new monopoly in the mobile services.

With the introduction of competition, there is now high mobile penetration with significantly improved service quality, and lower prices. The independent regulator now has very sharp teeth, not just a bark.

Both local and foreign investors will have greater confidence in the legal system of Jamaica due to the provisions within the laws to ensure protection of their rights and severe sanctions for those who breach same. There has also been a positive impact on employment and trade opportunities for Jamaica in this Global Village.
Whilst we welcome the modernization of these laws and the positive impact it has had on the economy to date, Jamaica has to ensure that its citizens continue to benefit from liberalization as foreign companies are free to repatriate profits. Investment must continue to be made by the players in this market in our education and the building of social and technological infrastructure as part of their corporate responsibility. This will result in the creation of employment opportunities for Jamaicans and particularly the young people as it is important to raise the standards of living, ensuring full employment and expanding the production of trade in goods and services.

The utilization of the telecommunications industry as an instrument for national development in Jamaica, a developing economy, has been welcomed. This can only have further positive gains for Jamaica both in the domestic and international market. Of significant importance is the investment flows brought into the country and the provision of Universal Access to consumers. The government’s future policy will have to focus on universal access being beyond voice however to include high speed access to telecommunication services, the internet and computer. This will reduce the digital divide that currently exists between rural communities, and urban areas. However safeguards must be put in place by the service providers to prevent them being made redundant due to the dumb pipe syndrome.

REFERENCES