

Merger control in Jamaica: overview

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REGULATORY FRAMEWORK

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

There is currently no regulatory framework for merger control in Jamaica.

TRIGGERING EVENTS/THRESHOLDS

2. What are the relevant jurisdictional triggering events/thresholds?

See Question 1.

NOTIFICATION

3. What are the notification requirements for mergers?

See Question 1.

PROCEDURE AND TIMETABLE

4. What are the applicable procedures and timetable?

See Question 1.

PUBLICITY AND CONFIDENTIALITY

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

See Question 1.

RIGHTS OF THIRD PARTIES

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

See Question 1.

SUBSTANTIVE TEST

7. What is the substantive test?

See Question 1.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

See Question 1.

9. Is it possible for the merging parties to raise a failing firm defence?

See Question 1.

REMEDIES, PENALTIES AND APPEAL

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

See Question 1.

11. What are the penalties for failing to comply with the merger control rules?

See Question 1.

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

See Question 1.

AUTOMATIC CLEARANCE OF RESTRICTIVE PROVISIONS

13. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

See Question 1.

REGULATION OF SPECIFIC INDUSTRIES

14. What industries (if any) are specifically regulated?

See *Question 1*.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

See *Question 1*.

JOINT VENTURES

16. How are joint ventures analysed under competition law?

There is no formal legal definition of joint venture. There is no special treatment of joint ventures with respect to merger control.

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

There is no provision in the Fair Competition Act for merger investigation.

RECENT MERGERS

18. What notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable?

The most recent mergers included:

- Digicel Jamaica (Digicel) and Oceanic Digital Jamaica (CLARO) in March 2011.
- The transfer of control of Columbus Communications Jamaica (FLOW) and Columbus Networks Jamaica from their parent company Columbus International to Cable and Wireless Communications on 6 and 7 November 2014. The result is that the same parent CWC controls Cable and Wireless Jamaica (LIME) and FLOW resulting in a concentration in the telecommunications and subscriber television market space.

Digicel/CLARO merger

In relation to the Digicel/CLARO merger, the Fair Trading Commission (FTC) and Cable and Wireless Jamaica (LIME) argued that the merger of Digicel and CLARO caused a concentration in the telecommunications market. The merger is notable because it was the first and largest merger since liberalisation of the telecoms sector in 1999 and the entry of Digicel in 2001.

The FTC took a robust approach, began investigations and instituted proceedings in court against Digicel and CLARO to

unscramble the merger. The FTC sought declarations under section

17 of the Fair Competition Act (FCA) that the agreement effecting the merger had the effect or likely effect of substantially lessening competition in the market (*2012 JMCC Comm 7*). LIME joined in the litigation. Digicel asked the court to determine the following preliminary issues:

- Whether the provisions of the FCA apply to the agreement or transactions effected by the agreement.
- Whether the FTC has jurisdiction in relation to the agreement or transaction effected by the agreement.

The Supreme Court judge ruled in favour of the FTC finding so far as relevant that:

- The FTC has jurisdiction over the telecommunications industry.
- Section 17 of the FCA applies in relation to agreements or transactions that fall under section 17 of the Telecommunications Act (TCA).
- Section 17 of the TCA applies to mergers and acquisitions such as the transaction between Digicel and CLARO.

Digicel successfully appealed the decision. The court took into account that the particular case was unlike the situation in *BAT and Reynolds v Commission of European Communities* that concerned the consideration of Articles 85 and 86 of the EC Treaty. In the Digicel case the companies did not remain independent subsequent to the agreement; the agreement between Digicel and CLARO resulted in a complete merger.

The Court found that the FTC had general jurisdiction over all agreements including telecommunications matters and agreements likely to have anti-competitive effects; however, it did not have jurisdiction over agreements where the TCA applied.

The FTC intends to appeal this decision to the Privy Council and filed an application for conditional leave. Conditional leave to appeal was granted on 10 June 2015.

FLOW/LIME merger

The Court of Appeal decision was still pending by the time the application for this second major merger began. This merger had a new dimension. FLOW also had an all-island licence in the subscriber television market. Licences are normally granted by zone. The norm is two cable operators in each zone. Each zone can cover up to three parishes.

In November 2014 the FTC, under Section 17 of the FCA, began an investigation into the likely competitive effect of the proposal by Cable & Wireless Communications (parent company of LIME) to acquire 100% ownership and control of Columbus International (parent company of FLOW).

The FTC however discontinued the investigation after the judgment of the Court of Appeal was delivered on the 19 December 2014 (www.jftc.com/Libraries/Miscellaneous/2015_02_16_FTC_Press_Advisory_on_LIME_FLOW_merger.sflb.ashx). The investigation was stopped as following on that decision there was no impediment to the Minister granting his approval to the merger. The FTC's press release committed to fulfilling its mandate to consumers by promoting competition.

PROPOSALS FOR REFORM

19. Are there any proposals for reform concerning merger control?

There are no immediate proposals for reform.

ONLINE RESOURCES

Fair Trading Commission

W www.jftc.com/home.aspx

Ministry of Science Technology Energy & Mining

W www.mstem.gov.jm

The Supreme Court of Jamaica

W www.supremecourt.gov.jm

Court of Appeal of Jamaica

W www.courtofappeal.gov.jm

MERGER CONTROL THRESHOLDS

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Practical Law Contributor profile



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Professional qualifications. Jamaica, Attorney-at-Law; Ontario, Barrister and Solicitor, Notary Public; FCI Arb, Chartered Institute of Arbitrators

Areas of practice. Commercial and civil litigation; arbitration; intellectual property and technology; corporate governance; employment; labour; finance and securities.

Non-professional qualifications. BA in History and Government, University of the West Indies; LLM, University of Toronto; EC Council (CCFE, CHFI)

Recent transactions

- Acting as arbitrator in a recent employment law dispute where the issue concerned the use of the employer's computer equipment to download prohibited material.
- Acting as counsel in arbitrations in telecommunications and cable matters.
- Handling commercial matters shareholder and director disputes, technology and information security matters.

Languages. English

Professional associations/memberships. Member of the Jamaican Bar Association; Chair of the Continuing Legal Education Committee; International Trade Mark Association; Integrated Advisory Group; International Technology Law Association.

Publications.

- *Legislating Cybercrimes in Jamaica: Issues in Corporate Liability, Ringtones of Opportunity: Policy, Technology and Access in Caribbean Communications*, edited by Hopeton S Dunn.
- *Copyright Laws in the Creative Economy: How can Science and Education Flourish in the Digital Era in LAC?, Enabling Openness: The Future of the Information society in Latin America and the Caribbean*, edited by Bruce Girard and Fernando Perini.