



COMMENTS ON RESPONSES  
TO OUR CONSULTATION  
ON NPRM  
COMPETITIVE SAFEGUARDS  
TO ADDRESS  
ANTI-COMPETITIVE PRACTICES  
BY DOMINANT  
CARRIERS

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# 1. Summary

## 1.1. Introduction

Mossel (Jamaica) Limited (“Digicel”) would like to thank the Office of Utilities Regulation (“OUR”) for the opportunity it has given to Digicel to comment on the responses given by interested parties to the OUR Notice of Proposed Rule Making concerning Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers (“the Consultation”).

Digicel looks forward to commenting in greater detail once the OUR has taken into account stakeholders’ responses and the comments on these responses and decided whether or not to proceed further with the current proposal.

Digicel will address only the issues as they were published by interested parties Digicel wishes to comment on.

Any additional inquires that may arise may be addressed to:

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## 1.2. Main Conclusions

In the below Digicel first reiterates its main conclusions as they also have been published in Digicel's Response Document that was published on the OUR website on 17 July 2006.

### 1.2.1. Legal Basis

Any Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers ("the Safeguards") adopted by the OUR must have a firm legal basis in order to ensure legal and business certainty. The legal basis for the proposed Safeguards appears very weak. For example, the underlying objectives of the Telecommunications Act, 2002 and the Fair Competition Act will need to be respected. We stress that the electronic communications sector has not been excluded from the scope of the existing competition rules found in the Fair Competition Act. Indeed, international best practice and comparable legislative frameworks in other countries the applicability of general competition rules to a specific sector has clearly fallen within the scope of the national competition authority and not the national regulatory authority.

### 1.2.2. Section 35

As regards the Telecommunications Act, 2002 itself, Part V explicitly concerns interconnection, while Section 35 concerns rules affecting dominant public voice carriers and the development of guidelines as to the types of anti-competitive practices to which the competitive safeguard rules apply. The OUR itself acknowledges the limited scope of Section 35 on several occasions.

### 1.2.3. Sector-specific rules and general competition

The complex relationship between sector-specific rules and general competition rules, including the responsibilities and roles of the OUR and FTC, has not been addressed. In particular, the OUR will need to respect that the application of many competition law principles is different in an ex-ante environment than an ex-post environment; the

starting point is not the same in many circumstances and can achieve different results on occasion.

#### 1.2.4. Effectively competitive

There is no objective justification for regulatory intervention if the retail market is effectively competitive.

#### 1.2.5. Nascent Market

Regulatory intervention with nascent and innovative markets needs to be avoided, particularly given the need to encourage investment and ultimately consumer benefits. Any regulatory intervention in such markets should be first required to meet a significant threshold and should be applied in a technologically neutral manner in any event. As an exception, however, Digicel encourages the OUR to intervene in the marketplace where an entity leverages its dominant position in one market to an emerging or neighbouring market. Such foreclose behaviour might include exclusive and unfair contract terms, bundling and anti-competitive discount schemes. Such business behaviour will choke the emergence of effective competition on nascent markets.

#### 1.2.6. Dominance

The identification of dominance under an ex-ante regulatory framework should be concerned with durable or persistent market dominance and conducted having regard to best practice economic principles.

#### 1.2.7. Essential Facilities

A natural monopoly arises where economies of scale are observed, no matter how big the output. As a result, the marginal cost curve holds constant or falls with increasing volumes. In overall terms, average total cost is falling even when the entire market demand is satisfied.

Digicel considers that any use of the 'Essential Facilities' concept should be tied to the technical economic concept of 'natural monopoly', since this is an instance of monopoly

power where regulatory intervention may be justified. By focusing on whether or not there are inexhaustible economies of scale, as well as on average total costs, the OUR will be able to ground decision making in robust numerical analysis. The alternative is decision making based on highly subjective impressions of whether a particular asset is important or capable of replication, which may lead to a grossly over-inclusive and uncertain approach.

## 2. Cable & Wireless Jamaica Response

In general the response of Cable & Wireless Jamaica Limited's ("C&WJ") was an interesting response. Digicel will suffice to say that, as it already reiterated in the above under 1.2.1; C&WJ notes that there appears to be a problem with regards to the legal basis for the proposed safeguards. Digicel agrees with C&WJ that there is an issue with the legal basis and is interested in the views of the Office with regards to this matter.

## 3. Columbus Communications Jamaica Response

Columbus Communications Jamaica Limited's ("Flow") response did not contain any issues that Digicel wishes to address in this comments document. In any event Digicel of course reiterates its standpoints as they were previously communicated in the Digicel Response Document.

## 4. Reliant Enterprise Communications Response

The Reliant Enterprise Communications Ltd. ("Reliant") contains views that are most certainly not shared by Digicel. Reliant is stating that Digicel 'is clearly the dominant network in Jamaica' and 'little has been done in general with mobile carriers or with Digicel to declare dominance.' Digicel wishes to point out that in September 2004 the OUR declared all mobile network operators dominant in mobile termination. Digicel requested that the OUR reconsidered its position. The matter is still in abeyance. This is also recognised by the OUR in its Consultation document.

Digicel also wishes to point out that dominance should not only be determined by for instance the number of subscribers a network operator has, but one should also address whether the company 'enjoys a position of economic strength'. Digicel further refers to its earlier Response Document sections 2.11 and 2.12. Dominance in itself should not necessarily be acted against; it is against anti-competitive behaviour and the abuse of dominance that policy needs to be targeted.

Finally, and this is quite important, Digicel already pleaded in its Response Document that competition in general does not benefit from over-regulation. Too much regulation could even be hurting competition in the end.

In the light of the review of Article 82 of the European Union Treaty (“the Treaty”) within the European Union (“EU”), Competition Commissioner Neelie Kroes held a speech at the Fordham Institute on the 23 September 2005. As is now well known, Commissioner Kroes declared that Article 82 analysis must be based on “effects in the market” and that “Enforcement Agencies should be cautious about intervening in the functioning of markets unless there is clear evidence that they are not functioning well”.

Commissioner further Kroes said: “My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm. I like aggressive competition – including by dominant companies - and I don’t care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 82 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market. We need to take into account not only short term harm, but also medium and long term harm arising from the exclusion of competitors.<sup>1</sup>”

Digicel is currently successfully operating in the highly competitive Jamaican market. The people of Jamaica have in large numbers enjoyed and continue to enjoy the full competition in Jamaica. In fact, prices have consistently been falling over the past 5 years. It is not a coincident that this considerable decrease in prices overall, coincides with the moment of inception and the suit of services that Digicel has offered to the public since 2001.

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<sup>1</sup> Neelie Kroes, Commissioner for Competition, Tackling exclusionary practices to avoid exploitation of market power – Some preliminary thoughts on the policy review of Article 82, speech at the Fordham Corporate Law Institute, New York 23 September 2005.  
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLang>