



Digicel Submission
In Response to
Consultation Document
“Competitive Safeguards Notice of Proposed
Rule Making – Data Market”

Introduction

Digicel takes the opportunity given by the Office of Utilities Regulation (“OUR”) pursuant to the Telecommunications Act, 2000 (the Act) to all interested parties to comment on the OUR’s Consultation Document “Competitive Safeguards – Data Market, Notice of Proposed Rule Making”.

Digicel wishes to reiterate its initial position that 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. Digicel therefore urges the OUR to give serious consideration to comments raised by stakeholders and the legal basis upon which its undertakes rule making for the data services.

Digicel will address some issues and reserves the right not to comment at this time on all issues and states categorically that Digicel’s decision not to respond to any issue raised by the OUR wholly or in part does not necessarily represent agreement in whole or in part with the OUR’s position, nor does any position taken by Digicel in this document mean a waiver of any sort of Digicel’s rights in any way. Digicel expressly reserves all its rights.

Any questions or remarks that may arise as a result of these Digicel comments may be addressed to:

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Specific Comments

Paragraph 2.24

Digicel maintains its position that the text of section 35 of the Telecommunications Act (which forms the basis of the OUR's intervention) only applies to dominant public voice carriers. Any move to extend the interpretation of this provision to operators that are not dominant in this market directly contradicts the text of the legislation and must be avoided in the interests of legal certainty.

Paragraph 2.26

While Digicel accepts that the division of responsibilities between the OUR and FTC lie in the distinction between the ex ante and ex post application of competition law principles, in both cases the intervention must be proportionate, reasonable and objectively justified. Such intervention can only be justified where the target of any regulatory action is demonstrated to have significant market power/dominance.

Paragraph 3.4

It is not clear why the OUR has chosen to make reference to its determination of dominance in the mobile call termination markets. The Competitive Safeguards address the market for data services and as such a finding of dominance in an alternative market can be of no particular relevance. In order to impose rules as part of the current NRPM, the OUR must undertake a detailed assessment of the market position of the company concerned, and only impose obligations where (as a result of this market review process) the company is found to be dominant in the market for data services.

Paragraph 4.5

The OUR has failed to define the term "public data network" or to clarify how it would apply the rules in a situation where the dominant undertaking utilised a single network to deliver data and non data services.

Paragraph 4.8

The organisational measures which are intended to safeguard the handling of confidential information apply to be relevant for vertically integrated companies such as CWJ, but are less so for companies that are not so structured. It is essential that before imposing symmetric regulation, the OUR must ascertain whether such measures are proportionate for all operators. It is essential that the cost of compliance does not outweigh any corresponding benefit and as currently drafted, it is not clear that a requirement for functional separation of a company's wholesale and retail arm would be reasonable in all cases as long as appropriate safeguards were in place to prevent any improper use of commercially sensitive information.

Paragraphs 4.9 and 4.10

Digicel welcomes the OUR's position that differential service provision is only anti-competitive where it puts other parties at a commercial disadvantage. The OUR should of course ensure that all operators are guaranteed to obtain a minimum level of service, but it should noted that differential treatment may also be pro-competitive. For example, where differential service is objectively justified (e.g. as a result of cost savings), then it should be permitted. The needs and aims of operators are different and so a 'one size fits all' approach may not be the best to take in all circumstances.