



Digicel Submission

In Response to

Consultation Document

“Application by Cable & Wireless Jamaica to be Classified as
Non-Dominant in the Provision of Public Voice Telephony”

Introduction

Digicel is grateful for the opportunity to provide comments on the Cable & Wireless Jamaica (C&WJ) application to be classified as non-dominant in the provision of public telephony. Digicel believes that in a dynamic telecommunications industry such as Jamaica, it is appropriate for the market conditions to be assessed on a regular basis. However, Digicel does not consider that the changes in the market which have occurred since the original determination have affected C&WJ's dominance in the relevant markets defined by the OUR. Therefore, it is not appropriate to remove the dominance determination at the present time

Digicel's failure to respond to any issue raised by the OUR in its Consultation Document does not necessarily represent agreement in whole or in part with the OUR's position or that of C&WJ.

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

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Overview

Digicel notes the new position taken by C&WJ in the current application. Digicel has argued in the past that the market for the termination of calls in Jamaica encompasses all operators. C&WJ argued otherwise, in fact C&WJ stated that:

*"Cable & Wireless Jamaica (C&WJ), in this document, reiterates its position that each Mobile Network Operator (MNO) is dominant in call termination on its own network. As C&WJ has addressed exhaustively, in its previous submissions, there is no technological alternative to reaching a subscriber of a particular network but to terminate on that network. As such, the market for call termination on each mobile network is a monopoly market."*¹

Based on C&WJ's above reasoning (and on the basis of technology neutrality) one must assume that the same must be applied to the fixed network. Therefore, on the basis of C&WJ's own reasoning, it must accept that it is dominant in fixed termination and therefore by extension dominant in fixed network interconnection. Digicel is not quite sure of the current position of C&WJ. Is it that C&WJ has now changed its view on the relevant markets as defined?

In any event, the application by C&WJ to be classified as non-dominant in the provision of public voice telephony seems to be rooted in an incorrect argument made by the OUR in its Dominant Public Voice Carriers – Determination Notice. In the determination notice the OUR stated that:

*"Based on data provided by the Statistical Institute of Jamaica (STATIN) for mid 2002, 3.04% of households surveyed indicated that they had both mobile and fixed line telephones. This means that these households view mobile and fixed telephony access (and calls) as complements rather than substitutes."*²

¹ See C&WJ'S Response to Digicel's Application for Reconsideration of the OUR'S Determination Titled "Decision on Assessment of Dominance in Mobile Call Termination" (Tel 2004/10), page 1.

² See page 8 of Determination Notice: Dominant Public Voice Carriers Document No: TEL 2003/07 August 14, 2003, Office of Utilities Regulation.

The OUR, without providing the empirical evidence seems to believe that by owning both mobile and fixed phones, the consumer must be using one to complement the other in both access and calls. At the very least, before coming to that conclusion, the OUR needs to identify when and where are persons choosing to use fixed or mobile phones. Similarly C&WJ is now trying to prove that the services of making and receiving calls through fixed or mobile telephony are substitutes without providing the substantiated evidence to support the assertion. In fact, the only evidence provided by C&WJ is the flawed comparison of penetration rates.

Digicel agrees that the market conditions have changed in the period since the original determination of C&WJ dominance. However, while there has been a significant increase in competition in the markets for mobile voice services, the same cannot be said for the fixed market where C&WJ retains in effect a monopoly. We therefore submit that C&WJ arguments in its application are not correct as a matter of economics or law and therefore we request that the OUR decline C&WJ's application.

Fixed and Mobile Penetration

C&WJ stated that at the beginning of liberalization, fixed line penetration was 22% and that it is currently at 13%, while mobile penetration is greater than 80%. Digicel would like to make it clear that it is incorrect to determine fixed penetration the way C&WJ has done it. Fixed penetration should be determined by measuring the number of lines in relation to number of households and corporate bodies. This is so, since in the majority of households there is need for only one fixed line phone although this will be used by multiple occupants. In the case of mobile penetration, the number of subscribers should be measured against the population, since cell phones are personal and every member of the household

may choose to own their own handset. Therefore, in the absence of evidence on the number of people using fixed lines at each location, a simple comparison of penetration rates is misleading.

Specific Questions

Question 1: What are your comments on the market definitions suggested by C&WJ? If you are not in agreement with this definition, please give reasons as well as what you consider to be the relevant markets?

C&WJ has chosen to solely rely on the increase in competition that it faces in the mobile market, to justify its application. This approach is incorrect. Rather C&WJ should have assessed the factors in each of the markets defined in the Determination, to support its assertion that it is no longer dominant. Additionally, the alternative market definition offered by C&WJ as a justification for its application (i.e. the existence of a single market for call origination on both fixed and mobile networks) is not correct for the following reasons:

- ***Level of mobile penetration*** - In its application, C&WJ has placed undue importance on the fact that in Jamaica mobile penetration exceeds that of fixed lines.
 - While we may accept that this may affect C&WJ's dominance in the markets for retail services, the same cannot be said for fixed access and fixed network interconnection. C&WJ has produced no evidence in its application to demonstrate why the increase in mobile penetration would effect the dominance determination in these fixed line markets.
 - The significant increase in mobile penetration has been replicated elsewhere³, but this has not affected the fact that in most

³http://ec.europa.eu/information_society/policy/ecom/implementation_enforcement/annualreports/12threport/index_en.htm

European countries, the fixed line incumbent has been found to be dominant in the market for fixed line access markets.

- The OUR should be wary of placing undue importance on the level of mobile penetration, but instead should focus on whether or not C&WJ has adduced any evidence to indicate that there is any substitute (from a demand or supply side perspective) for fixed access or fixed network interconnection. C&WJ has failed to do so.
- **Churn on its fixed network** - C&WJ also emphasises the fact that it experienced churn on its fixed network, since it has faced competition in the mobile market.
 - The decline in fixed line volumes has been replicated throughout Europe. With increasing competition in mobile markets and the reduction in retail rates that has occurred, customers now use their mobile phones for the majority of call minutes⁴. While this market feature would impact on the assessment of dominance in retail markets, it does not affect the markets for fixed access and fixed network interconnection.
- The OUR has defined a separate relevant market for fixed network interconnection. As stated in the Consultation Document, this market has different characteristics to the retail markets for voice calls:

"1.6 Interconnection markets are distinguished from retail and wholesale markets by virtue of the fact that carrier licences are required to provide or purchase such services and because interconnection services are distinct from wholesale or retail services, e.g. they comprise segments of a call rather than an end-to-end service. For these services, the interconnection seeker pays

⁴ As demonstrated by C&WJ's own call volume data

*interconnection charges, which is a source of revenue to the interconnection provider and a cost to the interconnection seeker."*⁵

- There is no alternative to fixed network interconnection with C&WJ. C&WJ faces no competitive constraints when providing these services and so it is able to price these wholesale services at a rate which exceeds the true cost of their provision.
- Therefore, C&WJ has the ability to significantly increase its competitors' costs in the mobile market. In the absence of clear accounting separation, it is not possible for OUR to have the necessary oversight of C&WJ's internal transfer costs which will enable it to ensure that C&WJ is no longer able to discriminate in favour of its own downstream mobile arm – *b*mobile.

Question 2: Do you have any comments on the views expressed by C&WJ concerning the degree of competition in what it considers the relevant markets?

- **Level of competition in the mobile market.** C&WJ argues that mobile call minutes exceed those of fixed call minutes and that the market is contestable (as indicated by the number of licences have been issued). While these factors may tend to support C&WJ's view of a single retail market for domestic and international calls, the same is not true for fixed access and fixed interconnection services.
- Any assessment of dominance in these markets should consider factors such as: market share, barriers to entry, prices, vertical relationships etc. C&WJ has adduced no evidence to support its view that it is no longer dominant in the defined relevant markets.

- *3.8 ...According to section 19 of the Fair Competition Act of 1993, "...an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors."*⁶
 - This is the key determinant. Even though the market conditions may have changed, if C&WJ is still able to act independently from its actual/potential competitors in certain relevant markets, then the Determination must remain in place. This is the case here, as entrants have no alternative but to obtain wholesale access services from C&WJ if they wish to access its fixed line subscriber base.
 - Competition in the mobile sector has not eroded C&WJ dominance in the fixed line service markets as defined in the original Determination. C&WJ's ability to exploit its dominant position remains and therefore it is still able to act independently of its competitors and consumers – i.e. it is dominant.
 - Therefore, it is not appropriate to remove the determination of dominance and associated regulatory obligations, as in the absence of these requirements, entrants will be unable to compete on their merits.

- **Market share** – It is instructive to note that C&WJ has not provided any evidence to indicate its market share in fixed access. While this is not conclusive of any finding of dominance, it is a very strong indicator. We would expect that before reaching any conclusion on the validity of the application, the OUR will undertake its own detailed information gathering

⁶ Ibid

exercise on this point. In the original determination document the OUR pointed out that:

*"2.29 Furthermore, it may be instructive to consider the experience in other countries. In the UK, sixteen 16 years after allowing entry into the market for fixed telephone access, British Telecom (BT) still controlled over 80% of the market."*⁷

- Even if C&WJ's market share has declined in the period since bmobile has faced competition in the mobile market, this would not affect C&WJ's dominance in fixed line markets. As the OUR itself has stated, the mere passage of time is not sufficient to address the underlying dominance of the incumbent in network facilities.

*"2.11 Dominance can be eroded over time as a result of market gains by the entrant and technological change. Hence, regular review is necessary. However, in network facilities, including interconnection markets, it generally takes significant time for new entrants to overcome the incumbent's dominance"*⁸

- Digicel accepts that market conditions may have changed since the period of the original Determination, but it is important to avoid drawing incorrect conclusions based on this fact, especially as fixed line incumbents throughout Europe are experiencing similar declines in their market share, without affecting their dominance in fixed line access.

"The EU average incumbents' market share in the overall fixed voice telephony markets on the basis of retail revenues (but also by volume of traffic) continues to show a declining trend from 67.7% at Dec. 2004 to 65.8% at Dec. 2005 (figures by volume of traffic are,

⁷ Dominant Public Voice Carriers – Determination Notice - 2003/07

⁸ OUR- Dominant Public Voice Carriers, A Consultative Document, March 2000

*respectively, 66% in 2004 and 63.9% in 2005). Looking at the incumbent's market share in each Member State separately, the biggest rate of decline (around 7%) has been experienced in Cyprus, Hungary, Ireland and Poland."*⁹

- **Barriers to Entry** - The barriers to entry into the fixed line markets remain high. Although it is possible to obtain a licence to operate competing fixed line services, the costs involved in operating such a service are prohibitive to most operators.
- The number of licences alone is not an accurate determinant of the level of competition in the market. The OUR must always consider the economics of the telecoms market and especially the very high level of sunk costs that exist, further any conclusion on barriers to entry must take account of the reality of whether entry has actually occurred in the period since the original Determination.
- **Vertical relationships** - As the only vertical integrated company operating in the wholesale and retail fixed and mobile markets in Jamaica, C&WJ has a significant economic advantage. Through its control of the market upstream, C&WJ is able to not only set its prices so that a margin squeeze can occur (e.g. as can be seen in the provision of directory enquiry services), but also has the ability to cross subsidise its retail services from the revenues earned at the wholesale level.
- **Leveraging dominance** – Digicel believes that C&WJ is using its dominant position in fixed access to leverage its position in other markets. For example in fixed access, C&WJ has refused the interconnection of Digicel's wireless broadband services, rendering it effectively non-viable. This

⁹ 2006 Implementation report, staff working document

occures against the background that C&WJ continues to develop its own broadband services and its observation as stated below:

*"...to be a credible network operator, a carrier must be able to offer its retail customers the ability to reach any other user connected to any other public network. In order to do so, network operators have no alternative but to purchase termination services from all the other operators running public networks (including MNOs)."*¹⁰

- Based on the above statement it seems to be a deliberate ploy by C&WJ to leverage its dominant position in the fixed market in other markets, such as the market for broadband services. Another example of C&WJ leveraging its dominant position is its constructive refusal to offer direct interconnection to its mobile segment. It is extremely unusual that an incumbent operator is allowed to unilaterally decide not to offer interconnection based upon the reasons provided by C&WJ and it is able to do so because of its continuing dominance in the respective markets.

Question 3: Do you have any other relevant comments or representation you think should be taken into account when considering whether C&WJ is dominant or not in the relevant markets?

Implications of removal of dominance determination on C&WJ

- On the basis of economic analysis, it is clear that C&WJ is still dominant in the markets for fixed line services. Therefore, the regulatory obligations imposed as a result of this Determination must remain in force.
- As a result of the Determination, a number of regulatory obligations were imposed on C&WJ to ensure that entrants in the market are able to compete

¹⁰ See C&WJ'S Response to Digicel's Application for Reconsideration of the OUR'S Determination Titled "Decision on Assessment of Dominance in Mobile Call Termination" (Tel 2004/10), page 4.

on the merits. If C&WJ (notwithstanding C&WJ's failure to provide any clear evidence to establish that it is not dominant) was successful in its application, then these obligations would have to be removed. This would have a fundamentally detrimental effect on Digicel and other entrants' ability to compete.

- For example, the OUR has imposed a requirement for C&WJ to implement an accounting separation process, as a result of its dominance in fixed line markets:

1.3 Entrants have to pay a large amount of their revenues in interconnection charges, making them vulnerable to abuse of dominance by the incumbent. A dominant firm has the ability to distort competition in a relevant market. This is especially so in telecommunications, in which a dominant firm is typically both:-

- *a supplier of critical inputs (interconnection and wholesale) to downstream service providers; and*
- *a competitor against these service providers in downstream retail markets.¹¹*

- This is still very much the case in the Jamaican market. The removal of the Determination at this early stage in market development would enable C&WJ to adversely affect competition through charging an excessive interconnection charge. Without the obligation, the OUR would not have the information it needs to take enforcement action wherever it is demonstrated that C&WJ's charges are not truly cost-oriented.

¹¹ Accounting Separation for Cable and Wireless Jamaica - Determination Notice (2006/04)

Therefore, Digicel respectfully urges the OUR to not only continue to classify C&WJ as dominant, but to ensure that appropriate regulatory obligations remain in place.

In conclusion, C&WJ has failed to:

- Adduce any clear evidence to support its application;
- Drawn incorrect inferences from the increased competition the *b*mobile arm faces in the mobile sector; and
- Provide any evidence to establish which competitive constraints it faces in the provision of fixed line access services.

Therefore, its application should be denied.