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

INDEX

1. Executive 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 respond 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' comments and decided whether or not to proceed further with the current proposal.

Digicel will answer the questions as they were raised by your Office and where Digicel deems it necessary we will further comment on the contents of the Consultation. For reasons of clarity we have followed the structure of the Consultation; first we will address those issues that we would like to give some further thoughts on and after that we will answer the questions. We also provide a short executive summary below.

Any additional questions that may arise may be addressed to:

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1.2. Digicel Executive Summary

a) 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.

   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 uncompetitive practices to which the competitive safeguard rules apply. The OUR itself acknowledges the limited scope of Section 35 on several occasions.

b) 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.

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

d) 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.

e) 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.

f) 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.

And Finally, 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. Initial Comments

2.1. Vibrant competition

In section 1.3 of the document, the OUR states that some retail markets have a 'vibrant competition'. However, the OUR does not specify what those markets are. One of the retail markets in particular has seen a widely recognised revolution invoked by Digicel: the mobile market.

2.2. 'Lagging competition'

The OUR further suggests in section 1.3 that competition in wholesale markets is ineffective, or has 'lagged behind', and the OUR seems to offer this lagging competition as the rationale for this consultation document. The OUR may well consider that achieving competitive wholesale markets is *per se* a worthwhile goal, but that does not seem to be the focus of this consultation document.

Digicel respectfully suggest that that the OUR should do a proper competitive assessment of the retail market, and then to establish some failure at that end - which it can attribute to a malfunctioning or non-existent wholesale market - in respect of which some type of regulatory intervention may be required, and in respect of which, the currently existing powers are inadequate. Alternatively, the OUR should be indicating and explaining where the alleged problems have occurred (e.g. refusal to supply) and why the OUR's existing powers, such as the pre-contract dispute resolution procedures, are inadequate.

2.3. Added Value

Furthermore, it is quite unclear what the added value of these Competitive Safeguard Rules is meant to achieve. . These proposed rules deal with many of the issues that are already covered by general competition law (in terms of the concepts identified), which falls to the Fair Trading Commission ("FTC") to enforce. In effect, the OUR seems to be creating a parallel competition law charter to be enforced by the OUR. In addition, as the

Consultation itself acknowledges, the OUR has already adopted specific rules on several issues.

2.4. Alternative

Digicel as an alternative would like to respectfully suggest that the OUR develop in conjunction and close cooperation with the FTC and the telecommunications industry, a set of general guidelines to deal with anti-competitive conduct in the telecommunications sector. These general guidelines would set specific rules that would apply to the telecommunication sector. A similar approach was taken by the European Union and it proved invaluable in serving the complex and fast moving telecommunications sector.

2.5. Nascent market

In 1.6 of the Consultation the OUR acknowledges that Section 35 of the Telecommunications Act ("the Act") deals with dominant public voice carriers only - but claims that its general powers under Section 4(1)(f) and Section 71 will allow the OUR to impose competitive safeguard rules. Firstly, Digicel wishes to underline to the OUR that the data market as it is outlined in the Consultation, is still a nascent market. Digicel therefore respectfully suggest that regulating new comers in this nascent market from the onset could hinder the development of a competitive market. This would limit the ability of newcomers into this market to fully compete with existing players such as Cable & Wireless Jamaica to the long term detriment of sustainable competition. Finally, with regards to the view outlined by the OUR in section 4(1)(f), Digicel wishes to point out that Section 4(1)(f) only summarises other functions of the OUR and does not *per se* confer any function on the OUR not otherwise conferred by the Act.

Moreover, Digicel is of the opinion that the OUR is bound by the structure of Section 35(1) of the Act that limits regulatory interventions exclusively to dominant voice carriers. That is to say Parliament has limited section 35(1) of the Act to dominant voice carriers and therefore the OUR cannot widen the scope of this section through rule making..

2.6. WTO-ABT Reference Paper

In section 2.16 of the Consultation, the OUR is introducing the concept of essential facilities from the WTO-ATB Reference Paper. 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.

The OUR in its Consultation further specifically, states under section 2.17 that 'Interconnection (is) to be ensured'. Digicel for over four years has tried to obtain direct interconnection between Digicel mobile network and the Cable & Wireless Jamaica ("Cable & Wireless") mobile network. Up until today Digicel has been unsuccessful in its attempts and Cable & Wireless have *de facto* refused direct interconnection (constructive refusal) to its mobile network. Digicel has filed a pre-contractual dispute requesting that the OUR deal with this refusal to interconnect behaviour by Cable & Wireless.

Given the mentioned commitments of Jamaica to the WTO-ABT, Digicel suggests that the centre of attention of the OUR in setting up the Competitive Safeguards first goes to the refusal, delay and/or frustration of interconnection as the OUR seems to understand the importance and adverse effects to competition in 3.1.3: "Delaying tactics, or delay in the provision of access (interconnection), occurs where the dominant carrier takes an unusual long period of time to provide the required input to its competitors".

2.7. Anti-Competitive Practices

In the document, the OUR very briefly discuss the ten most common anti-competitive practices. Although, common they are extremely complicated matters of competition law and policy.

2.7.1. Tied Selling/Bundling

In section 3.1.4 of the Consultation, the OUR discusses bundling as a practise that is usually anti-competitive. However, as is the case with certain types of price discrimination, there are cases where it is welfare enhancing.

2.7.2. Price Discrimination

There are many forms of price discrimination acknowledged in the international literature Digicel, therefore, urges the OUR to reconsider its definition as price discrimination can even enhance competition by having some people paying more so that other people can pay less. A clear example of this is in the US, where rural communities pay the same price for telecommunication services as urban communities.

2.7.3. Predatory Pricing

The definition that the OUR uses for Predatory Pricing seems to be a modified version of the Areeda-Turner test - which is just one of many standards. Digicel would like to respectfully point out to the OUR that the most influential work on predatory pricing is being undertaken by Bradley, Riordan and Bolton[1] (Princeton and Boston University respectively).

[1] In Ireland, the Irish Competition Authority adopted the Bradley, Riordan and Bolton doctrine on Predatory Pricing. In the Drogheda case the Competition Authority has taken the view that alleged predatory conduct by the Drogheda does not breach the Competition Act 2002. This view is taken on the basis that the Drogheda is not dominant nor could its alleged conduct constitute an abuse. The alleged conduct is arguably pro-consumer and more indicative of intense competition in the market than predatory conduct by a dominant undertaking. http://www.tca.ie/decisions/enforcement/e_05_001.pdf

2.7.4. Price Squeezes

In the section 3.1.8 of the Consultation Document that deals with Price (Margin) Squeeze one of the more important issues seems to be missing. In order to be able to speak of an unlawful price squeeze, one of the prices must also be predatory (unlawful).

2.8. Dominance in mobile call termination services

In section 3.4 of the Consultation the OUR is discussing the Determination that declared all mobile operators dominant in the respective call termination markets, which has been under reconsideration for quite a while now: "the OUR is currently reviewing the matter and will issue a decision when it is completed. Given that the determination is currently under review, it's currently not in force."

2.9. Old Information and developments

Digicel does not quite understand how the OUR can reasonably suggest that it is reviewing a decision pertaining to a process in which the last consultation was almost two and a half years ago. It is inconceivable given the time that has past since then that the OUR would rely so it seems, on old information in some cases 3 to 4 years out of date to day, to make a determination now. Furthermore, real prices have fallen significantly further since the last review and many other market dynamics have changed.

2.10. The Concept of Dominance

Before the OUR can even determine that there is Dominance, there is an extensive amount of factors that have to be taken into consideration by the OUR. This practise should be based on the major doctrine with regards to Dominance and the guidelines that apply to the establishing of Significant Market Power.

Dominance is essentially a special form of market power. The concept of dominance or Significant Market Power is following a well established worldwide regulatory practice,

whereby important assessments of market power and corresponding regulatory interventions are left to a specially constituted regulator. The concept of dominance has its origins in the competition (anti-trust) law, including merger control laws of the European Union ("EU"). The definition of dominance has been adapted in a number of decisions of the European Court of Justice.[2] Dominance is defined as a situation where: "A market player enjoys, either individually or jointly with others, a position of economic strength that enables it to behave independently of competitors and customers in any relevant market for telecommunications services. "

2.11. Behaviour

The concern to identify whether firms are dominant is based on a desire to prevent or punish exploitative or exclusionary behaviour by one or more firms. A typical example of exploitative behaviour by a dominant firm would be over-charging. This would amount to an abuse of a dominant position where the price of a service did not bear a reasonable relationship to the economic costs of its provision.

In Europe, the key determinant for the imposition of certain regulatory obligations in the telecommunication sector is the concept of Significant Market Power ("SMP"). The SMP concept has evolved under the existing regulatory framework to reflect the concept of dominance as understood under EU competition law, though such dominance must be of an enduring nature for SMP to exist (which is similar to a finding of dominance under EU merger control laws but not necessarily the case for a finding of an abuse of dominance under Article 82 of the EC Treaty). Both concepts relate to market power. The greater that power the more likely the holder is of being able to act independently of both its customers and competitors.

In order to assist national regulators in deciding whether there is SMP in a particular market, the European Union adopted Guidelines emphasise the factors that should be considered by regulators when analysing a relevant market.[3]

[2] See Case 27/76 United Brands v Commission 1979 ECR 207

[3] EC Guidelines, paragraph 76-78

These include:

a) The overall size of the firm under review;
b) The control of infrastructure not easily duplicated;
c) Technological advantages or superiority;
d) Absence of-, or low countervailing buying power;
e) Easy or privileged access to capital markets/financial resources;
f) Product/services diversification (e.g. bundled products or services);
g) Economies of scale.

2.12. Dominance in the Telecommunications Market

The making a determination of dominance or SMP in any case involves a very detailed appraisal of market specifics. A typical determination of dominance would at least require an identification of a specific market, an assessment of market shares, an analysis of barriers to entry, a consideration of effects of historic incumbency, an analysis of pricing data and a forward looking projection of how the market is likely to evolve, taking account of all of the factors as the were identified by the European Commission (see the above).

No one factor is necessarily conclusive: for example, a firm may have a large market share, but if other firms can enter the market quite easily and/or others have countervailing bargaining power, then the finding of dominance or SMP may not be warranted.

2.13. Voice and Data

In section 3.23 of the Consultation section 3.23 the OUR is discussing the proposal to develop and implement the regulatory framework to require dominant data carriers to lodge with the OUR an reference interconnection offer setting out matters relating to the price and terms and conditions under which a public data carrier will permit access to its public data network.

Digicel respectfully suggest that distinguishing between voice and data when it comes to developing a regulatory framework in general and a framework for interconnection in particular does not adhere to the principles of technological neutrality and should be reconsidered by the OUR. Regulation in general should be technology neutral. Interconnection and access need to be protected and advocated as a principle. Whether it is interconnection or access for voice or data does not and should not matter: the abuse of dominance must be minimized. The division between voice and data networks have been becomes even more difficult to distinguish due to the convergence of technologies (e.g., VoIP) the clear distinction between what is voice and what is data is becoming harder to make in the services arena.

Voice Interconnection in the near future will move from a C-7, circuit-switched world to a packet-switched environment. In the telecommunications field the GSM-Association has widely acknowledged the gradual move to an IP-IP interconnection environment. The OUR therefore should reconsider developing a separate 'Reference Data Access Offer' and should try to make the new version of the Reference Interconnection Offer universal; one that covers both data and voice interconnection and/or access.

3. Answer to Question 1

The OUR's regulatory policy should focus on incentivising of investment. From a fixed line perspective the requirement should be to promote competition generally in the broad fixed line market without simply focussing on the data market. An operator is much likelier to succeed in the fixed line data market if it is a multi-service provider i.e. including voice – consequently, focus should be on regulating Cable & Wireless in particular in the areas of cross-subsidisation, service bundling and predatory pricing where it has the market power to seriously disrupt competition.

Wireless data solutions require significant investments that must be incentivised and not discouraged by over-regulating this market. Operators are simply not going to invest in a market if they know Cable & Wireless are going to be permitted to engage in anti-competitive conduct. Equally, companies making substantial investment should be confident that their investments can earn an adequate return and will not be subjected to

regulatory pricing intervention at least until the market has matured. The OUR has previously given signals that investment will not necessarily be rewarded when it attempted to regulate mobile termination rates very early in the market development stage, contrary to government policy.

4. Answer to Question 2

Internet Service Providers should be included in the application of the RIO and the OUR should seek to modify the existing Cable & Wireless RIO. Not only because of the reasons that the OUR gives in the Consultation but also because of what was said in the above under section 2.13 of this response. Again the focus of the policy should be on giving incentives for new investments in (data) markets while ensuring the competition that it will be protected from anti-competitive strategies from declared dominant operators, in particular from Cable & Wireless.

5. Answer to Question 3

This question seems rather unclear. If Digicel understands the OUR correctly, the OUR is suggests including Information Requirements in the RIO of a Dominant Operator. Digicel does not see whether including Information Requirements or expanding them to be included in the RIO for Dominant Operators, would benefit competition in any way.

Furthermore, Digicel reiterates what it has already stated before with regards to the matter of Information Requirements. Digicel believes that it is critical that when information is asked from operators, the OUR should be clearly outline and explain why the information is being collected.

6. Answer to Question 4

As already stated in the above, Digicel thinks it is not a good idea to make a distinction between voice and data interconnection and/or access issues. The principles that apply in both service groups are identical. Because the position that especially Cable & Wireless has a fixed, a mobile and an internet services provider, it is important that special attention is paid to the inherent possibility of bundling and other forms of anti-

competitive behaviour from which other market parties need to be protected by your Office.

7. Answer to Question 5

This should be the case only where operators are determined by the OUR to be dominant after rigours analysis. Cable & Wireless is dominant in the provision of fixed line services over which they also provide their data services. Consequently, if Cable & Wireless are already subject to requirements of accounting separation, then these services should also be separated out - otherwise Cable & Wireless will have the ability to either misallocate costs to the data services and hide the costs there or they will be allowed to cross-subsidise the data services with other fixed-line activities through anti-competitive cross-subsidisation which is impossible to detect given the absent requirement of separated accounts.

8. Answer to Question 6

Digicel sees no requirement to define Essential Facilities for Jamaica as some sort of parallel test to the WTO standards. There are sufficient safeguards in the legislation to ensure that market failures do not occur. Furthermore, Jamaica has not come under any sanction from the WTO, nor is their any realistic threat of this happening with respect to Telecommunications services now or in the foreseeable future (also see below, the index from ITU).

Furthermore, the biggest critics of international settlement rates are the United States ("US") based operators who are engaged, as has been demonstrated previously by Digicel, in price gouging of US consumers that seek to call Jamaica. Furthermore, the Federal Communications Commission's ("FCC") own benchmarks suggest that Jamaica's international settlement rates are reasonable.

In Digicel's view an understanding of Essential Facilities as defined by the WTO should only be considered in the context of international trade. There is neither concrete, nor *prima facie* evidence to suggest that Jamaica is not adhering to its WTO obligations with

respect to the telecommunications markets. In fact operators from all over the world have seen exponential growth in retail revenue for their call services to Jamaica since market liberalisation 5 years ago.

And finally, on November 1, 2005 the ITU published the ICT Opportunity Index[4] for the second time. This Index recognizes amongst other things that the Caribbean, together with other regions, leads in access to new technologies. Chile, Argentina, Barbados, Jamaica and the Bahamas lead the region in terms of access to digital communications technology and its use, according to a this index.

According to the ITU's index these are the five countries in the region where new technologies are most accessible and where the people are most likely to benefit from advantages that the information society offers. The index goes from 0 representing no access to new technologies to 1, which means these technologies are fully accessible. The index takes into account the penetration and cost of internet services as well as penetration of mobile telephony.

[4] http://www.itu.int/ITU-D/ict/publications/dd/material/index_ict_opp.pdf