

HEAD OFFICE & BUSINESS CENTRE

P.O. Box 293, Grand Cayman
KY1-1104 Cayman Islands



P: 345.949.7800

Friday, 23 June 2017

Mr. Alee Fa'amoe
Deputy CEO and Executive Director ICT
Utility Regulations and Competition Office
PO Box 2502
Alissta Towers, 3rd Floor
Grand Cayman, KY1-1104

Dear Mr. Fa'amoe,

RE: NOTICE FOR REPLY COMMENTS (OF 2017-2 – CONSULTATION)

Cable and Wireless (Cayman Islands) Limited, d/b/a FLOW (“**FLOW**”) is pleased to provide our response to the opening comments submitted by intervenors, Digicel and Logic, to the Utility Regulation and Competition Office’s (“**Ofreg**”) public consultation document “Proposed Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power” (OF 2017-2 – Consultation), dated 1 May 2017.

Digicel and Logic express many concerns with the proposed SMP Guidelines in their opening comments. We are in fundamental agreement with Digicel and Logic on this issue and share their concerns.

Logic correctly observes “it is very difficult to apply static regulatory rules” to an industry such as ICT that is dynamic and undergoing technology convergence. Unless the limitations of what regulations can achieve and the significant risks of unintended consequences are fully appreciated, regulatory overreach is a significant concern. Logic summarizes this concern succinctly in its comments, as follows:

[T]he Guidelines suggest an increasingly complex set of rules in a market that has previously thrived under a light touch regulatory approach. This is concerning as regulatory complexity inevitably leads to unintended consequences, and introduces uncertainty into investment decision-making.

We agree with Digicel and Logic that the implementation of SMP Guidelines may facilitate further ex ante regulatory intervention, and we share their fundamental conclusion that *all* ex ante intervention, no matter how well intended, is unnecessary and inappropriate. If intervention is to occur, it should only occur on an ex post basis. According to Digicel:

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Given the dynamics of the market in Cayman, Digicel believes that an ex-post approach to competition law supervision would be sufficient to deal with any market failures or anti-competitive harms that might arise.

Logic offers similar comments:

Our experience in other markets suggests that an ex ante regulatory regime tends to proactively protect those competitors who are not willing to invest in their own facilities...In our view, a lighter touch approach that is empowered by a strong commitment to ex post enforcement of competition rules is the right solution for the evolving ICT industry in the Cayman Islands. Ex ante remedies often seek to create unsustainable competitive models and should be avoided.

FLOW likewise agrees with Digicel regarding how to evaluate competitive substitutes, and the importance of consumer behavior on the margins. We explained in our comments, for instance, that “it is not necessary for all customers to view two services as reasonably interchangeable for the services to be in the same relevant product market or to provide effective competition.” Likewise, Digicel observes:

It is not necessary that all customers are able and willing to change from product A to product B in order for product B to be included in the same market as product A. [Consumers receive the benefits and protections of competition] as long as the number of customers who are ready to switch is sufficiently large to render a price rise unprofitable.

We share Digicel’s concern regarding the relevance of geographic market considerations in the SMP Guidelines. In particular, geographic considerations should be rendered null where license conditions, such as those imposed on ICT operators in the Cayman Islands, require countrywide network deployment and availability.

Finally, we agree with Digicel’s observation that the SMP Guidelines should explicitly acknowledge and articulate the relevant role that OTT services can play in a competition investigation. According to Digicel:

[T]he emergence of OTT services means that a number of functional substitutes to traditional licensed voice and messaging services are now active in the market and that a number of these may not be licensable. In this regard, the guidelines should explicitly set out that a relevant economic market may comprise both licensed and unlicensed services.

That concludes our reply comments. Please do not hesitate to contact me should you have any questions.

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Yours Sincerely,
Cable and Wireless (Cayman Islands) Limited

A handwritten signature in blue ink, appearing to read "Victor Salgado", with a long horizontal line extending to the right.

Victor Salgado
Managing Director

From: Simalee Ebanks Simalee.Ebanks@digicelgroup.com 

Subject: RE: 'Notice for Reply Comments'

Date: June 23, 2017 at 4:01 PM

To: Consultations Group consultations@ofreg.ky

Cc: Raul Nicholson-Coe Raul.Nicholson-Coe@digicelgroup.com, Corinne Philip Corinne.Phip@digicelgroup.com

SE

Good Afternoon,

This is to confirm that Digicel does not have any further comments on this subject in addition to those submitted on June 1, 2017. However, we wish to reiterate the following points, which we believe are also supported by the comments made by the other operators:

- i. The ex-ante regulatory approach proposed by OfReg is not suitable for a market at the stage of development of the Cayman Islands at this time. Rather, an ex-post approach would be sufficient to deal with any market failures or anti-competitive harms that might arise. Any remedies or obligations should only be imposed on a designated operator and only to the extent required to deal with the specific and identified market failure.**
- ii. Undue emphasis should not be placed on market share in determinations of dominance. Rather, greater emphasis needs to be placed on the assessment of barriers to entry and expansion.**
- iii. The Guidelines should not reserve the right for OfReg to change various aspects of the Guidelines upon mere notice or to consider any other criteria or items of evidence for which provision is not made in the Guidelines. If there is a need to depart from the Guidelines in any material respect, there must be subsequent consultation process by which amendments to these Guidelines are proposed and put out for comment. In addition, if OfReg wishes to consider other criteria other than those for which express provision is made in the Guidelines, there must be some measure, set out in the Guidelines, as to what would make such criteria "relevant".**
- iv. Any market definitions and SMP assessments conducted in accordance with these Guidelines must necessarily take into consideration the impact in the various markets of unregulated OTT service providers who provide services using the networks of licensed network operators in the Cayman Islands and the public demand for such services.**
- v. Every stage of the process set out in the consultation document i.e. - market definition, the conclusion of determinations or the imposition of remedies or conditions – as each involves an administrative determination of public significance, should be subject to a separate consultation process.**

Regards,
Simalee Ebanks | Executive Assistant

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