



Digicel

May 31, 2017

Mr. Kenva Williams
Director General
Turks & Caicos Islands
Telecommunications Commission
P.O. Box 203 Business Solutions Complex
Leeward Highway
Providenciales

Digicel TCI
2nd Floor, Unit 207
Graceway House, IGA Plaza
Leeward Highway
Providenciales
Turks and Caicos Islands
Tel : + 1 (649) 331 3444
Fax : + 1 (649) 339 8944
www.digiceltci.com

Dear Mr. Williams,

Re: Consultation on Telecommunications (Competition) Regulations

Digicel thanks the Commission for the opportunity to submit its comments on the Commission's proposals relating to the implementation of competition regulations in the Turks & Caicos Islands, as set out in the Consultation Document published on April 19, 2017.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in this consultation or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement nor does any position taken by Digicel in this document represent a waiver or concession of Digicel's rights in any way. We expressly reserve all rights in this matter generally.

Please see below are our comments on the specific consultation questions.

Consultation Question 1: Please provide your views on the need for a more comprehensive and unified competition framework in the telecommunications sector in TCI, with supporting rationale.

The Commission has referenced a number of jurisdictions which have enacted sector specific competition provisions. Digicel notes that in practice none of these provisions have been put into operation. This empirical market evidence accords with Digicel's view that the models on which these types of legislative provisions are not suitable and are unworkable in small economies which have regulatory authorities with limited resources.

To the extent that there is a need to enact legislation to deal with competition issues this should be done on the basis of horizontal legislation with general applicability. Such legislation could have provisions for private enforcement obviating the need for the immediate establishment of a supervising authority but which may also contain enabling provisions for the establishment of such an authority in due course.

The fact that there are no active proposals for such legislation does not mean that a sub-optimal sector specific approach should be followed. Rather the Commission, as a key stakeholder in the legislative process, should highlight the need for such general legislation to the relevant Government authorities.

Consultation Question 2: Please provide your views on the manner in which a more comprehensive and unified competition framework in the telecommunications sector should be implemented in the TCI. Specially, please provide your views of the advantages and disadvantages of each of the four options discussed above and whether you agree with the Commissions preferred option of Competition Regulations and the Commission’s second preferred option of Competition Guidelines.

It is Digicel’s view that the preferable course is to enact standalone horizontal competition law applicable to the entire economy. Competition law related issues are highly complex and specialised and it is unlikely that a sector specific regulatory body (other than in the very largest markets) would have a sufficient volume of competition matters to develop the appropriate expertise to deal with them. Horizontal legislation with general applicability would potentially provide a critical mass of activity to ensure that such expertise thresholds were reached to allow effective operation of the related regulations. This approach would be particularly useful in markets such as the Turks and Caicos Islands where the emphasis would be on building local expertise in the field.

To the extent that sector specific rules are to be introduced, then Digicel believes that Option 4 is the optimum approach for the Turks and Caicos Islands. This option offers the greatest flexibility to adapt to changes in the sector which are imminent due to the ongoing convergence of telecoms, content and services. This convergence is likely to accelerate as the so called “Internet of Things” develops and it would be prudent to ensure that any regulations enacted at this time are sufficiently dynamic in this regard

Consultation Question 3: Please provide your views on the proposed structure of the Proposed Competition Regulations.

The structure of the proposed regulations is clear. The compartmentalising of the different aspects is a prudent approach.

Consultation Question 4: Please provide your views on the provisions included in Part I. If you recommend specific edits or revisions, please also provide the corresponding rationale.

- Digicel notes that Section 2(3) states:

“In addition to compliance with these Regulations, a licensee remains subject to any requirements and prohibitions concerning anti-competitive conduct that are set out in the Ordinance, other telecommunications sector Regulations and its licence, as well as and any laws of general application.”

If these proposed regulations represent a comprehensive set of rules governing competition law issues for the telecoms sector then all other obligations relating to these matters should be repealed. This is to avoid double jeopardy and inconsistency between the various pieces of regulation cited above.

- The definition of “dominant should be amended to read “....telecommunications products and services...”

Consultation Question 4: Please provide your views on the provisions included in Part II. If you recommend specific edits or revisions, please also provide the corresponding rationale.

Digicel believes that the ex-ante regulatory approach set out in this section is not suitable for a market at the stage of development of the Turks and Caicos Islands. It requires that markets be analysed and remedies designed, imposed and supervised to deal with speculative future behaviour. This type of ex-ante regulation is usually associated with economies which are actively engaged in promoting market entry by infrastructure-based providers. Given the economy of the Turks and Caicos Islands and the size of the potential customer base, Digicel does not believe that there is any realistic prospect of such market entry that would warrant this degree of regulation at this time.

Given the dynamics of the market in the Turks and Caicos Islands, 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 and would allow limited regulatory resources be focussed on those areas of activity that serve to increase the levels of access to services throughout the Turks and Caicos Islands.

The ex-ante approach would require regulatory resources to be expended on a wider set of market activities the vast majority of which will not have live issues. The regulatory burden on operators as well as on the Commission of conducting the related market analyses would be significant and would result in costs which would ultimately have to be borne by consumers with no discernible benefit.

In light of these considerations Digicel believes that this aspect of the proposed regulation should be removed in its entirety.

Consultation Question 5: Please provide your views on the provisions included in Part III. The Commission specifically invites comments on whether having to administer both a dominance-related ex-ante remedy provisions and forbearance provisions is appropriate given the overall framework included in the Proposed Competition Regulations and whether an amendment of the Ordinance should be sought that simplifies this dual approach. If you recommend specific edits or revisions, please also provide the corresponding rationale.

Should the Commission be minded to include the ex-ante provisions, then Digicel believes that any remedies or obligations should only be imposed on a designated operator to deal and only to the extent required to deal with the specific and identified market failure. This provision should be explicitly included in the regulation so as to give regulatory certainty over the level of regulatory intervention that an operator may face in circumstances where there has been no finding of illegal behaviour or market damage.

This approach to remedy design will automatically deal with the issue of forbearance as no remedies will be imposed if they are not necessary. This simplification in the operation of the proposed regulation would result in lower administrative burdens on both the Commission and operators. This approach would also ensure that there is focussed and appropriate levels of regulation within the sector.

Where ex ante remedies are imposed, the Commission should be required to carry out a review of both the market and the remedies themselves at intervals of no longer than 3 years with a view to removing or lessening such remedies unless the Commission can justify their continuation.

This provision is needed to ensure that regulated entities are not subject to un-necessary and potentially market distorting regulation.

Consultation Question 6: Please provide your views on the provisions included in Part IV. The Commission specifically invites comments on whether granting the authority to the Commission to impose financial penalties can properly be included in the Proposed Competition Regulations, or whether an amendment of the Ordinance is first required. If you recommend specific edits or revisions, please also provide the corresponding rationale.

Digicel notes the general prohibition on anti-competitive behaviour.

We note that the provisions of Section 17(1) potentially creates a form of double jeopardy where the same incident would be a simultaneous breach of both the Telecommunications (Interconnection and Access to Telecommunications Facilities) Regulations and these proposed regulations.

We have concerns that the specific wording in Section 17(2)(b) would prevent reductions in margins even if such reductions were not abusive or exclusionary but were, in fact, responses to either normal market operation or increases in cost.

Section 17(2)(e) should be amended by the following insertion to deal with materiality “...with the object of *substantially* lessening”

Failure to comply as set out in Section 17(2)(f) is not necessarily an abuse of dominance but is rather an administrative breach of the regulation and should be relocated to a more appropriate section.

Digicel notes that the provisions of Section 20 of the draft Bill do not relate to competition matters but rather are consumer protection measures which are sufficiently generic in their wording and application that they could apply to commercial practices in any part of the wider economy. From a public policy perspective, if such consumer protections are warranted and desirable they should be applied on in general legislation with horizontal application rather than in vertical, sector specific regulation. If they are not generally required or desirable then there seems to be little rationale to impose them only on telecommunications licensees.

Digicel notes that sections 23(5)(c) and Section 24 give the Commission quasi-judicial powers to impose pecuniary penalties which approximate to sanctions which would be imposed on a finding of guilt in a criminal matter. In this regard Digicel believes that the process and evidential standard to be used must approximate to those which would be used in judicial criminal proceedings and vindication of operators' rights to fair proceedings would also need to be factored into the process.

To deal with these issues Digicel proposes that any such penalties should only be imposed by a court on the application of the Commission.

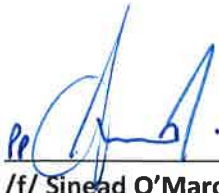
Consultation Question 7: Please provide your views on the provisions included in Part V. Specifically, the Commission would appreciate comments on whether the proposed scope of the merger review provisions. If you recommend specific edits or revisions, please also provide the corresponding rationale.

Digicel notes the proposed merger provisions.

Consultation Question 8: Please indicate if you consider that additional matters or provisions should be included in the Proposed Competition Regulations and, if so, please provide suggested wording for any such additions. Please provide the supporting rationale for your comments.

Digicel notes that there are no provision for appeal of decisions made under these regulations and in particular decisions which are quasi-judicial in nature.

Yours sincerely,



/s/ Sinead O'Marcaigh

CEO