From: **Dow Travers** dow@refuel.ky
Subject: Re: OF 2019 - 2 - Consultation on Proposed Anti-competitive Practices Penalties Rules (2)
Date: March 13, 2019 at 11:24 AM
To: Consultations Group consultations@ofreg.ky
Cc: Katherine Briggs katherine@refuel.ky

DT

Dear Consultations Group,

Please see our comments

below:

Question 1: What are your views on the proposed six-step calculation methodology outlined in the draft Anti-Competitive Practices Penalties Rules? See "2"

Question 2: What are your views on the proposed starting point (expressed as a percentage) in the calculation methodology outlined in the draft Anti-competitive Practice Penalties Rules?
We interpret "Turnover" (using the definition provided in the proposed law) as Revenue. In the petroleum sector, revenue in a financial year can be an order of magnitude greater than profit, and thus make the 15%-20% starting point significantly higher than the previous minimum proposed penalty.

Question 3: What are your views on the Office's requirements regarding leniency agreements with parties guilty of participating in concerted practices. see "4"

Question 4: Please provide your views on any other matters you consider relevant to this Consultation.

The definition of "Concerted Practice" seems to, in the absence of clear evidence, allow for the Office to use their discretion. What is the due process or appeals process should someone disagree with the Office's decision?

Yours faithfully,
Dow Travers

Dow Travers
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Fuel doesn't have to cost the earth

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20 March 2019

Mr. Alee Fa'amoe
Deputy CEO & Executive Director ICT
Utility Regulation and Competition Office
85 North Sound Rd
Alissta Towers, 3rd Floor
P.O Box 2502
Grand Cayman KY1-1104
Cayman Islands

Dear Mr. Fa'amoe,

Re: OF 2019-2 - Consultation on Proposed Anti-Competitive Practices Penalties Rules

Cable and Wireless (Cayman Islands) Limited, dba "Flow", hereby submits our responses to the four consultation questions included in Ofreg's Consultation Document.

Ofreg question 1: What are your views on the proposed six-step calculation methodology outlined in the draft Anti-Competitive Practices Penalties Rules?

Flow response to Ofreg question 1: The six-step calculation methodology proposed by Ofreg entails a wholesale restructuring and significant expansion of the previous penalties framework set forth in Consultation OF 2018-1. Ofreg indicates here that it "[reached] the position that it would re-draft the rules in order to expand on the calculation methodology" based upon comments received from five Licensees. However, absent from the record are any copies of these comments, summary of their conclusions or arguments, or any substantive explanation of what precipitated this change of course. Ofreg offers no explanation for how Licensees' comments justify or cause Ofreg to reach the new position that a wholesale re-writing and expansion of the proposed penalties framework is warranted.

Based upon Flow's comments in Consultation OF 2018-1, the only set of comments over which we have purview, Ofreg's re-write and expansion of the penalties framework does not appear to be justified or appropriate. In our comments, we inquired on the basis for determining the minimum and maximum thresholds for penalties, but we did not opine or object to the proposed penalties framework. Furthermore, the six-step calculation methodology proposed by Ofreg does not even address our initial concern, as to the justification for the minimum and maximum thresholds. In fact, as we explain below, the turnover thresholds used in Ofreg's revised framework to establish minimum penalties, in effect, guarantee most if not all active Licensees will end up paying the maximum penalty in all instances, regardless of the duration or severity of an infringement. Therefore, we ask Ofreg to revert to its previously proposed framework or justify and articulate its rationale for the substantial changes to the current proposed penalties framework.

Ofreg question 2: What are your views on the proposed starting point (expressed as a percentage) in the calculation methodology outlined in the draft Anti-competitive Practice Penalties Rules?

Flow response to Ofreg question 2: Ofreg's proposed calculation methodology states that

> *"The Office will normally use a starting point between 15% to 20% of the relevant turnover, up to the maximum penalty in accordance with section 80(7), for the most serious types of infringement ... [and] a starting point between 10% to 15% up to the maximum penalty in accordance with section 80(7) [for] less serious object infringements."*

While the calculation methodology offers a different framework for establishing penalties, Ofreg again does not provide an explanation for how these minimum "starting point" penalty thresholds are determined, or why they are justified and reasonable.

A lower bound penalty threshold of 10% of a Licensee's total annual turnover (for less serious offenses) or 15% of total annual turnover (for more serious offenses) is not a reasonable or meaningful threshold, as this lower bound will substantially exceed the statutory maximum of $3 million for most if not all Licensees currently operating in the Cayman Islands.

These percentage turnover thresholds render meaningless the "starting point" of the proposed calculation methodology, as the starting point will automatically revert to the maximum allowable penalty under the statute in all instances, regardless of the duration or severity of the infringement. Therefore, we ask Ofreg to revert to its previously proposed framework or establish a reasonable "starting point" threshold that takes into account the annual turnover of Licensees in the Cayman Islands.

Another concern we have with the proposed "starting point" methodology pertains to Ofreg's approach to identifying "the most serious types of infringement." The proposal states that the "most serious" infringements, warranting the highest penalty, are "those which the Office deems are the most likely by their very nature to harm competition." This is a completely inappropriate criterion for at least two reasons. First, the criterion speaks not to the severity or "most serious types of infringement" at all, but to the degree of confidence or likelihood harm will occur. In contrast, an appropriate criterion begins not by looking prospectively for harm, but for evidence actual harm has been incurred. After all, conduct that has done no harm to competition should not be sanctioned or incur any penalty.

Second, even if the criterion is re-specified to focus on the existence of actual harm, instead of on prospective harm, the severity of a penalty must be based not just on the existence of harm (or "likelihood" harm is incurred), but on the materiality, severity and duration of the harm. For instance, we believe no penalty should be imposed on an operator even where a demonstrative infringement has occurred, if the harm to competition caused by that infringement is immaterial.

Ofreg question 3: What are your views on the Office's requirements regarding leniency agreements with parties guilty of participating in concerted practices?

Flow response to Ofreg question 3: At this time, we have no objections to Ofreg's proposed leniency agreements with parties found guilty of an infringement.

Ofreg question 4: Please provide your views on any other matters you consider relevant to this Consultation.

Flow response to Ofreg question 4: We have no further views on this issue that we wish to share with the Office at this time.

Yours sincerely,
Cable and Wireless (Cayman Islands) Limited, trading as FLOW

Paul Osborne

Paul Osborne
~~Managing Director~~ Country Manager

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March 22, 2019

Utility Regulation and Competition Office
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85 North Sound Road
Grand Cayman KY1-1104
CAYMAN ISLANDS

Re: OF 2019 – 2 - Consultation on Proposed Anti-competitive Practices Penalties Rules

We refer to the OF 2019 – 2 Consultation launched by OfReg on February 13, 2019. Please find below the subject consultation response from Caribbean Utilities Company, Ltd ("CUC").

Question 1: What are your views on the proposed six-step calculation methodology outlined in the draft Anti-Competitive Practices Penalties Rules?

Our view is that it is a suitable methodology and we welcome the clarity that it brings.

Question 2: What are your views on the proposed starting point (expressed as a percentage) in the calculation methodology outlined in the draft Anti-competitive Practice Penalties Rules?

We note that the starting point is "relevant turnover" and that this is defined at Rule 5 in a manner that would, in its current formulation, include neutral or pass-through turnover upon which the Sectoral Provider makes no profit. Using this as a starting point may therefore result in a disproportionate starting level for a penalty when considered against the economic activity of the Sectoral Provider which actually creates profit and value.

We therefore suggest the following amendment to the definition in Rule 5:

The relevant turnover is the turnover of the relevant party in the relevant market affected by the infringement in the relevant party's last business year, excluding revenue which is neutral as to earnings or upon which the Sectoral Provider makes no profit.

Question 3: What are your views on the Office's requirements regarding leniency agreements with parties guilty of participating in concerted practices.

No comments.

Question 4: Please provide your views on any other matters you consider relevant to this Consultation.

Below are a list of suggested corrections and/or clarifications:

1. As regards the definition of "*Concerted practice*" – suggest that "*contact*" be amended to "*conduct*" in the following formulation: "*course of dealing, understanding, coordination, or ~~contact~~ conduct*".

2. 8(1) – Insert "*Step 4*" into the descriptive text to the right of this section.

3. 8(1) – "*ruminate*" is not a recognized legal term. Suggest using "*consider*" or "*take into account*" instead.

4. 10(1) – correct the reference to "*in rule 8(1)*".

5. 11(1) – replace "*where he has*" with "*where it has*". This is consistent with other references to the relevant party (which is never gendered).

6. 12(2)(a) – replace "*he*" with "*it*".

7. 12(3)(b) – correct the reference to "*sub rule 12(2)*".

8. 12(4) – replace "*enterprise*" with "*relevant party*".

9. 12(6) – replace "*guidelines*" with "*rules*".

Yours faithfully,

Letitia T. Lawrence
VP Finance & CFO

Water Authority-Cayman

Incorporated by Law No.18 of 1982 in the Legislative Assembly of the Cayman Islands

The Consultation Group
Utility Regulation and Competition Office
PO Box 2502
Grand Cayman, KY1-1104
CAYMAN ISLANDS

26 March 2019

via email to: consultations@ofreg.ky

Re: Consultation – Proposed Anti-Competitive Practices Penalties Rules

To whom it may concern,

With respect to the consultation on Proposed Anti-Competitive Practices Penalties Rules launched by the Utility Regulation and Competition Office ('OfReg') on 13 February, 2019, Water Authority – Cayman is hereby submitting its comments on the proposed process.

Question 1: *What are your views on the proposed six-step calculation methodology outlined in the draft Anti-Competitive Practices Penalties Rules?*

Outlining the sequence of the calculation leads to transparency, however the layout in the proposed rules does not clearly identify all of the 6 steps. For example, steps 2,3,5 and 6 are clearly labeled in the rules however there is no indication of step 1 or 4.

Additionally, for the most part, how the calculation is attained within each of the 6 steps is not clear with Step 2, adjustment for duration being the exception. In our opinion, values should be assigned to each factor so that the calculations in each step is transparent and clear, rather than the values for each factor being at the discretion of the Office.

Question 2: *What are your views on the proposed starting point (expressed as a percentage) in the calculation methodology outlined in the draft Anti-competitive Practice Penalties Rules?*

While it is agreed that there must be some starting point in the calculation, 15%-20% of turnover seems to be extremely high even with the understanding that this is a penalty being imposed.

It is further noted that there are multiple factors which are applied on top of this starting point, and they too should be assigned percentages or fixed costs so that calculation is transparent and clear.

In section 4 (3)(b), it is not clear what the 10% to 15% is part of.

Deterrence seems to be considered in the calculation of the penalty more than once: it is included as part of the starting point calculation under section 4 (6) and section 8. It is suggested that this should only be considered in the calculation once.

Question 3: *What are your views on the Office's requirements regarding leniency agreements with parties guilty of participating in concerted practices?*

It is not clear what a leniency agreement is, and in our opinion, it should be defined.

In Section 11 (1) of the proposed rules, which details step 6 Application of reduction for leniency, there is reference to a "*rule 13 of these guidelines*", however the Consultation documentation clearly indicates that there are only 12 rules.

If there is to be a penalty imposed for wrong doing, in our opinion, there should be no exception where OfReg may reduce the penalty due to financial hardship as suggested in section 11 (4). The penalty should stand and necessary legal measures to collect should be followed.

It is considered that leniency discounts of 100% and 50% are too high; while there must be some discount to encourage such persons to come forward, the percentage needs to be lower as in our opinion, there still needs to be both a deterrent aspect in the rules and consequences for the action originally taken; ignorance should not be allowed as an excuse.

Question 4: *Please provide your views on any other matters you consider relevant to this Consultation.*

In our opinion, the proposed calculation methodology should be further reviewed to ensure that more details are provided as to when the Office will adjust up/down the calculation. Examples include section 4 (4) which states *"The above principles do not prevent the Office from applying a lower starting point."* Similarly, in Section 8.

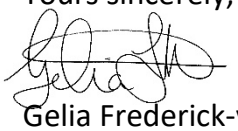
The Authority is concerned regarding the numerous levels of discretion that OfReg has in determining the penalties as this could potentially create a floodgate effect for appeals or judicial review requests by affected parties.

In section 5 (2) states *"The Office will generally base relevant turnover on figures from a relevant party's audited accounts, but retains the right to require the accounts to be*

presented in any manner." Standards should be fixed and as certifiable accounts are recognized as official once audited, it is our opinion that only audited accounts should be required/accepted.

We look forward to the Office's feedback on the comments provided.

Yours sincerely,



Gelia Frederick-van Genderen
Director, Water Authority

cc: Mr Kearney Gomez, MBE JP, Chairman, Water Authority Board *via email to kearney.gomez@gmail.com*

Digicel

DIGICEL CAYMAN ISLANDS

RESPONSE TO:

OF 2019 – 2 – Consultation on Proposed Anti-Competitive Practices Penalties Rules

15th March 2019

[Submission Date extended to 29th March 2019]

We thank you for inviting Digicel to provide its Comments on the Consultation on Anticompetitive Practices Penalties Rules.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in the Comments of other participants in the Consultation or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement, in whole or in part nor does any position taken by Digicel in this document represent a waiver or concession of any sort of Digicel's rights in any way. Digicel expressly reserves all its rights in this matter generally.

Please do not hesitate to refer any questions or remarks that may arise as a result of these comments by Digicel to: -

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Digicel

Introduction

Digicel refers to the Utility Regulation and Competition Office's ("**OfReg**") consultation paper on the *Proposed Anti-Competitive Practices Penalties Rules* ("**Draft Rules**").

Digicel reiterates comments it submitted on 18 May 2018 in response to the Initial Phase of the consultation issued on 23 March 2018. Specifically, while Digicel welcomes the opportunity to comment on the Draft Rules, it remains disappointed that neither the 23 March 2018 consultation document, nor the current consultation document contains any reasoned basis or details, which explains the need for publishing the Draft Rules at this time. This remains a barrier to more constructive, and better informed comments being submitted.

It also still remains unclear to Digicel why the OfReg is attempting to 'adopt remedies to deter anti-competitive conduct', particularly where no such anti-competitive conduct has been brought to the attention of the Telecommunications Sector. If indeed such conduct has been identified, Digicel reasonably expected to receive these details, or findings from any investigation that may have been conducted. The OfReg must therefore strongly consider circulating either an explanatory document, or a document that clearly sets out concerns that the OfReg has supposedly identified and, which has resulted in the Draft Rules being published at this time.

Digicel welcomes amendments suggested by Digicel, which were made to the initial 18 March 2018 Draft Rules published by the OfReg. This includes, the Draft Rules now properly referring to "Sectoral Providers" as defined under the URC Law, and not limited to "Licencees" as defined under the URC Law; and further, the inclusion of a proposed methodology for calculating penalties, similar to the European Commission's Guidelines[1] on the method of setting of fines. Digicel is disappointed, however, that amendments are not track-changed for ease of reference.

Finally, Digicel is disappointed that it was not provided with the opportunity to review comments OfReg received from other interested parties in response to the Initial Draft Rules. These comments have also not been uploaded to the OfReg website. In its initial consultation document published on 23 March 2018, at 'page 4', under paragraph 20, the OfReg stated that it would publish industry comments, which has not happened.

That said, and in the interim, as required under Section E of the consultation document, **Digicel's initial response** to the Consultation Questions follows (in so far as it affects the telecommunications (and ICT) industry in the Cayman Islands). These comments remain subject to Digicel reviewing an explanatory document, and comments that OfReg has received from other interested parties in response to the initial Draft Rules.

[1] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C210/2.

Question 1: What are your views on the proposed six-step calculation methodology outlined in the draft Anti-Competitive Practices Penalties Rules?

Digicel, in its interim submission, in response to the 23 March 2018 consultation, highlighted the need for the Draft Rules to be preceded either by an explanation or guidance on the proposed methodology that would be utilised by the OfReg when calculating penalties. Digicel welcomes the inclusion of the methodology in the amended Draft Rules.

Notwithstanding the above, Digicel's view that the purpose of the Draft Rules are unclear, remains. The Draft Rules, for example, duplicates the powers of the OfReg, as contained under the URC Law. This will result in confusion in the industry in terms of, which law would take precedence and under what circumstances. The OfReg must also explain how industry confusion is likely to be dealt with in situations where the OfReg is called to reconcile between the URC Law and the Draft Rules. It also remains unclear, which of the two would take precedence if there are infringements under sections 66 or 70 under the URC Law.

Digicel therefore respectfully reiterates its earlier comments that:

i. Section 80(3)(a) of the URC Law already gives the OfReg powers to impose penalties. There is therefore no need for separate, confusing and likely contradictory laws to be published.

ii. Section 80(7) of the URC Law already provides for a maximum penalty that may be imposed.

iii. Sections 76(1) and 77(1) of the URC Law empowers the OfReg to deliver written directions as it "considers necessary" to bring an end to infringements relating to sections 66 and 70 of the Act.

iv. Section 78 of the URC Law gives the OfReg the right to apply to the court for an order against providers to comply with any directions issued, which direction arguably already includes the requirement to pay an imposed penalty within a specified time.

It is also noteworthy that while the OfReg appear to have duplicated to an extent the European Commission's competition policies and guidelines, it has not explained how the Cayman Islands jurisdiction compares to the European Commission jurisdictions in terms of the infringements and level of penalties contemplated under the Draft Rules. It is Digicel's respectful view that the OfReg must ensure that such Draft Rules are fit for the purpose for which it is being implemented, and are appropriate and suitable to the jurisdiction that it is being introduced in. Digicel have not seen evidence of any market specific research, analysis or publications in this regard, and therefore can only conclude that none was ever procured, and under the circumstance that the Draft Rules remain unjustified.

The Draft Rules should therefore not be adopted until the OfReg has completed a round of face to face consultations, and conducted market led research, concluding in the publication of either an explanatory

document or a summary of its findings, which points to the need for the Draft Rules. Until this has happened, the Draft Rules remains without merit, and the six step process, which have been lifted off guidelines belonging to a more complex jurisdiction, and one where the regulatory landscape and economy that simply cannot be compared to that of the Cayman Islands.

That said, subject to Digicel's firm views as set out above, and in the interest of cooperation, Digicel provides its comments as it relates to the amended Draft Rules.

The six-step procedure, as presently drafted, contemplates the determination of penalties, which are set against the turnover or gross revenue of the infringing business (section 4(1)(i)). While this in itself may be accepted procedure and practice in other jurisdictions, the OfReg appear to have adopted the European Commission's procedure without evidence of any analysis or comparison exercise having been completed, which should have taken into consideration such factors as, Cayman Islands population, economy and wealth, regulatory landscape, local laws and regulations, and more importantly the present and genuine need for the publication of such Draft Rules. This is evidenced by the fact that the OfReg expects that the starting point percentage for the calculation of penalties shall be between 15%-20% of the relevant turnover, up to the maximum penalty permissible under the law. The percentage is set significantly higher than other jurisdictions including the European Commission's set percentage, and remains without reason. The setting of penalties must not be motivated by the desire to collect money for use by the OfReg, however, must be justified and this must be accompanied by well set out explanatory notes.

Pursuant to section 6 of the Draft Rules, the OfReg will have the power to multiply the penalty by the number of years of infringement. While this may be acceptable practice in larger more developed jurisdictions, Digicel is concerned that the OfReg, has unfairly and without any justification, sought to extend this power by inserting a further term, which gives it the power to adjust the penalties for part years by treating it as a full year, and in cases where infringement is less than one year, the OfReg may treat it as a full year. Only in "exceptional circumstances", as provided under the same section, the OfReg would consider decreasing the penalty. The OfReg must reconsider this arbitrary extension to its powers, especially as penalties should not be calculated over months during which there is no infringement, and where there is no apparent damage to the economy. Digicel also requests that the OfReg provides an explanation or further details as to what the 'exceptional circumstances' are likely to be. This has not been defined and no details provided.

Digicel is equally concerned with section 8(2) of the Draft Rules. Under this section, the OfReg gives itself the power to increase penalties, well after the first 3 steps have already concluded, during which steps it is expected to have already diligently determined the penalties. Digicel therefore requests that the OfReg provides an explanation of this section, and what it sets out to achieve by including this additional power, and further, requests confirmation that, when reaching such a decision as required under the first 3 steps, that it would provide the industry its properly set our and reasoned written decision. As presently drafted, this is not clear.

Finally, Digicel is concerned that under section 8(3) of the Draft Rules, while the OfReg contemplates that there may be situations where a relevant party's turnover may be very low or zero, and therefore the resulting penalty may also be very low, it has, regardless, given itself powers to make "more significant adjustments" for "both general and specific deterrence". The OfReg however, have not provided the relevant factors, and or methodology it would apply when calculating such significant, and after the fact adjustments. Any such adjustments would therefore be arbitrary unless a proper and detailed explanation is provided. Digicel also requests an explanation of what these "general and specific" deterrence are likely to be.

Question 2: What are your views on the proposed starting point (expressed as a percentage) in the calculation methodology outlined in the draft Anti-Competitive Practice Penalties Rules?

Digicel acknowledges that the starting point (expressed as a percentage) is a concept that is applied by national competition authorities or regulators in other larger and more developed jurisdictions, and calculated on the basis of the turnover of a company, and the damage done to the economy during the infringed period.

That said, Digicel has not seen any market research conducted or the outcome of such research, which concludes that there are presently widespread anti-competitive issues in the Cayman Islands, or that a possible trend points towards such behaviour expected to occur in the near future. Digicel is also not aware of any market based research being conducted, which explains the reasons for setting penalties on the basis of Sectoral Provider's turnover, and no reasoned basis for setting such a high percentage as is currently set in the Draft Rules.

The Draft Rules sets the starting point at a minimum percentage of 15%. This, in Digicel's view is high and unjustified. A quick research of penalties, which are set against turnovers around the world, reveals that amounts up to only 9% are set as the minimum starting point, and more importantly, most developed nations regulators would only consider applying such percentages in the more extreme cases. The OfReg, neither in its Draft Rules, nor in any explanatory paper, have provided any reasons as to why it has set such a high starting point percentage. Digicel, in its initial submissions in response to the OfReg's 23 March 2018 consultations, highlighted that it is unlawful for OfReg to set a 'floor' or minimum fine under the Draft Rules as it is not permitted to do so under the URC Law, and further that the minimum fine that was suggested in the initial Draft Rules was significantly high, thereby defeating the purpose of having a 'low' penalty floor. While the amended Draft Rules no longer contains reference to a 'floor' or minimum penalty amount, the OfReg instead have replaced the minimum penalty amount with a reference to a starting point percentage, is still set at a significantly high percentage, being 15% of the turnover of the infringing business.

If OfReg were to compare its minimum starting point percentage to other laws and regulations, which seeks to regulate matters of great importance and concern to consumers around the world, for example the General Data Protection Regulation, it would find that the penalties for offences under those wide reaching and internationally recognised regulations sets a minimum percentage of only 2% of a company's annual turnover.[2] This is a significantly lower percentage to that being set by the OfReg, without justification or reasons provided as to why such a high percentage has been set.

The European Commission[3] have also set an overall limit, which is much lower than the OfReg's minimum percentage starting point. The fine set by the European Commission is presently limited to a low 10% of

[2] https://www.gdpreu.org/compliance/fines-and-penalties/
[3] http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf

the overall annual turnover of a company. The OfReg, instead of seeking to discourage and or stop anti-competitive practices, appears to be looking for ways of unduly punishing the industry, or to collect funds by imposing significant monetary penalties. Penalties cannot be disproportionate to the infringement or factors such as the jurisdiction and the economy of a country. The doctrine of proportionality is based on rationality, and OfReg's aim of deterrence cannot be justified to lead to the unfair punishment or eventual crippling of any industry.

The present Draft Rules therefore, leaves Sectoral Providers with no assurance that the OfReg would consider issues properly, and there are no guarantees that penalties would be proportionate to the issues, or that a lower penalty could ever be imposed. The Draft Rules points to arbitrary determinations, high and disproportionately set penalties being imposed, and no ability for the Sectoral Providers to genuinely engage with the OfReg in regards suspected infringements. The OfReg must therefore seriously reconsider its Draft Rules and immediately commence industry wide discussion on the need for such Draft Rules, or other more effective ways in which any supposed issues can be dealt with between the OfReg and Sectoral Providers.

Question 3: What are your views on the Office's requirements regarding leniency agreements with parties guilty of participating in concerted practices?

Notwithstanding Digicel's position that there is presently no need for the implementation of the Draft Rules, particularly given the lack of explanatory notes, information or market research having been conducted, Digicel welcomes the inclusion of terms, which relates to leniency agreements.

Section 12(2)(d) under the Draft Rules provides that a party that comes forward must "refrain from further participation in the concerted practices from the time of disclosure of the concerted practices to the Office (except as directed by the Office)". It is not clear to Digicel why the OfReg has included the words, "except as may be directed by the Office". Digicel therefore seeks further details in this regard. As drafted, it appears to suggest that the OfReg may, in special circumstances, allow the practice to continue. It would assist to understand what these special circumstances are likely to be, and how the OfReg intends to deal with such cases.

While the Draft Rules provides for leniency arrangements, and for parties to approach the OfReg, there are no further details provided on the process to be followed, or the manner in which parties may approach the OfReg. For example, are parties required to attend the OfReg in person, would an email suffice, what level of details must be submitted, what happens if anonymous information is provided, or what the OfReg will do in terms of the next steps and consideration for decisions that are issued.

Digicel therefore welcomes further discussions with the OfReg in this regard. Digicel recommends that a face to face consultation be called before the Draft Rules are progressed any further as these and other relevant sections remain unclear.

Question 4: Please provide your views on any other matters you consider relevant to this Consultation.

Digicel reiterates comments it has made in the preceding paragraphs. Further, and as submitted in its initial submission, Digicel encourages the OfReg to properly engage with Sectoral Providers before implementing the Draft Rules, and to share with the Providers any market based research it has conducted and its findings, which have led to its decision to publish such Draft Rules. There remains no market research or reasons provided, and the Draft Rules contains terms, which have not been discussed or explained to Providers. Further, Digicel is disappointed that no explanatory notes or preceding consultation paper discussing the Draft Rules have been published, and no reasons given for a number of new terms now included in the amended version of the Draft Rules, for example, penalty amounts and percentages that are being set, and how Lenience Agreements will be set out, what details will be included or what process will be employed in order to bring the Agreements into effect.

Digicel is also disappointed that the OfReg has failed to publish other comments that it would have received from other interested parties during the initial consultations, which was published on 23 March 2018. This lack of transparency and openness remains a concern, and simply cannot be ignored.

Under section 2, the definition of the term "Concerted practice" should include that a conduct will only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition. Therefore, if this threshold is not met, a conduct should not be deemed concerted practice.

Further, under section 2, the definition of "turnover" contains the words "money's worth". It is not clear, and not defined anywhere in the Draft Rules, what "money's worth" means or what it may include. This needs further discussion and details should be provided as part of the next phase of consultations.

Digicel also seeks further clarification of what the following term under section 5(2) means, that is, "(OfReg) retains the right to require the accounts presented in any manner". What other manner of presentation of the accounts is expected, or what level of details are required? This is not discussed further anywhere in the Draft Rules. While Digicel appreciates that audited accounts may be presented, which makes the most sense, reference to accounts being presented in other manner requires further discussion and details must be provided in the Draft Rules of what the expectation of the OfReg is in this regard.

Digicel is also interested to understand why the OfReg has included the word "severe" before the words "duress or pressure" under section 7(3). Duress is defined as "a situation whereby a person performs an act as a result of violence, threat, or other pressure against the person". It is therefore unclear how the OfReg plans to differentiate between what may constitute, for example, a severe threat or severe pressure as opposed to likelihood of real threat and pressure. Would this also mean that the OfReg may, of its own discretion, determine that although duress or pressure existed, it would not be considered as a mitigating factor as it did not meet the OfReg's definition of being "severe"?

Digicel has similar queries in relation to the use of the word "genuine" under section 7 (3)(b), which precedes the word "uncertainty". Uncertainty is defined as being "something that is uncertain or that causes one to feel uncertain." The OfReg must therefore provide an explanation as to why it is of the view that a party may not be "genuinely" uncertain about a conduct that may be an infringement. How does a party prove that it is genuine in such circumstance? To that end, what factors or matters would the OfReg take into consideration when determining if a party is genuine or not.

Digicel is also unclear on the use of the word "round" under section 8(5) of the Draft Rules, where the sentence reads, "…the Office will assess whether, in its view, the overall penalty proposed is appropriate in the round".

Finally, Digicel is interested to know what the OfReg intends to do with any penalties collected from infringing Sectoral Providers. That is, what activities or exercises, related to the benefit of the industry and betterment of the people of Cayman Islands, would the funds be applied towards.

Conclusion

Digicel remains of the view that there must be greater certainty and transparency when Draft Rules are published and more so when significant penalties are contemplated. The present Draft Rules or the consultation process, in Digicel's respectful view, do not meet these requirements.

Digicel is generally supportive of rules and guidelines that are provided by the OfReg and, which clarify the OfReg's intended application of relevant legislation. However, any such rules and guidelines must also be relevant to the current market context and be responsive to specific issues or problems that have been identified. In this case, with respect, it remains unclear what, if any, is the basis for the promulgation of the Draft Rules.

The OfReg must therefore provide additional information pertaining to its decision to consult on the Draft Rules and details of any market research findings that have concluded that a real risk has been identified.

For the reasons outlined above Digicel respectfully proposes that the Office reconsiders the Draft Rules and calls an industry wide face to face meeting or consultation to discuss the need for the Draft Rules before proceeding any further with the current consultation.