Towerhouse LLP

Analysis of Regulatory Issues in the Cayman Islands

An Overview Report for C3 by Towerhouse LLP

15 May 2020

Towerhouse LLP

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A. Executive Summary

1. Towerhouse LLP has been asked by Infinity Broadband (trading as 'C3') to review the performance of the Utility Regulation and Competition Office of the Cayman Island ("OfReg") in regulating the Cayman Islands Information and Communication Technology ("ICT") sector. We have been asked to advise on whether OfReg has acted appropriately in addressing competition issues in the sector. As part of this exercise we outline examples of regulatory best practice in other jurisdictions and propose a set of specific steps needed to stimulate competition and investment protect the interests of Cayman consumers and businesses.
2. There is certainly room for legislative improvement. However, in our view OfReg could and should make much more proactive use of its existing powers to promote competition and overcome the powerful inertia of the monopolists. In summary:
    a. The market power of the incumbent operators of the communications infrastructure of the Cayman Islands(e.g., Cable & Wireless (CI) Ltd (trading as FLOW) and Datalink Limited (the ICT subsidiary of CUC, the electricity national company), has not been properly assessed.
    b. As a consequence, OfReg has failed to put in place suitable ex-ante regulation to prevent these players from taking advantage of their dominant position or control over their infrastructure. The regulatory regime currently in place is not fit for purpose and this is inhibiting the development of competition and entrenching dominant practices.
    c. OfReg does not seem to be tracking ICT market trends such as competitors' shares or the reach of new fibre networks. Such information should be used to educate its approach and in its reporting on its progress to Cabinet.
3. C3 has raised six disputes about the anti-competitive behaviour of other operators (Flow, Logic, DataLink) with the regulator since 2014, the most recent being filed in June 2019. Not one of these has been determined by OfReg or by its predecessor regulator.
4. In our clear view, a regulator such as the UK's regulator for telecommunications, the Office of Communications ("Ofcom") would have taken an entirely different approach to every single one of those disputes, pursuing them with vigour and reaching a result - almost certainly in favour of the referring party - in a tiny fraction of the time taken so far by OfReg.
5. The extensive delays in resolving these disputes demonstrates that there is no real sanction against delays by operators who control the limited infrastructure in the Cayman Islands in implementing competition. The Infrastructure Sharing Regulations 2003 are not an effective tool and the regulator is failing to act promptly in determining decision requests. In the annex to the report we have provided an overview of these six outstanding disputes. We have reviewed OfReg's approach against that which would likely be taken by Ofcom, to highlight how an alternative, and more expedient, dispute resolution mechanism ensures a level playing field for all market participants, leading to better outcomes for consumers.

6. We consider it essential that steps are taken to introduce regulatory measures that, over the longer term, deliver a level-playing field for current and future market players. The experience of other jurisdictions demonstrates that a level playing field enables lower prices and higher quality ICT services for everyone. **This would benefit all Cayman consumers and will be a driver of growth across the Cayman economy.**

7. It is our view that a root cause of C3's current challenges and issues in the ICT market is the existence of major deficiencies in the Cayman regulatory framework. Principally these are:

   a. *Lack of Significant Market Power (SMP) Regulation.* An assessment of the relative power of the players in any market is a pre-requisite for any system of economic regulation. There is already evidence that dominant operators are using their market power to hinder market entry by competitors like C3. Despite this, OfReg is yet to carry out a market review of the most competition sensitive markets. While we note that OfReg has made a recent announcement that it will be conducting a competition market review [1], and has published guidelines to this effect,[2] it is yet to undertake the review – it is therefore a priority step which we urge OfReg to resolve.

   b. *Ineffective wholesale infrastructure access regulation.* The Infrastructure Sharing Regulations 2003 have failed to address the high barriers to new competitors entering/expanding in the Cayman ICT market. These regulations are ill-fitted to address the dominant operators' incentives to protect their market positions and need to be supplemented by ex-ante SMP regulation.

   c. *Lack of certainty in the dispute resolution process*. There is a framework to bring disputes against the incumbent operator under the Dispute Resolution Regulations 2003[3]. However the process is neither clear nor rapid enough. This combined with an ill-fitted framework to discipline operators means that incumbents have no credible threat of enforcement incentivising them to avoid anti-competitive conduct.

   d. *OfReg should track market trends* to educate itself on the success of its measures to encourage competition and to demonstrate the success of its approach to Cabinet and the general population.

8. As a result of these deficiencies, there continue to be high structural barriers to entry and expansion into the ICT infrastructure market. This means that C3, as an entrant to the ICT market which does not control infrastructure, has been precluded from meeting its obligations under its ICT licence conditions to deploy its infrastructure in accordance with the roll out schedule contained under Annex 1A of C3's licence. Consequently, C3 has had no choice but to apply for numerous extensions to its roll out plan. C3's inability to meet its roll out plans is a clear indication of what seems to us evident barriers to entry to the infrastructure ICT market.

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[1] OfReg Annual report 2017.

[2] https://www.ofreg.ky/upimages/commonfiles/1507891125OF20172DeterminationandGuidelinesontheCriteriafortheDefinitionofRelevantMarketsandtheAssessmentofSMP.pdf.

[3] We have been advised that a consultation process is underway to review new draft regulation . We would urge Government to consider whether the current regulatory process is fit for purpose, and in particular, whether the dispute referral process could be revised to ensure that disputes are resolved within a more timely process.

As a result of these failures, Caymanians have been unable to enjoy the benefits of effective competition – such as lower prices, higher quality services, wider availability of world leading technology and innovative new products.

9. The rest of this report explains why Towerhouse considers there are structural barriers to entry to the Cayman Islands ICT market and why it is necessary to impose sector regulation on operators with significant market power in order to promote competition. This report also seeks to indicate how infrastructure-based competition is likely to be achieved and provides policy proposals to enable OfReg to undertake this process.

10. Our proposals are that OfReg:

    a. Undertakes a now overdue wholesale market review as soon as possible;

    b. Implements appropriate SMP conditions on dominant operators to prevent them from hindering open competition, including imposing obligations upon them to provide competitors with non-discriminatory access to their critical infrastructure;

    c. Establishes a clear dispute referral procedure with consistent time frames for its own responses, as well as those of providers, and clear guidance on the penalties for failure to comply with regulatory obligations and failure to appropriately assist dispute resolution processes and market investigations; and

    d. We also suggest that Government take action to clarify and enforce OfReg's reporting obligations to cabinet and look to clarify OfReg's responsibilities through legislative change.

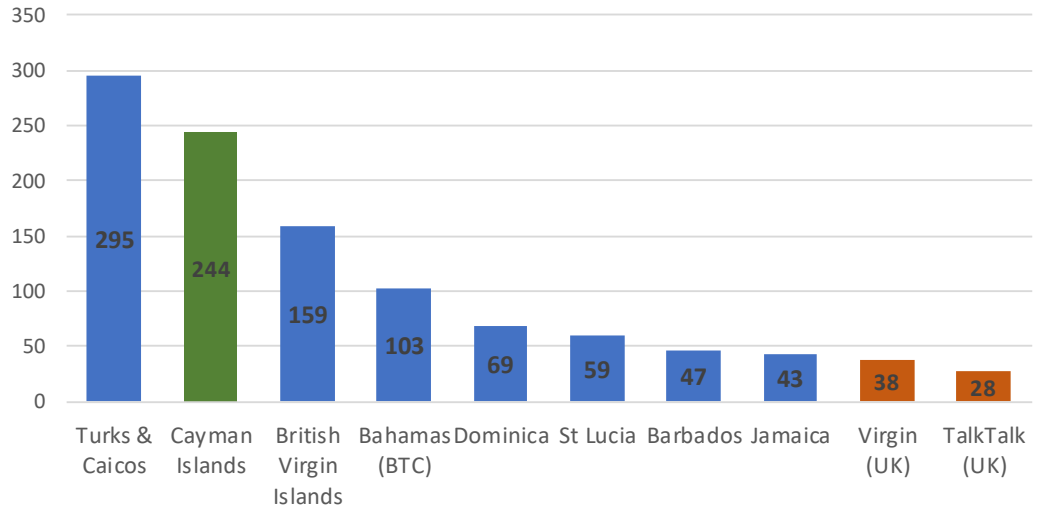
B. Introduction

11. The availability of telecoms infrastructure underpins much of the economic and social activity of modern society with broadband connections now considered essential by most people. Consumer and business demand for higher speeds, better resilience and lower cost broadband is growing rapidly. Investment in fibre networks is necessary across ICT markets to meet increased demand for bandwidth and to accommodate the benefits of new technologies such as 5G. 5G requires a denser fibre network grid than earlier cellular technologies to support its higher speed but shorter range radio sections and therefore fibre network roll is essential. Consistent with this view of the desired general direction of ICT markets, OfReg has a statutory duty to promote innovation within the ICT sector with a view to contributing to national economic competition and development.[4]

12. In markets where competition is effective, companies have strong incentives to invest and innovate to offer superior products and win business from their competitors. As has been shown around the world, effective competition is more likely to deliver improved consumer welfare, lower prices and greater choice. It also stimulates greater investment and innovation on the part of the incumbent players and has led to accelerated build out of fibre networks. It is OfReg's statutory duty to promote the interest of consumers both in the short-term and the long-term.[5]

13. At the moment there is no effective competition in the Cayman Islands fixed telecoms market. Consumers are suffering as a result – in the Cayman Islands, customers pay more than almost anyone else in the region and availability of fibre-speed broadband is limited. The picture is even worse when compared with broader international benchmarks (Table 1).

Figure 1: Price of 100Mbps broadband subscription, USD per month excl VAT/GCT



[4] Section 62 of the Utility Regulation and Competition law (2019 Revision) (the "URC Law 2019").
[5] Section 6(c) of the URC Law 2019.

Table 1: Price of 100Mbps broadband subscription, USD per month excl VAT/GCT

Country	Company	Product	Downlink (Mbps)	Local currency	Price (local, advertised)	VAT included	Exchange rate	Price (local, excl VAT)	Price, USD (excl VAT)
Turks & Caicos	Flow	Superfast 960	96	USD	295	0.0%	1.00	295	295
Cayman	Flow	Superfast 100	100	KYD	200	0.0%	0.82	200	244
BVI	Flow	Superfast 100	100	USD	159	0.0%	1.00	159	159
Bahamas	BTC	Download 75	75	USD	103		1.00	103	103
Dominica	Flow	Max	50	XCD	185	15.0%	2.69	161	68.8
St Lucia	Flow	Max	75	XCD	160	15.0%	2.69	139	59.5
Barbados	Flow	Plus 120	120	BBD	110	17.5%	2.00	93.6	46.8
Jamaica	Flow	Max	100	JMD	5,999		138.5	5,999	43.3
UK	Virgin	M100	108	GBP	36	20.0%	0.78	29.9	38.4
UK	TalkTalk	Superfast	67	GBP	26	20.0%	0.78	21.6	27.7

Note: broadband price comparison, international benchmarks. Prices for Caribbean markets are for FLOW single play broadband except Bahamas (BTC). UK prices include voice line and connection fee amortised over 12 months.

Source: Towerhouse own research based on operators' published pricing.

14. In the Cayman Islands, FLOW owns and controls the majority of the critical ICT network of the Cayman Islands (mainly comprised of underground duct and dark fibre, landing stations, exchanges, manholes, cabinets, etc). Datalink is a subsidiary of the electricity network provider CUC and controls the entirely of the overhead ICT infrastructure, namely, the telegraph poles used by ICT providers for fibre optic cable routing and final connections into buildings. Together these two operators, although independent, control the key ICT infrastructure in the Cayman Islands[6].

15. It is well established that new entrants to ICT markets will rely to some extent on existing infrastructure or services, especially when competition is nascent. Thus, non-incumbents have been and remain reliant on FLOW and Datalink to enter and expand. The lack of effective regulatory intervention has allowed these two businesses to exercise effective control over which operators can enter and expand in the market, and the extent to which they can do so[7]. This has prevented effective and sustainable competition. OfReg has the powers to address these short-comings given that one of its strategic objectives is to promote competition.[8]

16. In the absence of regulation stopping dominant providers from asserting their market power under the current regime, they have every incentive is able to put delays and obstacles in the way of its rivals while claiming to remain within the legal bounds of what they are obliged to do under the current regime. Access seekers who want to carry on their business essentially have no other option but to contract with the dominant player on whatever terms are offered. The effect of this conduct is that newer entrants or smaller providers committed to deploying fibre infrastructure and relying on the open access framework are prevented from rolling out their network in accordance with their investment and deployment plans and fall short of the

[6] We are instructed that WestTel Ltd (T/A Logic) is a further ICT provider in the Cayman Islands ITC industry and competitor of C3. Logic controls some underground duct and dark fibre (C3 estimates approximately 10%). However, it is highly reliant upon access to the infrastructure of FLOW and DataLink.

[7] We note for example the unresolved 2014 DataLink Dispute. As set out in the accompanying table to this report, this dispute relates to DataLink allowing providers to have preferential positions on the pole, contrary to its agreement with C3.

[8] Section 6(1)(b) the URC Law 2019' (Op. cite footnote 3).

infrastructure roll out schedule prescribed in their licences.[9] This state of affairs is unlikely to lead to effective competition and the benefits that high-quality ICT infrastructure would bring to the citizens of the Cayman Islands.

17. C3 has submitted six decision requests about the anti-competitive behaviour of DataLink, FLOW and Logic with the regulator since 2014, the most recent being filed in June 2019. Not one of these has been resolved by OfReg or by its predecessor regulator.

18. These disputes provide a clear example of how the currently regulatory framework for regulated access does not work. If C3 is successful, the outcomes of these disputes will not resolve the broader issues surrounding competition and access in these markets – instead, the extensive delays in resolving these disputes demonstrates that there are rewards for those providers with control over ICT infrastructure by hindering their competitors ability to access to such infrastructure for as long as possible. The Infrastructure Sharing Regulations 2003 are not an effective tool to protect access seekers and fail to ensure that dominant infrastructure providers do not act anti-competitively.

19. This report outlines why effective, non-discriminatory regulation to provide wholesale access to critical infrastructure is a necessary pre-condition for effective ICT competition to exist in the Cayman Islands. The benefits of regulated access to the infrastructure of operators with significant market power are widely accepted and a feature of telecoms regulation across liberalised ICT markets. This enables newer entrants to access segments of the incumbents' infrastructure which are non-replicable for them either because of high cost or even, as is relevant to the Cayman Islands market, suitable property not being available at all. The relevant infrastructure typically includes passive components such as dark fibre (bare strands carrying no signal), ducts and telegraph poles as well as space in or adjacent to distribution frames (network accumulation points), exchanges, data centres or landing sites. It can also include active network elements such as voice termination, ethernet circuits up to and including a very high capacity single wavelength over fibre optic strands. Such regulatory intervention enables newer entrants to build scale and establish a critical mass of customers before they build infrastructure of their own as their scale economics improve. Over time greater degrees of infrastructure-based competition may become viable, which can bring with it self-sustaining effective competition at the infrastructure level and ultimately withdrawal of regulatory obligations.[10]

20. Infrastructure based competition, where achievable, is usually the ultimate goal for competition in the ICT market. One of the key tenets of economic regulation is that it should mimic market forces as much as possible to guarantee effective competition. This means that regulated access prices should be targeted to replicate prices that would emerge in a competitive market. This will permit entrants to create their own downstream retail products, compete at the retail level on price, service and quality and give consumers choice. This is more likely to ensure that market participants decisions are based on economic merits rather than

[9] Annex 1A of C3's licence, C3 has had to request numerous amendments to its roll out plan to further extend the deadline contained under annex 1A.

[10] Martin Cave, 'Encouraging Infrastructure competition via the ladder of investment' Telecommunications Policy 30 (2006) 223-237.

artificial retail price caps set by the regulator which are inherently less accurate the further down the value chain they are set.

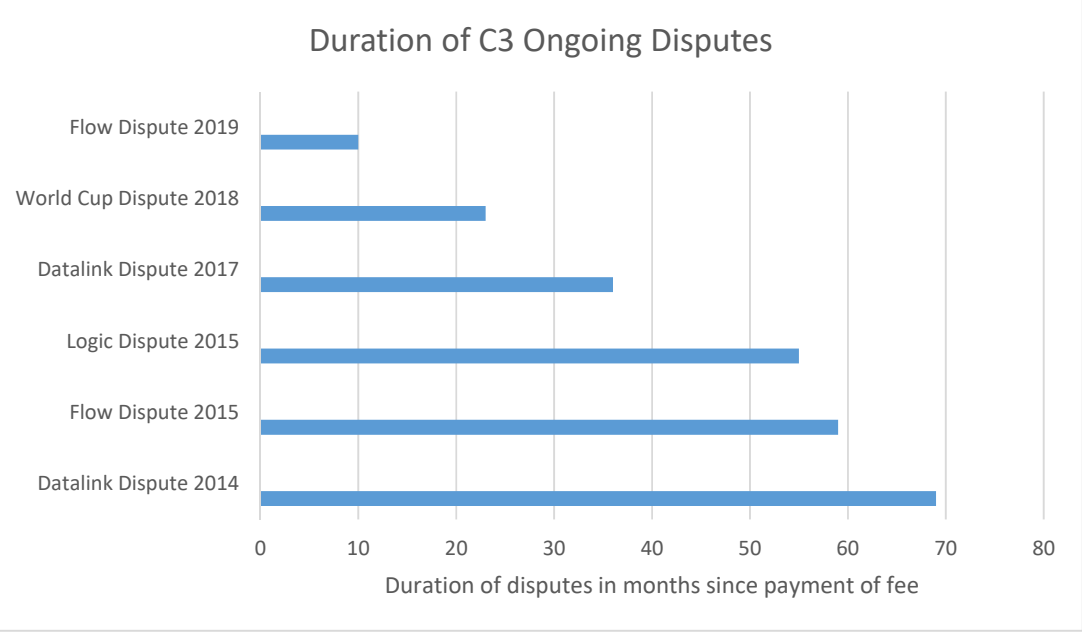
21. C3's experience in the market, combined with best practice guidance, illustrates that an open access regime such as the one that exist in the Cayman Islands is unlikely to fuel infrastructure-based competition.

C. The critical importance of effective dispute resolution and enforcement

Failures in dispute resolution undermine effective competition in Cayman

22. C3 has raised six disputes about the anti-competitive behaviour of other operators with the regulator since 2014 (see Table 2), the most recent being filed in June 2019. Not one of these has been resolved by OfReg or by its predecessor regulator. The extensive delays in resolving these disputes demonstrates that there are rewards for the operators who have control over infrastructure in hindering their competitors for as long as possible. The Infrastructure Sharing Regulations 2003 are not an effective tool and the regulator is failing to ensure that dominant providers, and those with control over infrastructure, do not act anti-competitively.

Table 2: Duration of C3's ongoing disputes[11]



Source: C3.

23. C3's experience with each of these disputes illustrate that measures need urgently to be taken to make OfReg's dispute resolution procedure fit for purpose. For each of the disputes, OfReg has failed to give the parties any appropriate indicative timetable for its consideration of the

[11] For more details regarding these disputes, please see the table in the Annex to this report.

dispute; nor has it provided any information as what the parties should expect from the process.

24. The consistent failure of OfReg to reach a resolution on *any* of C3's referrals points to broader problem that OfReg is overly reliant on competition law and is not being sufficiently active in managing the market's failings and the obstructive behaviour of the dominant providers. Typical behaviour of dominant telecom incumbents, of putting artificially high wholesale prices on their monopoly components, imposing unnecessary delays, giving spurious reasons to decline service, and generating a high level of technical errors and sudden and unannounced network outages, have been tackled effectively through active ex-ante regulation in other jurisdictions.

25. Failure to provide certainty in the process is likely to affect stakeholders' trust in OfReg, and therefore their appetite for investment, and ultimately consumers who cannot enjoy the benefits of competition. Therefore, while asymmetrical regulation is essential to facilitate effective competition, the benefits of imposing new requirements on dominant providers are unlikely to be delivered unless appropriate measures are adopted to ensure OfReg is effective in enforcement.

International best practice: Dispute resolution

26. Best practice guidance states that two of the key principles of economic regulations are: predictability and efficiency.[12] This means that:

    a. The framework for economic regulation should provide a stable and objective environment enabling all those affected to make long-term investment decisions with confidence; and

    b. Decision-making should be timely and robust.

27. The World Bank and the ITU jointly warn regulators that '*the failure to resolve disputes quickly can limit competition, cause delays in the introduction of new services and infrastructures, block or reduce investment in the sector, and impede liberalisation and development of the sector*'.[13]

28. In the UK, Ofcom has a statutory duty to reach a determination within 4 months,[14] and when practical '*as soon in that period as practicable*' before the 4-month deadline.[15] Conversely, under the Dispute Resolution regulations 2003 OfReg has an obligation to 'act expeditiously', taking into account, inter alia, the subject the matter of dispute and its' own objectives and functions'.[16] Lack of explicit dispute resolution targets in the Caymanian framework means that C3 is yet to see a decision on any of its six disputes submitted between 2014 and 2019.

29. While Ofcom is not mandated to accept disputes that relate to a potential breach of an SMP condition, the law sets out a very limited set of factors Ofcom should take into account when

[12] BIS (2011), Principle of economic regulation' (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31623/11-795-principles-for-economic-regulation.pdf).
[13] See section 6.6.2.3 of the World Bank, Info Dev and ITU 'ICT Regulation toolkit' (Op. cite footnote 43).
[14] Section 188(5) Communications Act 2003.
[15] Section 188(6) Communications Act 2003.
[16] See regulation 11 of the Dispute Resolution Regulation 2003.

deciding to take a dispute (for example, if there is likely to be an alternative way to promptly and satisfactorily resolve the dispute[17]). Also, Ofcom has published detailed guidelines in relation to these considerations.

30. By contrast, OfReg has discretion to decide whether or not to accept any dispute, which means that stakeholders must convince the regulator that their grievances do not fall under one of the eleven categories under which OfReg can decline to take the dispute. This creates significant uncertainty for access seekers when considering whether to invest the necessary legal resources to bring a dispute.[18] While OfReg has specific powers to initiate an investigation if there is a dispute between the parties regarding network access and the infrastructure sharing provisions,[19] the framework does not provide a clear route for an ICT provider to trigger such an investigation procedure. Also, under this route OfReg is required to provide a timetable to the parties for determining the dispute.[20] However, OfReg seem to seldom rely on this route, usually taking a reactive approach to dispute between ICT providers. Furthermore, while section 67(A) of the ICT law 2019 provides that OfReg must publish a procedure for the resolution of its own initiative investigations, OfReg has not published such guidelines. In each of the six disputes C3 has submitted, OfReg has accepted C3's request for a determination under the Dispute Resolution Regulations 2003, but has not provided any indicative timetable for the resolution of the dispute nor it has provided guidance as to what the parties should expect from the procedure.

31. Ofcom dispute resolution guidelines for the handling of regulatory disputes are detailed and provide predictability and certainty of the process.[21] The guidelines apply to the handling of regulatory disputes that relate to the provision of network access[22] and also to those relating to the entitlements to network access that a CP is required to provide.[23] The guidelines cover disputes between: different CPs, a CP and a person who makes associated facilities available and different persons making such facilities available.[24] There are two key procedural phases in Ofcom's assessment of any dispute submission:

    a. Enquiry Phase: During this Phase (usually 15 working days) Ofcom considers (i) whether the statutory grounds for a dispute referral have been met, and (ii) whether it is appropriate for Ofcom to handle the dispute. If Ofcom decides it is appropriate for it to handle the dispute, it will define the exact scope of the dispute and open formal proceedings.[25]

[17] Section 186(6) of the Communications Act 2003.
[18] Regulation 10 of the Dispute Resolution regulations 2003.
[19] Section 67A Information and Communications Technology Law (2019 Revision)
[20] Section 67A(2) provides that when initiating an investigation, the Office includes a timetable for considering and determining the dispute.
[21] Ofcom Dispute Resolution Guidelines for the handling of regulatory disputes (7 July 2011) https://www.ofcom.org.uk/__data/assets/pdf_file/0020/71624/guidelines.pdf
[22] Section 185(1), Communications Act 2003.
[23] Section 185(1A), Communications Act 2003.
[24] Section 185(1)(a)-(c), Communications Act 2003.
[25] Paragraphs 4.2-4.4 of the Ofcom's dispute resolution guidelines (Op. cite footnote 68).

b. Formal Proceedings: During this phase, Ofcom will determine the dispute following consultation with, and taking account of any submissions from, the Parties to the dispute (and any other interested parties that have a view to the dispute). Ofcom must determine the dispute within 4 months of its decision that it is appropriate for it to handle the dispute, except in exceptional circumstances.[26]

Applying international best practice to unresolved disputes in Cayman

32. We recommend that international best practice timescales now be applied to the outstanding disputes which have been submitted in Cayman.

33. As noted above, Ofcom's approach to referrals similar to those listed in Table 2 (page 9) would follow its dispute resolution guidelines as detailed in the previous section. It would start with an Enquiry Phase of usually 15 working days to consider whether there are statutory grounds for a dispute referral and whether it is appropriate for Ofcom to handle the dispute. If Ofcom decides to proceed it will define the scope of the dispute and open formal proceedings.

34. From deciding to proceed with formal proceedings Ofcom has 4 months to determine the dispute, except in exceptional circumstances. During formal proceedings Ofcom will determine the dispute following consultation with, and taking account of any submissions from, the parties to the dispute and any other interested parties.

35. Ofcom will send a copy of its final determination, together with a full explanatory statement, to every party to the dispute[27]. The final determination is binding on the parties and is enforceable in court. In addition, Ofcom will normally publish a non-confidential version of the final determination on its website.

36. Ofcom has conducted numerous investigations, those with relevance to the complaints in Table 2 include:

    a. Investigation into BT for its use of the "Deemed Consent" to cut its compensation payments for delays in connecting high-speed Ethernet lines, closed: 10 August 2017. Ofcom found against BT; BT was fined £42.3 million (including £300,000 for failings of disclosure) and was obliged to refund £300 million in overcharges (very largely to competitors).

    b. Investigation into BT concerning compliance with cost-orientated pricing of average porting conveyance charges, closed: 4 January 2017. Ofcom found against BT, BT appealed, its appeal was dismissed.

    c. Dispute relating to whether Openreach (part of BT) provided new unbundled copper services to TalkTalk on fair and reasonable terms and conditions, closed: 15 August 2013. Ofcom found in BT's favour having examined its contractual service level guarantees and finding them adequate.

37. Should Ofcom find that a provider has breached its regulatory obligations, it has the ability to impose a financial penalty (in accordance with section 392 of the Communications Act 2003).

[26] Section 188(5), Communications Act 2003. Or, where the court orders the handling of the dispute by Ofcom to be stayed in accordance with section 187(3), Communications Act 2003.
[27] UK Communications Act 2003, section 188(7)(a)

When determining the level of penalty to impose, Ofcom is required to adhere to its Penalty Guidelines. Whilst there are a number of factors that Ofcom is required to consider when determining the level of fine, it is important to note that the main objective of any fine is the goal of deterrence.[28]

38. In conclusion, it is our opinion that faced with the evidence of anti-competitive practises shown in some if not all of the referrals made by C3 in Table 2, Ofcom would investigate the complaints in a timely manner, consulting any parties concerned, and if it found abuse of dominance it would make a determination setting out the nature of the infringement. Ofcom would also consider whether it is necessary to impose a financial penalty on that provider. The determination would be enforceable in court.

39. In the annex to this report we have provided an overview of these six outstanding disputes, and provides an overview of the likely outcome of those disputes, had Ofcom had jurisdiction over the issues at hand. It demonstrates how a more structured approach to dispute resolution alternative, and more expedient, dispute resolution mechanism – combined with a regulator which is well versed in imposing penalties against providers who fail to comply with the regulatory framework- ensures a level playing field for all market participants, leading to better outcomes for consumers.

D. Why ex-ante regulation is necessary in the Cayman Islands

40. Given the 'utility-like' nature of telecommunications, the sector engenders its own distinct set of public interest issues such as ensuring that all citizens have access to certain minimum set of services at an affordable price, that the market is responsive to innovation and that the integrity of service is guaranteed. Competition policy and economic regulation in this area is based on the premise that 'the public interest' or 'social good' of telecommunications is best served when the sector works efficiently and this is more likely to occur where competition thrives. This is far from the position in the Cayman Islands.

[28] Ofcom's "Penalty Guidelines – section 392 Communications Act 2003" can be found at: https://www.ofcom.org.uk/__data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf. Ofcom will consider the circumstances of the case in the round to determine the appropriate and proportionate amount of penalty. The main objective of imposing a penalty is deterrence. A few examples of the potentially relevant factors that Ofcom will consider are: the seriousness and duration of the contravention; the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants; any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention; whether in the circumstances appropriate steps were taken to prevent the contravention; the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring; any steps taken for remedying the consequences of the contravention; and whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); etc. Ofcom will also have regard to any relevant precedents, but may depart from them depending on the facts and context of the case.

41. The rules that promote effective competition in general provide 'the organising foundations' of robust ICT regulation across the globe.[29] To achieve a competitive market these rules are further split between:
    a. the reactive *ex-post* application of traditional competition law principles to activities in the ICT sector; and
    b. pro-active *ex-ante* regulatory intervention in the operation of the ICT markets.
42. It is widely accepted that *ex-post* competition law alone cannot be relied upon in all cases. This is due to the fact that implicit in *ex-post* competition law is that it assumes that market forces could work effectively without intervention. Due to the characteristics of some markets, competition will never be effective without intervention.
43. Even where these characteristics are not present, solely relying on traditional competition law may still not be appropriate due to the characteristics of competition law *itself* which can be slow, complex, involve high evidentiary burdens and is inevitably expensive, all of which can be prohibitive to effective enforcement. In such circumstances *ex-ante* regulatory intervention by a specialist regulatory authority is critical.[30]
44. It follows from the above, that it will be impossible for the Cayman Islands to achieve effective competition across the value chain unless OfReg undertakes an appropriate review of ICT markets to determine the degree to which there are markets that are susceptible to ex-ante regulation and adopts appropriate remedies to discipline market behaviour.[31] To date, due to the limited scope of OfReg's ex-ante regulation and failure to intervene at the wholesale level (namely, to date OfReg has only introduced retail price controls and limited access regulation contained in the incumbents' licence conditions), ICT providers must rely on traditional competition law to address competition issues on an ad hoc basis.[32] This is inefficient and unlikely to lead to effective competition in the Cayman Islands' ICT sector.

Applying regulation where operators have significant market power

45. To establish whether an ICT market should be subject to SMP regulation, the European Commission has developed a three-prong test which is applied by all European regulators to determine whether a specific market (identified as such using a competition analysis of the relevant product and geographic reach of the service) is susceptible to ex-ante SMP regulation.[33] The test is a cumulative one and requires:

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[29] FCC report 'A New Federal Communications Commission for the 21st Century'. 1999.
[30] See Chapter 1 of Ian Walden, Telecommunications Law & Regulation, 5th edition.
[31] Indeed, the only example jurisdiction that initially pursued ICT market liberalisation through reliance solely on the application of competition law is New Zealand. However it is widely accepted that such an approach was not sustainable in the long turn as it was inefficient and led to significant delays in the liberalisation process.
[32] The Competition law regime in the Cayman Islands is contained in the URC Law 2019 and it applies to all the sectors regulated by OfReg. As any traditional competition law regime, the provisions contained under Part 12 of the URC law 2019 are designed to prohibit agreements that have anti-competitive effect and abuse of dominant position and provide OfReg with powers such as: powers to conduct an investigation, enter premises, request information and issue directions and fine anti-competitive undertakings.
[33] Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communication sector susceptible to ex ante regulation (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:en:PDF).

a. the presence of high and non-transitory barriers to entry;

b. a market structure which does not tend towards effective competition within the relevant time horizon; and

c. the insufficiency of competition law alone to adequately address the market failure(s) concerned.

46. C3's experience demonstrates that there are important aspects of the ICT sector in the Cayman Islands that would be susceptible to ex-ante regulation.

47. In the Recommendation, the European Commission identifies two types of barriers to entry: structural and legal or regulatory. High-structural barriers are said to exist when the market is characterised by absolute cost advantages, substantial economies of scales and/or economies of scope, capacity constraints and high sunk costs. A related structural barrier is said to exist if the provision of service requires a network component that cannot be easily replicated. For example, barriers are traditionally identified in the ICT sector with respect to the widespread deployment and/or provision of local access networks to fixed locations, wholesale broadband access and wholesale leased line termination.[34]

48. Structural barriers are damaging to competition because they create asymmetric conditions between incumbents and new entrants that prevent the latter from establishing themselves in the market. While a service provider may be able to successfully 'enter the market' high barriers to entry may prevent them from establishing themselves as a competitor and therefore enable effective competition.

49. Taking into account the geographic dimension of the Cayman Islands (a 264-square -kilometre territory comprising the three islands of Grand Cayman, Cayman Brac and Little Cayman with a population of circa 64,420 people), on paper, the national ICT market looks like a healthy, competitive market. Consumers appear to have choice and market players should in theory be experiencing the pressure of competition and so be incentivised to provide cheaper and better services, be more efficient and innovative - all to the benefit of consumers. However, the legacy presence of national incumbents is inhibiting the development of effective competition.

50. These high barriers to entry are easily identifiable in the Cayman ICT market:

a. *FLOW has a ubiquitous electronic communications network in the Cayman Islands* giving it significant economies of scale advantages and therefore absolute cost advantages over its competitors. Non-discriminatory access to FLOW's infrastructure is likely to enable other ICT service providers to benefit from FLOW's economies of scale and therefore create a more level-playing field between market players. However, due to the currently ill-fitted symmetrical access regulation regime contained in the Infrastructure Sharing Regulations 2003 FLOW is in a position to control access to its network by access seekers, for example in relation to its provision of duct access.

b. *FLOW has control over key network bottlenecks that cannot be replicated*. For example, FLOW's exclusive control of the Maya-1 landing station[35] places it at a significant

[34] Paragraph 9 of the European Commission recommendation and paragraph 4,5 and 6 of the Annex to the Recommendation (Op. cite footnote 13).

[35] See 2019 Flow Dispute

advantage over its competitors. This creates the potential for competition problems in any downstream retail market that depends on international connectivity (e.g. broadband markets). Practically all data sent or received off the island end ups traveling via one of the two Cayman Islands undersea cables. For an island, subsea cables are essential facilities and are widely subject to strict access rules requiring access to be provided.

c. *Datalink is in control of the ICT pole network*. Use of these poles is particularly crucial to new entrants like C3 that need access to it to deploy their own fibre connections. Any conduct that makes it more time consuming and costly for new entrants to use Datalink's shared pole network is likely to be a significant drag on competition.

The structure of the Cayman Islands ICT market does not tend towards effective competition

51. While it is true that in innovation-driven markets, characterised by ongoing technological progress, high barriers to entry may become less relevant. Dynamic or longer-term competition can take place among firms that are not necessarily competitors in an existing 'static market'. However, regulatory intervention is necessary when high barriers to participation in a particular market (i.e. at the infrastructure/wholesale level) prevent market players from exerting competitive pressure through innovation in the first place.[36] In assessing whether the barriers to entry identified above are likely to persist in the absence of regulation, OfReg needs to ask itself whether true entry in those segments of the market (i.e. wholesale infrastructure access, as well as wholesale broadband and leased line access) is likely to arise by simply relying on an open access regime. OfReg has a statutory duty to ask itself these questions.

52. On the basis of above criteria, the EU Commission has identified a number of markets as being susceptible to ex-ante regulation, these are generally wholesale/infrastructure access markets. Countries across the EU have introduced ex-ante regulation in those markets. The main markets referred to in this report are:

    a. Market 4: wholesale infrastructure access (including shared or fully unbundled access);

    b. Market 5: wholesale broadband access;[37] and

    c. Market 6: wholesale terminating segments of leased lines, irrespective of the technology used to provide leased lines or dedicated capacity.

53. In combination, these markets cover the complete spectrum of wholesale inputs that can facilitate infrastructure-based competition. However, they have been separated into different markets because of the purpose and geographic scope each wholesale input is designed to address. In this report we do not refer to call origination or call termination (markets 1 and 2).

54. Based on the experience in other countries it is unlikely that innovation capable of removing those barriers will arise in the foreseeable future in the Cayman Islands without the introduction of *ex-ante* regulation. Indeed the UK and EU markets are likely to continue to be

[36] See paragraph 11 of the EU Commission recommendation (Op cite footnote 13).

[37] According to the EC Commission in their recommendation (Op. cite footnote 13), this market comprises non-physical or virtual network access including bit-stream access at a fixed location. This market is situated downstream from market 4.

regulated for the foreseeable future. OfReg is likely to make similar findings if it undertakes an appropriate assessment of these markets in Cayman.

Competition law alone will not address the market failures in the Cayman Islands ICT market

55. Finally, the decision to identify a market as susceptible to *ex ante* regulation should also depend on an assessment of the sufficiency of competition law to address the market failures that result from the first two criteria being met.[38] As C3's experience as a smaller participant in the Cayman Islands ICT market without control over infrastructure demonstrates, competition law alone and symmetrical regulation are proving inadequate at addressing issues of fair access in these ICT wholesale markets. As a consequence, competition is unable to thrive.

56. C3's disputes before OfReg demonstrate the need for a regulatory framework that is both designed to curtail the natural economic incentives of firms like FLOW and Logic (in respect of underground duct and dark fibre) and DataLink (in respect of telegraph poles) to limit competition and equip OfReg with the right regulatory tools to ensure that those providers with control over infrastructure face clear requirements to provide effective and appropriately priced access to their infrastructure coupled with ongoing compliance oversight (including redress for failure to comply). Competition law alone will be unable to deliver effective competition because it operates *ex post facto*: by nature, competition law aims to punish past abuses of dominance in individual cases, and is neither aimed to prevent abuse of dominance arising in the first place nor is designed to create a level playing field by removing barriers to entry. The reactive nature of competition law means that the process for getting redress is lengthy and the outcome of the dispute applies to the facts of the particular case only.[39] Further, while competition law operates on a case-by-case basis, ex-ante regulation is able to provide up front regulatory certainty and predictability which is crucial for markets not yet subject to competition. Finally, ex-ante regulation due to its pre-determined nature is more likely to enable swift intervention.

57. As an example, lack of ex-ante wholesale regulation in the Cayman Islands means that, in relation to C3's outstanding disputes with FLOW, Logic and Datalink:

    a. OfReg will have to engage on the issues under dispute ex-post facto, i.e. only once C3's position in the market has already been affected.

    b. As C3 awaits a determination from OfReg, it has been open to FLOW to restrict C3's access to FLOW's infrastructure in relation to services completely unrelated to the dispute.[40] As a matter of principle, it is crucial that regulatory decisions are made quickly in this kind of situation; otherwise, the regime creates incentives for dominant players to game the process by sanctioning entrants which complain.

[38] See paragraph 13 of the Commission recommendation (Op. cite footnote 13).
[39] ITU regional workshop on 'Competition in Telecommunications Markets', Khartoum-Sudan, May 2016.
[40] While we are not in a position to comment on motivation, we are advised, for example, that Flow has refused to undertake contractually mandated work (duct clearance and survey) for C3 since C3 submitted a decision request in relation to the 2019 Flow Dispute, despite the work being entirely unrelated to the 2019 Flow Dispute. This has caused C3 significant actual and opportunity costs.

58. The resulting state of affairs is a regime which tacitly permits the "sanctioning" (by providers with control over infrastructure) of newer entrants or smaller providers which complain, since the provider with control over infrastructure has free reign to continue to act, free of regulatory scrutiny. This, coupled with OfReg's failure to resolve disputes, discourages entrants or smaller providers from bringing complaints. The threat of this type of behaviour deters smaller providers from making decision requests, and may additionally have a significant impact in the willingness of new entrants to invest in the Caymanian market as there is no way of ensuring their investments are safe.

59. While the Cayman Islands legislation includes provisions enabling OfReg to undertake market reviews in order to impose the necessary ex-ante regulation identified in this report,[41] OfReg is yet to carry out the essential competition analysis for the relevant wholesale markets to determine whether any of the participants in the market have significant market power. OfReg has the powers to undertake this process: under section 45 of the Utility Regulation and Competition Law 2019 ("URC Law 2019"), OfReg could, once a significant market power provider is identified in the relevant market in line with the criteria set out in section 44 (which is not inconsistent with the Commission Recommendation highlighted in this section), impose conditions under section 45 of the URC law 2019 on dominant providers, which are likely to address some of the high entry barriers identified in this report.

60. The next section of this report seeks to demonstrate why the current open access regulatory framework is ill-fitted to address these high and non-transient barriers to entry.

E. Why better wholesale infrastructure access regulation is necessary in the Cayman Islands

61. Wholesale infrastructure access is essential to remove barriers to entry to the ICT market, incentivise the deployment of high-capacity networks and to maximise coverage. However, in order to lead to effective infrastructure-based competition, regulation must be targeted at the incumbent provider with SMP in the wholesale infrastructure market. Simply having an open access framework such as the one contained under the Infrastructure Sharing regulation is insufficient.

62. Access to civil engineering has become the cornerstone of ICT regulation. Indeed, at the centre of the new European Electronic Communications Code,[42] national regulators are asked to consider first **whether wholesale infrastructure access alone would address competitive challenges in a given region or market** before considering applying any downstream access remedies, however this is coupled to SMP regulation.[43] The rationale is that:

> *Civil engineering assets that can host an electronic communication network are crucial for the successful roll-out of new networks because of high costs of duplicating them, and the significant savings that can be made when they can be reused.*

[41] Section 44 and 45 of the Utility Regulation and Competition law 2019 Revision.
[42] Directive 2018/1972/EC 'the European Electronic Communications Code' ('the EECC').
[43] Recital 187 and Article 72 of the EECC (Op. cite footnote 25)

…Where Civil engineering assets exist and are reusable, the positive effect of achieving effective access to them on the roll-out of competing infrastructure is very high, ***and it is therefore necessary to ensure that access to such assets can be used as a self-standing remedy*** *for the improvement of competitive and deployment dynamics in any downstream market'*[44]

63. Under the new European regulatory framework, the obligation is available as a specific remedy necessary in those circumstances where civil engineering assets are owned by an undertaking designated as having SMP.[45] In other words the remedy is asymmetrical.

64. A perfect example of how the Infrastructure Sharing Regulations 2003 are ill-fitted to fulfil this role is C3's experience with their request for co-location at the Maya-1 landing station which is now being considered by OfReg as part of a dispute between C3 and FLOW[46]. C3 requested FLOW install a 2RU switch within the Maya-1 landing station which is currently owned and controlled by FLOW, FLOW claimed that it did not have sufficient space nor was the station 'configured or designed to allow such access'. When C3 asked for access to the land adjacent to the landing station in order to build an out-house to house its equipment, FLOW claimed the land was reserved for future expansion. FLOW offered as an alternative solution that C3 use FLOW's expensive leased lines services to connect the landing station to a manhole outside.

65. The Infrastructure Sharing Regulations 2003 enable a party to refuse access to its infrastructure (irrespective of the type of infrastructure) if there is insufficient capacity or if such provision would create a technical or engineering difficulty that could not be addressed.[47] This means that there is no positive obligation on FLOW to create capacity nor there is an obligation to ensure technical feasibility. The regulations also do not distinguish between key bottlenecks and the need for access to those bottlenecks to have the effect of removing market power. This means that FLOW can offer a solution which still enables FLOW to control the bottleneck (i.e. a backhaul leased line service) and effectively be considered in compliance with the regulations[48].

66. Therefore, while there is a regulatory framework in place encouraging infrastructure sharing arrangements, the symmetric nature of the Infrastructure Sharing Regulations 2003 means that the framework is not fitted to address the unbalanced relationship between incumbents or providers with control of infrastructure on the one hand and new entrants or providers without control of infrastructure on the other: for example, providers without control need to rely on the controlling entity's economies of scale, in turn controlling entities do not have an incentive to provide an infrastructure sharing service in a way that reduces their market share.

67. In international jurisdictions it is not typical to impose symmetric access obligations on all CPs. The legacy of national incumbents in telecommunications sectors is the driver for asymmetric regulatory obligations being imposed only on those with a monopoly or SMP. In this case,

[44] See recital 187 of the EECC (Op. cite footnote 25).
[45] Recital 187 of the EECC (Op. cite footnote 25).
[46] The 2019 FLOW Dispute
[47] See regulation 3 of the Infrastructure Sharing Regulation 2003
[48] In relation to the 2019 FLOW Dispute, C3 maintains that FLOW's argument does not sufficiently justify the use of the exception under the regulations, as there is sufficient capacity and the provision should not create a technical or engineering difficulty that cannot be addressed. However, these concerns should not detract from the apparent weakness of the regulations.

asymmetric regulation would address high barriers to entry by introducing specific requirements on the incumbent such as, service level agreements and service level guarantees conditions, or obligations on ordering process, pricing and specific non-discrimination requirements. Asymmetrical regulation tends also to include a prohibition of forced bundling of essential wholesale facilities with unregulated services. Given that these obligations are more onerous on some service providers than other, the main legitimate route is through a market review process and SMP conditions, duly consulted on.

68. Experience demonstrates that in countries in which wholesale infrastructure access has been introduced, barriers to competition have been reduced. These countries have all experienced greater FTTP deployment by both incumbent and non-incumbent operators than countries that do not have the remedy.

International best practice: UK approach to duct and pole access (DPA)

69. One of the key infrastructure asymmetric regulation is applied to, is the access to the incumbent's duct and pole. The UK experience is an important one and it can be used to draw lessons on the best way to introduce DPA. In the UK, Ofcom started by imposing SMP conditions on the national incumbent (BT) to grant non-discriminatory and price regulated access to its ducts and poles.[49] The obligations include:

    a. Network access on reasonable request including to associated facilities as reasonably necessary for the provision of network access;[50]

    b. No undue-discrimination.[51] This means: the dominant provider must provide the same products and services to all telecom providers (including itself) on the same: timescales, terms and conditions (including prices and service levels) by means of the same systems and processes and by providing the same information;[52] and

    c. A cost orientation obligation on access charges plus a charge control.[53]

70. In order to implement these conditions, Ofcom has insisted that the incumbent negotiates standard terms with industry in meetings which are attended by the regulator and the Office of the Telecoms Adjudicator (a body charged by Ofcom with overseeing implementation of regulatory remedies). This hand-on approach requires investment of time up front but significantly reduces the risk of disputes further down the line, because (for example) it means that an access seeker has confidence that it will obtain access as long as it meets criteria which are clearly laid out in the contract beforehand. OfReg could introduce similar conditions and could devise a similar process to enable parties to negotiate the standards terms by relying on an expert external adjudicator.

[49] These SMP conditions have been imposed by Ofcom in the Wholesale Local Access market (therefore they do not currently apply to backhaul or core). However, under the new Business Connectivity Market review Ofcom is proposing to introduce a dark fibre remedy to enable providers to use for connections from exchanges where BT faces no competition from rival operators, physical access to its fibre-optic cables, allowing them to take direct control of the connection.

[50] Condition 1, Annex 33, Legal Instrument Wholesale Local Access Market Review Statement (2018)

[51] Condition 4.3 (see footnote 30)

[52] Paragraph 3.30 of Volume III of Ofcom, Wholesale Local Access Market Review Statement (2018).

[53] Condition 6 (see footnote 30).

71. BT is also subject to Service Level Agreements ("SLAs") and Service Level Guarantees ("SLGs") as part of its contract with industry. SLAs set out a supplier's commitment to provide services to an agreed quality, for example, within a specified period. The associated SLGs specify the level of compensation that the customer would be entitled to should the service not be provided at the quality specified in the SLA, for example, if delivery of the service was late. They are essential in providing the incumbent with an incentive to deliver duct and pole access at an appropriate level of performance. These conditions are not currently satisfactorily covered under the Wholesale Sub-duct Agreement.

72. The policy position in the UK is that there should certainty about the timescales for the controlling entity to respond to all types of order.[54] This could therefore apply to a simple request to rent space in or on BTs physical infrastructure, or alternatively it could comprise a request to rent space within BT's ducts along with any necessary network adjustments ('make ready work') for accessing the physical infrastructure. It also applies, where relevant, to relief of congested infrastructure. Clearly defining the parameters of access seekers' contractual rights from the outset is likely to serve as an additional layer to the ex-ante regime and help OfReg police the incumbent's behaviour.

International best practice: Key bottlenecks including undersea cable landing sites

73. A key bottleneck mentioned in this report is undersea cable landing stations. The prevailing policy approach across OECD countries is that regulation should aim to enable new market players to have equal access opportunities to essential existing infrastructure.[55] Infrastructure is deemed essential if it is necessary for reaching customers and/or enabling competitors to carry out their business and if it cannot be replicated by any reasonable means.[56.] Therefore, this includes access to landing stations.

74. The ITU considers that leaving control of access to international submarine cables in the hands of one operator creates potential for competition problems in any downstream retail market that depends on international connectivity (e.g. broadband markets). For this problem, the ITU considers that the best remedy is greater competition, including allowing co-location of facilities at the cable landing station.[57]

75. Landings stations are often either owned by all the telecommunication providers serving the national market, who allow a consortium to manage access, or are owned by a third-party (either a private or public company) which gives equal access to all ICT providers on equal terms, as is the case in the UK. It is seldom the case that one incumbent operator is able to control such an

[54]See paragraph 6.150, WLA Statement Vol 3 (Op. cite footnote 38.

[55] OECD (2013), Broadband Network and Open Access, OECD Digital Economy Papers, No.218, OECD publishing, Paris. Landing stations are essential infrastructure as these are necessary for reaching customers and/or enabling competitors to carry out their business and cannot be replicated by any reasonable means (see Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector (OJ C265/02, 22.8.98).

[56] Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector (OJ C265/02, 22.8.98).

[57] ITU (2017), workshop on enhancing access to submarine cables for Pacific Island countries (slides from session 5: access to landing station).

important bottleneck and most examples of regulating access to landing stations come from developing economies transitioning to an open access system whereby all ICT providers have equal access to the bottleneck.

76. For example some national regulators in EU Member States, which did not already have an open access framework in place for landing stations, have imposed obligations upon incumbent operators to provide access to their submarine cables.[58] The Access and Interconnection Directive (which is the regulatory framework governing access to infrastructure in the EU) has been interpreted to include such facilities as falling within the definition of 'access' despite no express reference to cable landing stations.[59]

77. Other countries such as India have recently extended their infrastructure access regulation to landing stations. In India, any owner of a landing station must provide, on fair, non-discriminatory terms and conditions, access to its cable landing station, to any eligible Indian International Telecommunication Entity requesting access to international submarine capable capacity on any submarine cable systems.[60]

78. Singapore is another example where the national regulatory authority[61] recently decided to extend the use of its existing powers related to interconnection and access to cover landing stations. Measures requiring Dominant Licensees to submit a proposed Reference Interconnection offer to the Authority for approval were modified, adding specific measures related to landing stations.[62] The effect of such measures allows for access to co-location space at landing stations, with operators competing with the incumbent ("SingTel") able to access capacity that they own or lease on international cables directly at the landing station. The Singapore regulator stated: "access to SingTel's submarine cable landing stations is an essential input for many telecoms services. Unnecessary access restrictions limit operators' competitive scope to provide international telecoms services".[63]

79. Parallels can be drawn between the competition issues identified in the previous examples and the situation in the Cayman Islands regarding the issues raised about in C3's disputes about access to the Maya-1 landing station[64]. FLOW enjoy a position of dominance at Maya-1, a position which has seemingly allowed it to restrict other operators, such as C3, from physically connecting their networks to international circuits in the past.

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[58] Commission, 'Implementation of the EU regulatory framework for electronic communication – 2015', SWD(2015) 126 final, 19 June 2015.
[59] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108/7, 24 April 2002, Article 12 and Article 5.
[60] Article 3.1 of the TRAI notification of 7 June 2007.
[61] The Infocomm Development Authority of Singapore (IDA).
[62] See Schedule 4B, Submarine Cable Connection Service in SingTel's Reference Interconnection Offer 2005: https://www2.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Frameworks-and-Policies/Interconnection-and-Access/SingTels-Reference-Interconnection-Offer-2012/SingTels-Reference-Interconnection-Offer-2005/13-Schedule4B15Oct06.pdf. Dominant Licensees submitting a RIO is a requirement the Code of Practice for Competition in the Provision of Telecommunication Services 2005 (issued by the Info-communications Development Authority of Singapore).
[63] IDA Deputy Chief Executive Officer and Director-General (Telecoms) Mr Leong Keng Thai, 2005: http://www.ida.gov.sg/News%20and%20Events/20050712175459.asp.
[64] 2019 Flow Dispute

The need for regulation of wholesale infrastructure access

80. When compared to the symmetrical regulation of the Infrastructure Sharing Regulation 2003, it is possible to see how ex-ante regulation of wholesale infrastructure access to, amongst others, the inputs identified in the previous sections, is much more efficient and effective in promoting competition. This is because the conditions are (i) specific to the type of infrastructure access sought; and (ii) reflect that the provider has market power and is likely to have incentives to block or hinder access as far as possible, such that more onerous and prescriptive obligations are necessary than would be appropriate under symmetric regulation.

81. For example:

a. The Information and Communication Technology Law 2019 (the "ICT Law 2019") stipulates that a licensee to whom a request is made (e.g., FLOW/Datalink/Logic) must respond to any infrastructure sharing request within a period of one month from the date of the request and it must provide the infrastructure sharing service within a reasonable time.[65] While the ICT Law 2019 does not specify what 'a reasonable time' means, under the Infrastructure Sharing Regulations 2003, for example, FLOW is required to acknowledge receipt of an infrastructure sharing request from C3 no later than 3 days from the requestor's submission.[66] Subsequently, a quotation must be provided no later than 30 days[67] and shall contain all the necessary information for the requestor to be able to consider the rates, terms and conditions for receiving the infrastructure sharing services.[68] Within 20 days of the receipt of the quotation, the requestor (C3) and the responder (e.g., FLOW) should undertake good faith negotiations to resolve any outstanding matters for purposes of producing and interconnection and infrastructure sharing agreement.[69] As previously mentioned, given the issues identified in this report with the regulations and dispute resolution process, the incentive for the responder to reach a resolution with the requesting parties on these matters is low.

b. By contrast, in the UK, BT is contractually required to acknowledge receipt of a valid network adjustment order (e.g. duct clearance) order within 4 working hours and provide a response notice within 5 working days from the acknowledgement of the order. The response notice must provide detail of whether or not BT accepts the network adjustment and provide reasons if the order is being rejected. While Ofcom has left it to industry to decide the specific timescales for the provision of service Ofcom has set out the parameters:

[65] Section 65(3) of the Information and Communications Technology Law (2019 Revision),
[66] Regulations 8(5) of the Infrastructure Sharing Regulations 2003.
[67] Regulation 8(7) of the Infrastructure Sharing Regulations 2003.
[68] Regulation 8(9) of the Infrastructure Sharing Regulation 2003.
[69] Regulation 8(10) of the Infrastructure Sharing Regulation 2003

i. Confirmation that an order has been accepted (i.e. that the order includes the necessary information for the incumbent to consider the request) must be provided within a matter of days.[70]

ii. Order approval: in relation to a route must be provided within 5 days and for a local access area (20 days).[71]

82. As a current example, the 2019 FLOW Dispute relates to FLOW's delays in providing duct access services in relation to the Shamrock road to High-Rock route, and C3 has experienced similar delays in relation to West Bay. Given how broad the principal obligation under the infrastructure sharing regulation 2003 is (i.e. to provide access 'within reasonable time') and how generous the timescales are, it is open to FLOW to restrict competition at downstream by continuing to benefit from the barriers to entry upstream.

The need for regulated cost-based wholesale pricing of infrastructure access

83. Another matter which is problematic in the Cayman Islands access framework is the incumbent's ability to overcharge for access services in the absence of a transparent cost methodology obligation. While access seekers have an obligation under the Infrastructure Sharing Regulation 2003 to ensure that their tariffs are sufficiently unbundled and cost orientated.[72] Because there is no dedicated price control on, for example, FLOW in relation to its infrastructure services, FLOW is able to freely value its capital employed and unilaterally determined what a reasonable rate of return is on its capital employed as well as all attributable operating expenditures, depreciation and contribution to common costs. As far as we know, OfReg has not analysed these figures and therefore there is no oversight as to whether these costs are accurate, or overestimated (i.e. gold-plated) and whether FLOW has decided that a 'reasonable return' is more than is necessary for a hypothetical efficient undertaking. In other words, there are no ways to ensure that FLOW's assets have been cost accounted properly and therefore whether or not FLOW has complied with its obligation to charge cost orientated rates.

84. It is quite possible that FLOW's assets are in fact significantly depreciated and therefore access to FLOW's network should be cheaper. In relation to access charges, the EU Commission stipulates that regulatory authorities should value reusable legacy civil engineering assets on the basis of the regulatory accounting value net of the accumulated depreciation at the time of calculation, indexed by an appropriate price index, such as the retail price index, and excluding those assets which are fully depreciated, over a period of not less than 40 years, but still in use.[73]

[70] Wholesale Local Access Market Review – Statement volume 3 ('WLA Statement, Vol 3') paragraph 6.158 (https://www.ofcom.org.uk/__data/assets/pdf_file/0023/112469/wla-statement-vol-3.pdf)
[71] (Op. cite footnote 38).
[72] Regulations 6(f) and 6(h) of the Infrastructure Sharing Regulations 2003.
[73] See recital 186 of the Electronic Communications Code (Op. Cite footnote 17).

85. Mandating access usually means that access prices have to be regulated too.[74] Without appropriate price regulation, dominant firms and those with control over infrastructure can increase prices above competitive levels, so harming consumers. Price regulation acts as a proxy for competition which tends to drive prices towards cost. The best practice approach to regulating access pricing in the wholesale markets identified as susceptible to ex-ante regulation are price-controls which are based on a bottom up long-run incremental cost model and in some cases benchmarking.[75] In any event, in order to legitimise price controls and in accordance with the principles of good regulation, the process of setting price controls should be transparent and subject to a full public consultation of OfReg's methodology.

F. Other identified deficiencies with the infrastructure sharing regulations 2003

86. As identified throughout this report, an additional problem with the infrastructure sharing regulation 2003 is that the provisions are vague. When regulation is unspecific or ambiguous it is substantially less enforceable. There is also an increased scope for misuse and misapplication of the law (particularly by a provider with a commercial incentive to adopt an interpretation of the law that imposes fewer and less onerous compliance obligations). The lack of clear and unambiguous regulation also leads to a lack of trust on the part of new entrants and smaller providers in the regulatory process and in the regulator's ability to discipline the market. Spotting non-compliance is harder for the regulator as is bringing a complaint for a competitor.

87. This has discouraged access seekers from formally raising compliance concerns with OfReg and led them to acquiesce to less than ideal arrangements with the incumbent for wholesale access. It has also led to less trust in OfReg's capacity to ensure the dominant providers and those controlling infrastructure are compliant with the regulation that is in place. For example:

    a. The infrastructure sharing regulations do not specify exactly when access should be provided once an agreement has been reached.[76] This means that C3 has had to accept significant time delays in the provision of access services which can in turn result in loss of customer business, for example, if lead times for connections are too great or too uncertain.

    b. While the regulations require the access provider to provide access in good faith, it does not specify what this means in practice. [77] In disputes the controlling providers can

[74] Section 2.4.1 of the ITU and World Bank best price 'ICT regulation toolkit' ('the ICT regulation toolkit). (http://www.ictregulationtoolkit.org/index).

[75] Benchmarking involves comparing access prices across a peer group of countries to determine what price would be reasonable (see section 2.4.2 of the ICT Regulation toolkit) (Op. cite footnote 43).

[76] There is no definitive statutory deadline for giving access/responding to requests for access under the Infrastructure Sharing Regulations (see regulations 5 and 8). s

[77] See regulations 6(a) of the Infrastructure Sharing Regulations 2003. Also, regulations 10 provides that in the event of disagreement between the parties in relation to the provision of access services 'the parties shall negotiate in good faith'. It is not clear whether regulation 10 applies to all provision of services or just in the negotiation of wholesale contracts (such as e.g. the Master Pole Agreement and the Wholesale Sub-duct Access

creatively argue that they have acted in good faith or simply shift the blame for delays because there are no clear and unequivocal specific timescales that they need to adhere to (see section D about on SLAs and SLGs).

c. There are no obligations regarding quality of service.[78] This is particularly problematic as, we understand, on numerous occasions FLOW has informed access seekers of planned engineering outages resulting in C3's customers losing their services without any notice.

d. Network outages planned by FLOW for engineering reasons were, we understand, not notified to C3 even though it is a (wholesale) customer and its own customers' service was affected.

88. We also identify that an additional deficiency in the framework is that the only way for new players to seek redress for non-compliance with the Infrastructure Sharing Regulations 2003 is to rely on the Dispute Resolution Regulations 2003 which also fail to compel the regulator act swiftly or within a specified timeframe. As indicated above, we are aware that there has been recent consultation on new regulations, however, we understand that the updates do not include any substantive change to the dispute resolution process, such as proposing a timetable within which disputes must be resolved. Best practice indicates that a regulator's objectives are more likely to be attained if processes are streamlined and stakeholders have trust in the process. The next section addresses this question.

G. Conclusions and recommendations: Policy proposals

OfReg must undertake a market review and introduce ex-ante regulation of wholesale access

89. As discussed in this report, open access regulation is likely to be insufficient to address the barriers to competition at the wholesale level. Following our analysis above, our policy recommendation is that OfReg should start by carrying out a market review of the competitive conditions of the markets it considered susceptible to ex-ante regulation based on the analysis in this report.

90. We believe that following such analysis, OfReg is likely to conclude that FLOW and Datalink are dominant providers in these segments of the market.[79] An SMP finding should result in the asymmetric application of access remedies on FLOW and Datalink in wholesale access markets. OfReg is able to impose these conditions under section 45 of the URC law 2019. We recommend that specific clearly articulated obligations should be introduced to mimic a level-playing field between the ICT service providers. The key features/minimum requirements of the access remedies should include:

a. An obligation that access must be granted to:

i. incumbent networks; and

Agreement). Regulation 11 sets out a short 'black-and-white' list what actions in relation to the negotiations will be considered as violating the requirement under regulation 10.

[78] Regulation 6 which sets out the principles and guidelines for the provision of access services do not contain any provision regarding quality of service.

[79] OfReg may also consider whether any other providers have substantial infrastructure in the ground, and whether they should be required to share infrastructure with other providers that request access.

ii. other essential facilities;

b. A non-discrimination obligation in relation to that access;

c. A general obligation that access prices be fair and reasonable and if necessary be subject to a charge control over a specific time horizon;

d. A detailed obligation that in cases where there is no duplicate infrastructure, prices for access be derived from efficiently-incurred costs;

e. An obligation to publish regulated accounts on a yearly basis;

f. An obligation to negotiate wholesale contracts which are in line with specific obligations set out in advance by OfReg (e.g. over SLA and SLGs, and quality of service standards);

g. An unbundling obligation (or prohibition on tying services) – i.e. a prohibition on any requirement that in order to gain access to a required facility, providers need to pay for other facilities/services (which they do not require) as well.

91. In order to introduce these conditions, we recommend that OfReg relies on the framework already in place under section 44 and 45 of the URC law 2019. OfReg has two option to implement the conditions, either via the:

a. Introduction of SMP conditions in the forms of an administrative determination, decision, order and regulation under section 6 of the URC Law 2019;

b. Implementation of obligations as licence conditions on the dominant providers or those who control infrastructure pursuant to section 31 of the ICT Law 2019.

OfReg must address shortcomings in dispute resolution and enforcement

92. In this report we also identify deficiencies with the regulatory process and, based on C3's experience, we consider that more regulatory certainty as well as a streamlining of the dispute resolution process is necessary. We consider that in order to improve the predictability and efficiency of the compliance and enforcement process the most effective approach is to introduce a statutory duty to resolve disputes within a specific timeline. Additionally, OfReg should be required to published guidelines on the dispute resolution procedure and appropriate imposition penalties as soon as possible. Finally, it is of vital importance that OfReg resources the department responsible for regulation of the ICT industry, as well as that market's dispute resolution process and investigations, with the necessary, appropriate and sufficient expertise.

93. Aside from the recommended changes to process, it must be noted that C3 still awaits six determinations, dating back as far as 2014, each of which would most likely have been determined – in C3's favour – within four months of the decision request had the behaviour occurred in the United Kingdom. As illustrated in this report and the annex thereto, C3 remains severely financially and commercially disadvantaged whilst these disputes remain undetermined and the incumbent providers' behaviour remains unchecked. In circumstances such as these we consider it would be entirely appropriate that Cabinet should consider what powers are at its disposal to ensure that these disputes and others in future are resolved without delay.

Annex: Summary of Current C3 Disputes

#	Dispute	Decision request fee date and amount	Regulator	Summary of Dispute	Update since Decision Request made[1]	How matter would be treated under United Kingdom regime[2,3,4]
1.	2014 Datalink Dispute	8/1/2014 (KY$250)	ICTA	Facts - CUC entered into a master pole agreement (MPA) with C3 (at the time Infinity) in 2005. - CUC novated the agreement to Datalink (wholly owned subsidiary of CUC) in 2012. - DataLink occupies a monopoly position in respect of the Poles. - Attaching Utilities are the parties who have the right to attach to DataLink's Poles. - Lime (now Flow) was the first Attaching Utility to attach to the Poles, followed by C3, which therefore had the second-best position on the Poles. - Since 2005, DataLink and Logic became Attaching Utilities. DataLink allocated both DataLink and Logic preferable position, below C3's position rather than above it. - This leaves C3 at the top and therefore in the worst position on the Poles. - DataLink additionally unilaterally moved C3's attachment position to 258 inches, instead of the 254 inches that the MPA provides for. Issues	**No determination** **(67 months)** C3 remains in the worst position on the Poles and DataLink has increased the height of the position to 258 inches, against the terms of the MPA. C3 has suffered financial detriment in terms of delay and cost of make-ready work as a result. The decision therefore remains vital to C3's business.	Ofcom has the powers to impose conditions on stakeholders that have significant market power (section 78ffs of the Communications Act 2003). A common SMP condition imposed on the incumbent is to provide access to infrastructure on fair and reasonable and non-discriminatory terms. Ofcom's general duties also require it to further the interests of consumers in relation to communications markets, including by promoting competition (section 3 of the Communications Act 2003). Action taken to resolve a dispute would take this into consideration (i.e. Ofcom would consider the impact of stakeholder actions on the market/consumers). Ofcom has statutory powers to investigate potential breaches of the regulatory framework. Should Ofcom find a breach, it can impose

[1] In relation to provider disputes, the Office is currently under an obligation to act ***expeditiously***, taking into account the subject the matter of dispute and its own objectives and functions.

[2] The UK telecommunications regulator, the Office of Communications ("Ofcom"), is required, in accordance with section 188(6) of the Communications Act 2003, "where practicable … to make their determination before the end of a **four month** period, they must make it as soon in that period as practicable". Ofcom also adheres to their dispute guidelines (Dispute Resolution Guidelines for the handling of regulatory disputes (7 July 2011) https://www.ofcom.org.uk/__data/assets/pdf_file/0020/71624/guidelines.pdf) which set out the process that must be followed for each dispute. Following the receipt of a dispute, Ofcom will commence an enquiry phase (which typically lasts 15 working days) during which Ofcom considers: (i) whether the statutory grounds for a dispute referral have been met; and (ii) whether it is appropriate for Ofcom to handle the dispute. If, following this, Ofcom decides it is appropriate for it to commence formal proceedings, Ofcom will determine the dispute following consultation with, and taking account of any submissions from, the Parties to the dispute (and any other interested parties that have a view to the dispute). Upon receipt of a dispute, and the commencement of formal proceedings Ofcom must, except in exceptional circumstances, resolve the dispute within 4 months. Should Ofcom delay the decision-making process, stakeholders have a legal recourse to require Ofcom to adhere to its statutory duties.

[3] ***Note.*** Towerhouse LLP is a law firm – it is not a regulator and does not have investigative powers. Towerhouse has outlined in this note what it considers the likely outcomes of these disputes would be, should Ofcom have regulatory oversight over these issues. The views expressed in this note are based on the information we have, Ofcom's statutory powers, and the approach taken by Ofcom in the past. However, opinions set in this table should not be considered as determinative of what Ofcom would do.

[4] The factual summaries in this table have been provided by C3. The commentary in the last column is by Towerhouse LLP.

				- the height above ground at which C3 is required to attach their fibre optic cables to the Poles. - the order of attachments as between the four Attaching Utilities. <u>Submissions</u> - A higher position on the Poles is a worse position, for multiple reasons, including more delay and cost caused to the Attaching Utility by the increased safety make-ready work and strengthening make-ready work of a higher position. - As the second Attaching Utility, C3 should have a preferable position to DataLink and Logic. - DataLink has exploited its position as the "owner" of the Poles to secure itself a better position. - To access the poles, C3 must invest in bucket trucks, as the ladders purchased for a 254-inch-high Pole attachment will no longer be sufficient. - Datalink's behaviour is preventing C3 from performing its own Licensee commitment of providing island wide coverage by 2017. <u>Remedies requested by C3:</u> - declaration that C3 has a contractual right to attach to the Poles at a height above ground of 254 inches, rather than the 258 inches asserted by DataLink. - declaration that DataLink acted unlawfully in its allocation of space to itself and to Logic and requested the Office intervene in determining the rightful order. of. attachments. - declaration that C3 should be entitled to attach at 234 inches above ground, in the space immediately above that assigned to Lime (in respect of all Poles).		financial penalties; set out the action that the provider to take action to comply with the regulatory requirement they have breached; and/or, specify the actions it should take to remedy the consequences of the contravention. Ofcom's ability to impose financial penalties derives from section 392 of the Communications Act 2003. When determining the level of penalty to impose, Ofcom is required to adhere to its Penalty Guidelines.[5] ***<u>Note.</u>*** the above applies to all of the disputes referred to below. It seems likely that Ofcom would determine that DataLink had significant market power, and that DataLink would be subjected to SMP conditions, when operating within the relevant markets. Should a dispute be referred, it is very likely that Ofcom would accept the dispute, and that it would have been resolved within 4 months, rather than the issue remining outstanding after 67 months. The likely outcome would be that Ofcom would find that DataLink was not providing C3 with access to poles on a fair/non-discriminatory basis (i.e. that DataLink was acting in an unlawful way) and impose remedies to resolve this dispute. This would include requiring DataLink to

[5] Ofcom's "Penalty Guidelines – section 392 Communications Act 2003" can be found at: https://www.ofcom.org.uk/__data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf. Ofcom will consider the circumstances of the case in the round to determine the appropriate and proportionate amount of penalty. The main objective of imposing a penalty is deterrence. A few examples of the potentially relevant factors that Ofcom will consider are: the seriousness and duration of the contravention; the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants; any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention; whether in the circumstances appropriate steps were taken to prevent the contravention; the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring; any steps taken for remedying the consequences of the contravention; and whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); etc. Ofcom will also have regard to any relevant precedents, but may depart from them depending on the facts and context of the case.

						provide such access in a fair and reasonable manner, to be determined by Ofcom.
2.	2015 Flow (then Lime) Dispute	6/17/2015 (KY$850)	ICTA	<u>Facts:</u> - C3 has made multiple requests to Lime (now Flow) to share their underground duct space to access potential customers. - In 2014 and 2015 C3 made multiple requests to access the underground ducts, including a request to access Lime's West Bay Road duct and multiple requests in relation to Lime's Thomas Russell Way ducts. - C3 received no responses from Lime, until in April 2015 it submitted a request to access Lime's duct along Thomas Russell Way and received a quotation for access. - One year's access, as quoted, would cost C3 CI$41,710.39, plus its costs of installation. <u>Issue:</u> - The quotation received was priced so high as to discourage another licensee from sharing infrastructure . - As such Lime's behaviour was and remains anti-competitive. - Lime's refusal is preventing C3 from performing its own Licensee commitment of providing island wide coverage by 2017. <u>Remedies requested by C3:</u> - Lime to justify this cost or reduce, to allow other licensees to quickly roll out their services and provide redundancy.	**No determination** **(56 months)** For the Thomas Russell Way duct, C3 made an alternative arrangement to use poles instead of ducts. For the West Bay Road duct, Lime finally granted access – this took 16 months, during which time C3 had no access. There is a direct correlation between the failure to issue a determination in relation to a 2015 decision request and the matters complained of in the 2019 Flow request – there have been no consequences to Lime/Flow of their breaches, so breaches continue (and to be endemic in the market). In the meantime, C3 has lost significant potential business as a result because Flow has not been required to cease its anti-competitive behaviour.	Ofcom's duties and powers (row 1) are mentioned above. We also note that the UK is subject to the *Communications (Access to Infrastructure) Regulations, 2016 (SI. No. 700)*. This regulation created new rights over 'infrastructure operators' by allowing 'network operators' to seek to obtain information about, conduct a survey on and seek to gain access to the 'physical infrastructure' of that 'infrastructure provider', in order to reduce the costs of the rollout of high speed electronic communications services. Should a dispute have been referred to Ofcom, the very likely outcome is that Ofcom would have accepted this dispute and resolved it within 4 months (instead of it remaining unresolved after 56 months). The most likely outcome would have been that Ofcom would require Lime to provide access to its infrastructure on fair and reasonable terms and charges, resulting in more competition in the market, for the benefit of consumers. Given the frequent market reviews undertaken by Ofcom, in accordance with the regulatory framework, it is also likely that Ofcom would be reviewing the market on a forward looking basis and imposing SMP conditions on the stakeholders with SMP in order to encourage competition within the market.

3.	2015 Logic/ WestStar Duct Dispute	10/14/2015 (KY$750) 12/10/2015 (KYC$100)	ICTA	Facts Logic declined C3's request to share underground infrastructure from Eastern Avenue along West Bay Road due to insufficient capacity, safety and security and technical/engineering concerns. C3's strong belief was and remains that Logic's refusal was based on fear that subscribers would convert to C3. Issue/Submissions: - C3's strong belief was and remains that Logic's refusal was based on fear that subscribers would convert to C3. - Logic's License confirms under 17(2) that "*a Licensee shall not deny another Licensee access to its infrastructure arrangements*". - The Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 4(1) confirm that "*a licensee shall not refuse, obstruct or in any way impede another licensee in the making of any interconnection or infrastructure sharing arrangement*". - C3 makes the following submissions in relation to Logic's stated reasons for refusal: o Insufficient capacity: a third-party survey should be conducted to confirm whether the network can facilitate infrastructure sharing – Logic is retaining space for its own expansion at an indeterminate date; o Safety: Logic has not particularised this reason and should provide an explanation and examples; o Technical matters: Logic should particularise its reasoning. - Logic's refusal is preventing C3 from performing its own Licensee commitment of providing island wide coverage by 2017. Remedies (determinations) requested by C3: - An independent survey be conducted to confirm sufficient capacity. - Logic be required to comply with the Regulations	**No determination** **(54 months)** The Office directed the parties to instruct BSTG to conduct an independent inspection and report of availability in Logic's infrastructure in January 2016 so that the Office could "consider its next steps". However, after several months, C3 was forced to use Flow ducts instead as matters did not progress and C3 was losing business and therefore revenue as a result.	Noting Ofcom's powers and duties (row 1), and the regulations in force (row 2) (which mirrors those applicable in the Cayman Islands), it is likely that Ofcom would accept this dispute and resolve it within 4 months (instead of it remaining unresolved after 54 months). During the course of the dispute, Ofcom would likely have required Logic to provide (potentially on a confidential basis) the information regarding capacity, safety and technical matters relied upon by Logic. Depending on the output from Logic, Ofcom would take a view on whether Logic's response was reasonable in the circumstances. Should it consider that Logic has acted unreasonably, given its general statutory duties, it would likely require Lime to provide access on fair and reasonable terms and charges.
4.	2017 Datalink Dispute	4/26/2017 (KY$750)	OFREG	Facts - C3 entered into a master pole agreement (MPA) in 2005 with CUC. Under the MPA C3 is allowed to attach to CUC's poles, once they are ready for C3's attachment. - In 2006 and 2007 C3 made requests to attach to poles in the necessary form (as per the Agreement) as agreed between C3 and CUC. - As a result of the requests, CUC instructed UMC to undertake make-ready work.	**No determination** **(35 months)** C3 has access to the poles, but had to make significant duplicate payments to DataLink in order to get such access. DataLink charges	As detailed in row 1 above, Ofcom has the power to impose SMP conditions on the dominant provider. This includes, amongst other things, an obligation on that SMP provider to publish a reference offer, as well as providing network access on fair and reasonable terms, conditions and charges. This ensures that stakeholders are granted access to infrastructure

				- C3 was billed for the make ready work, in excess of CI$200,000.00. - In 2012, C3 was ready to attach. DataLink refused to allow the attachment on the basis that: o the make-ready had expired (note there is no clause allowing make ready to expire); and then o the make-ready work was unauthorized (though it was undertaken on CUC's instruction by their own certified contractor UMC). - DataLink refused access to the poles unless C3 provided permits. C3 noted that the permits must be issued by CUC. - DataLink confirmed that CUC (via UMC) had not completed the make-ready work and therefore could not issue the permits and as such C3 could not have access to the poles. This was the first time that C3 was made aware of any outstanding make-ready. <u>Issue</u> - C3 has not been allowed to attach to the poles on which is already paid more than CI$200,000.00 to make-ready. - DataLink has since charged C3 a second time for make-ready and reservation fees on the same poles. <u>Remedies (determinations) requested by C3</u>: - the poles C3 paid make-ready for 2006/7 permits be issued immediately, allowing C3 to attach. - if it is determined that further make-ready is required, DataLink bear all the cost for such make-ready. - DataLink refunds C3 for all the make-ready it has been charged for twice. - where CUC has replaced poles, those poles be made-ready at DataLink's expense. - determination on loss of revenue and operational costs that would have been generated by C3 (for the revenue) or not paid (for the operational costs) since the infraction. - determination that DataLink/CUC has abused its dominant position generally and is in breach of the MPA.	for make-ready each time C3 makes an access request despite the fact that they are meant to retain space for other providers. Without a determination, there is no deterrent for DataLink to continue to charge unfairly and in duplicate. In the meantime, C3 has lost significant potential business as well as the duplicated costs of make-ready because DataLink has not been required to cease its anti-competitive behaviour	on fair, and equivalent, terms. Ofcom regulatory reviews whether these conditions are fit for purpose as part of its market reviews. It is most likely that Ofcom would accept this dispute, and would have resolved it within 4 months, as opposed to there being no resolution within 35 months. It is also likely that Ofcom would find that DataLink has breached its SMP obligations to provide network access on fair and reasonable terms and charges, and mandate that it do so going forward. Ofcom would likely monitor DataLink's behaviour to ensure that it is complying with its mandate and take appropriate action if DataLink continues not to comply. As mentioned above, Ofcom may well – as part of its market reviews – have imposed SMP obligations on DataLink to try and level the playing field and mitigate DataLink's ability to abuse its SMP condition.
5.	2018 World Cup Dispute	6/19/2018 (KY$850)	OFREG	<u>Facts</u> Direct TV sublicensed certain rights to Logic for the 2018 World Cup. Logic did not have a license for an FTA channel. Logic granted the right to Channel 23 to Flow, allowing Flow exclusive access to broadcast all World Cup games. Logic refused C3 access to Channel 23. <u>Submissions</u>	**No determination** **(19 months)** Though the World Cup has passed, the behaviour remains persistent – in the absence of a determination,	Given Ofcom's general duties to promote competition (row 1), and that its regulatory and statutory purview extends to broadcasting, it is likely that Ofcom would investigate this conduct.

				Channel 23 is an OTA/FTA channel, and must be made available to any who asks for access to this channel. Logic did not have the right to refuse C3. The agreement granting exclusive rights to Flow was in breach of several clauses of Logic's regulatory license: o Clause 14 prohibits agreements which "have as their objective or effect the prevention, restriction or distortion of competition relating to any ICT service or ICT network subject to this law". o Clause 15 prohibits conduct "which amounts to the abuse of a dominant position in a market is prohibited if it may affect the trade of ICT network and ICT services within the Islands". Granting exclusive rights to Flow was in breach of as well as Cayman Islands legislation: o Section 66(1) of the Utility Regulation and Competition Law prohibits agreements "which have as their object or effect the prevention, restriction or distortion of competition". Any agreement, arrangement, or decision which is prohibited by 66(1) is void. o Section 70(1) of the Law prohibits conduct "which amounts to the abuse of a dominant position in a market is prohibited if it may affect the trade of ICT network and ICT services within the Islands". The practice of acquiring broadcast rights and not allowing access to the broadcast of the content unless you subscribe to a particular provider, is expressly prohibited in the United Kingdom. Logic was additionally in breach of its agreement with Direct TV, as it broadcast the content on Fox, CTV and TSN as well as Channel 23.	Logic and Flow regularly purchase rights to popular shows (America's Got Talent) and sporting events. As they do not have a local channel, they require C3 to block them, as a marketing tool to force customers to switch to their service to be able to watch the popular events. Flow and Logic have created channels (e.g. Flow Sports 2) and made them available on Flow and Logic cable Systems. As originally submitted, the relevant provider licenses and local legislation requires that all providers should have access. Without a determination, this behaviour will continue as there is no deterrent to providers and those providers who comply with the law, like C3 are left at a significant disadvantage. A determination is vital to deter future breaches of this nature. In the meantime, C3 continues to lose significant business and revenue.	Ofcom's guidelines for investigating breaches of broadcasting licences[6] sets out that, following an initial assessment (which is usually completed within 15 working days), and formally opening a dispute, Ofcom will generally complete its investigations within 50 workings days, as opposed to there being no resolution after 19 months. The likely outcome of this investigatory process is that Ofcom would find that Logic had acted in breach of its licence and would consider whether it should impose sanctions against the broadcaster. In considering whether, and which sanctions to impose, Ofcom would adhere to the "Procedure for the consideration of statutory sanctions in breaches of broadcast licences"[7], and Penalty Guidelines document.

[6] Ofcom's General Procedure for investigating breaches of broadcast licences, dated 03 April 2017 (https://www.ofcom.org.uk/__data/assets/pdf_file/0019/31942/general-procedures.pdf)

[7] Dated 03 April 2017 (https://www.ofcom.org.uk/__data/assets/pdf_file/0030/71967/Procedures_for_consideration.pdf). The sanctions available to Ofcom to include in its decision include: a direction for the broadcaster not to repeat a programme/advertisement; a direction to broadcast a correction; the imposition of a financial penalty; and/or a decision to shorten, suspend or revoke a licence. When considering the appropriate level of fine, Ofcom will also consult its Penalty Guidelines.

6-10	2019 Flow Dispute			This dispute relates to a series of failures of Flow to meet its infrastructure access obligations under relevant laws, in particular the Information and Communications Technology Law (2019 Revision) and the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations 2003, as follows:	**No determination** **(7 months)**	With respect to all of these claims, it is likely that Ofcom would have accepted this formal dispute and resolved it within 4 months (as opposed to the issue remaining outstanding after 7 months). We deal with the likely outcome for each failure below.
6.				**Failure 1: Flow failed to undertake duct clearance work following an infrastructure sharing agreement for duct access in a timely manner and for a cost orientated price** Facts: - C3 paid the deposit over two years before making the decision request - Flow has failed to: respond to access requests for several months; carry out surveys in a timely manner; provide requisite information regarding surveys; and carry out duct clearance work. - C3 is therefore unable to exercise its contractual (and regulatory) right to make use of the duct sharing services. Submissions: - Flow has breached its obligation to provide infrastructure sharing services in good faith and in a timely fashion. - Flow's actions constitute both a failure to process infrastructure sharing request in line with the Infrastructure sharing regulations, and a breach of Flow's obligation not to obstruct or in any way impede a licensee for making an infrastructure sharing arrangements. - Flow has overcharged C3 for this work. C3 Requests that: - Flow is mandated to carry out the necessary duct clearance work on the relevant route in line with Flow's obligations - Flow revises the invoice for this work and include a reduction of 50% of the price due to reflect Flow's severe delay in carrying out the work and a refund for the amount overcharged as determined by the Office.	There is no update in relation to Flow's conduct and no determination and, as such, the Dispute (and all failures noted) remains ongoing. No doubt there will be further behaviour that warrants a decision request in due course, as there is currently no penalty or deterrent in place for breaches of the law and regulations. In the meantime, C3 continues to lose significant business and revenue as a result.	**Failure 1:** This dispute raises similar issues to, and likely outcomes, as those in rows 2 and 3 of this table. The likely outcome of that dispute would be Ofcom requiring Lime to provide access to its infrastructure on fair and reasonable terms and charges. The issue of under or over payment (and any associated interest) would also be considered by Ofcom, and a determination made in accordance with section 190(d) of the Communications Act 2003 in this regard if required.
7.		7/2/2019 (KY$750)	OFREG	**Failure 2: Failure to comply with contracts due to sub-duct size issue along the Shamrock Road to Maya-1 landing station route** Facts:		**Failures 2 and 3 and 4:** these failures raise similar issues to those outlined at rows 2, 3 and

				- In 2017 the parties agreed verbally and by email that C3 would be permitted to use 1.5'' duct in the Shamrock Road to High Rock Landing station route instead of the contractually stipulated 1-inch sub-duct. - C3 undertook installation work under the supervision of a Flow representative. - Flow then claimed that C3 had breached the agreement and required C3 to pay three times the standard rental price for the access. - Flow has since refused to continue with other contractually mandated, unrelated work (duct clearance, survey work) until this is resolved, causing C3 to incur significant actual and opportunity costs. Submissions: - Flow must provide infrastructure sharing services in a manner that maximises the use of public ICT networks and enables competition in a timely and economic manner. - Flow has an obligation to provide infrastructure sharing services in good faith. C3 Requests that: - C3 is permitted to use its 1,5" sub-duct and cable as was agreed between the parties. - The Office should agree to act as an adjudicator to enable the parties to resolve the issue in binding mediation.		4 of this table. Given the regulations in place, and the prior written agreement between the parties, Ofcom would likely engage with the parties to understand capacity issues, and the associated costs (including the removal of redundant copper), and seek to find an outcome which meets its statutory obligations. It is likely that Ofcom would mandate Flow to provide access to Maya-1 on fair, reasonable and non-discriminatory term and charges. As part of Ofcom's market review, it may impose conditions regarding the landing station to ensure that all other stakeholders have access, to increase competition in the market for consumers.
8.				**Failure 3: Flow's failure to provide access to co-location facilities at the Maya-1 landing station and provide valid reasons for refusal.** Facts: - Flow, which owns the landing station, claims that it is not 'configured or designed' to allow C3 to install a 2RU switch and has no capacity to accommodate C3's equipment. - Flow refused C3's proposal to rent a space in the adjacent land, on the basis that Flow was 'reserving the space for future expansion'. - Flow has now agreed to reconsider, provided that C3 pays significantly inflated rents. Submissions: - C3 disputes Flow's reasons: the nature of a landing station is to enable connection between land cables and undersea cables and a third-party 2RU switch occupies very little space		

				- landing stations are significant bottlenecks in communications markets and allowing the national incumbent to control this strategic bottleneck will impair competition for the benefit of Caymanian consumers and businesses. - Best practice indicates that access seekers must be allowed within the landing station. C3 Requests that: o Flow be required to make C3 a viable commercial offer for co-location inside the Maya-1 landing station. o the Office ensures that one single market player does not control such a significant bottleneck.		
9.				**Failure 4: Flow's failure to allow C3 to install two fibre cables at the Maya-1 landing station, without providing a valid reason** Facts: - Following a duct survey carried out by Flow for duct access, Flow asserted lack of capacity outside the Maya-1 landing station and congestion at Bodden Town. - C3 identified sufficient space to install two fibre cables along the route instead. - C3 has failed to accept or consider this solution and has failed to provide any valid reason. Submissions: - C3 should be provided with duct access for this route because there is capacity in the route (30%) which is likely to increase once Flow removes the redundant cables as proposed. C3 Requests that: o Flow be mandated to provide infrastructure sharing services in relation to this route and to remedy any lack of capacity by removing any redundant copper cables along other sections of the route.		
10.				**Failure 5: Flow's failure to provide cost orientated duct survey estimates** Facts:		**Failure 5:** It is likely that Ofcom would request information from Flow to understand that basis

				- C3 requested Flow to carry out a number of surveys of its underground ducts in Grand Cayman. ▪ *Shamrock road:* paid by C3 in full (US$75,600) and completed by Flow on September 2017. ▪ *Frank Sound Junction:* Flow quoted CI$45,850 (segment one) and CI$ 11,900 (segment two). C3 is yet to accept these estimates and therefore the surveys have not yet been carried out by Flow. ▪ *Central Georgetown:* paid for by C3 in full (CI$26,600) on February 2019 and on 12 March 2019 Flow cancelled the work with no refund. Submissions: - The quotes and invoices are not "cost orientated, transparent and non-discriminatory". - While Flow have provided some information as to how they arrive at these cost estimates, it has not been sufficient, and Flow have not provided any reason as to why they have chosen to price surveys the way they do. - Given Flow's position in the market, and the incentive to price above cost, regulatory scrutiny as to how Flow prices is important - Flow's survey pricing and delay in the provision of this element of the service constitute a real barrier to competition C3 Requests that: - Flow required to revise the various survey estimates to ensure that they reflect costs in a transparent manner. - Flow required to provide cost orientated and transparent estimates going forward. - Further C3 Request: Costs be awarded to C3 for preparation of its submissions in accordance with 16(1) of the Dispute Resolution Regulations 2003		of the survey charges; as well as to better understand the basis for the agreement on costs/surveys so as to understand what is reasonable to pay in the circumstances. It is likely that Ofcom would require that the charges be set at a level that is fair and reasonable in the circumstances, and require Flow to undertake the relevant surveys. With regards to the costs of making the claim, Ofcom would consider whether it is reasonable to mandate the Flow pay costs.