

11 May 2018

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

Dear Mr. Myles,

Re: OF 2018-1 - Consultation on Consultation on Proposed Anti-Competitive Practices Rules

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

Ofreg question 1: What are your views on the proposed draft Anti-Competitive Practices Rules?

Flow response to Ofreg question 1: We understand a principal function of the Office, under the Utility Regulation and Competition Office Law (2016), is to "promote appropriate and fair competition" (see, Section 6(1)(b)). We find the draft Anti-Competitive Practices Rules to be a reasonable reflection of this responsibility, however, with an exception to the level of penalties specified in the draft Rules, which we elaborate in our response to Question 2, below.

Ofreg question 2: Do you agree with the level of penalties specified in the draft Rules?

Flow response to Ofreg question 2: We understand the maximum penalty, specified the draft Rules, Section 3(1)(b), is CI\$10 million and the minimum penalty, specified in the draft Rules, Section 3(1)(a), is CI\$10,000. Likewise, we understand the maximum penalty of CI\$10 million is maximum amount permitted by law, see URC Law, Section 80(7), whereas the minimum penalty of CI\$10,000 does not appear to have any basis in law. That is, there is no mention of a minimum penalty level in the URC Law, Section 80 or any other part of the URC Law.

Regarding the maximum penalty of CI\$3 million, we find the amount excessive and unreasonable. We understand this maximum amount is permitted law, but we do not believe that this justifies or condones its application. Absent an empirical basis, such as past history or legitimate suspicion of future misconduct, the application of this maximum amount is an unnecessary exercise of the Office's authority.

Regarding the minimum penalty of CI\$10,000, we observe the amount is not based on law and would thus appear to be arbitrary and unnecessary. There does not appear to be any mention in the URC Law, Section 80, about a minimum penalty of CI\$10,000 or any minimum penalty for that matter. We

are also unclear what worthwhile function a minimum penalty serves to protect consumers or deter misconduct.

Ofreg question 3: Please provide your views on any other matters you consider relevant to this Consultation?

Flow response to Ofreg question 3: We have no further views on this issue that we wish to share with the Office at this time.

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

Daniel Tatham
Interim Managing Director

c.c. David Cox, Vice President Regulatory Affairs, FLOW

Friday, May 11, 2018

Utility Competition and Regulations Office

Re - Consultation OF 2018-1 Proposed Anti-Competitive Practice Rules

Dear Sir

RUBiS Cayman Islands Ltd (RCIL) thanks OfReg for the opportunity to provide comments to the **Consultation on Proposed Anti-Competitive Practice Rules**.

Upon review of the Consultation document issued on 23rd March 2018, RCIL submits the following comments for consideration by OfReg. Note that the comments provided herein are not exhaustive and do not represent agreement nor a waiver of RCIL's rights.

Question 1: What are your views on the proposed draft anti-competitive practice rules?

In the countries where it operates, the Group strives to act with professionalism and integrity, in compliance with existing laws and regulations. Acting with integrity means rejecting corruption in all its forms, preventing conflicts of interest and insider trading, having respect for the individual, complying with the rules on competition, and engaging in sound management of environmental resources.

Rubis is keen to compete openly and fairly with its competitors in full compliance with the national and international competition rules that apply to the Group.

Question 2: Do you agree with the level of penalties specified in the draft rules?

There is a wide range of level of penalties specified in the draft rules (3(1) a and b). Further guidance should be provided on the process used to determine the level of penalty (based on damaged caused by the anti-competitive behavior for example).

Question 3: Please provide your views on any other matters you consider relevant to this consultation?

3.(3) 14 days to show cause why a penalty should not be levied may seem insufficient in case of further clarification or evidence required to prove a complex case

Further guidance is sought on the following

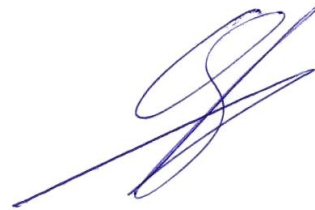
1/ Forum and modus operandi to appeal in case the penalty is deemed to be excessive in the circumstances,

2/ Individual vs Corporate accountability (in case individuals have anti-competitive behavior which are in conflict with the Company Code of Ethics),

We look forward to working with OfReg on this matter and hope that the aforementioned points will be duly taken into account.

Very truly yours,

Walter Sanchez
Managing Director
RUBiS Cayman Islands Lt





DIGICEL CAYMAN ISLANDS

RESPONSE TO:
OF 2018 – 1 – Consultation on Proposed Anticompetitive Practice Rules

18th May 2018

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

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

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

Jaynen Mangal

Senior Legal & Regulatory Counsel

Digicel Cayman Islands

Email: Jaynen.Mangal@digicelgroup.com

Mobile: +1(758) 724 0884

Introduction

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

While Digicel welcomes the opportunity to comment on the Draft Rules, we note that the consultation paper does not contain any reasoned basis or clear details, which explains the reasons for publishing the Draft Rules at this time. This makes it particularly difficult for Digicel to provide its constructive or substantive comments.

This may have been inadvertently left out due to an oversight by the Office, in which case Digicel would be grateful to obtain a copy of the reasons, market based research and analysis the Office relied on before drafting the Draft Rules. If, however, no such preceding document was procured, Digicel respectfully submits that the Office should seek to finalise such document and circulate the same to the industry for its review and comments before the Draft Rules are discussed further.

While paragraph 12 of the consultation paper, which precedes the attached Draft Rules, attempts to summarise the main objectives, it unfortunately falls well short of the level of detail expected before the industry can properly engage in a constructive consultation process on a subject, which would have significant impact on providers under the Act. It is common practice for explanatory notes to precede such regulatory consultations before any draft documents are released for industry engagement and consultation.

In the interim, however, and as required under Section D of the consultation paper, *Digicel's initial response* to the Consultation Questions follows (only in so far as it affects the telecommunications (and ICT) industry in the Cayman Islands).

Question 1: What are your views on the proposed draft Anti-Competitive Practices Rules?

Digicel is unclear as to the purpose of the Draft Rules. The Draft Rules as currently drafted appear to be a duplication of the powers that the Office already possesses under the Act. Digicel therefore questions the need for the Draft Rules at this time. Such duplication will only cause the industry confusion, particularly in situations where the Office may be called upon to reconcile between the Act and the Draft Rules, or where the Office is required to confirm, which would take precedence in cases of an infringement of sections 66 or 70 under the Act. Further, the Draft Rules do not appear to expand on any general powers or terms relating to processes the Office may rely on when setting penalty amounts as contained in the Act, other than to reiterate what is already contained in very broad and general terms, which is contrary to what the consultation paper sets out as being an objective of the Draft Rules.

For example:

- i. Section 80(3)(a) of the Act already gives the Office general powers to impose a penalty.
- ii. Section 80(7) of the Act already caps the maximum penalty that the Office may impose (KYD\$3,000,000).
- iii. Sections 76(1) and 77(1) of the Act empowers the Office to deliver written directions as it “considers necessary” to bring an end to infringements relating to sections 66 and 70 of the Act.
- iv. Section 78 of the Act gives the Office the right to apply to the court for an order against providers to comply with any directions the Office has issued, which direction it could be argued may already include the requirement to pay an imposed penalty within a specified time.
- v. Section 80(1) and 80(2) of the Act already gives the infringing provider the opportunity to comment on any decision or penalty being imposed by the Office.

These are all matters, which are already sufficiently provided for under the Act. With the exception of the introduction of a minimum penalty, which is discussed further below, the Draft Rules have in essence simply re-iterated the existing processes and terms. It would be useful if the Draft Rules explained and provided guidance on the proposed methodology of the Office when calculating penalties – similar to the European Commission’s Guidelines on the method of setting of fines.¹ In Digicel’s submission, given that the Office is empowered by the Act to impose financial penalties such a guidance on its methodology is required to give interested parties legal certainty.

Question 2: Do you agree with the level of penalties specified in the draft Rules?

As highlighted above, in terms of the ceiling or the highest amount that can be imposed by the Office as penalty towards an infringement (KYD\$3,000,000), this is already provided for under the Act and it remains unclear to Digicel why the Office seeks to iterate such powers that is already expressed under a primary legislation.

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

Digicel notes, however, that the Draft Rules sets a minimum penalty that may be imposed [KYD\$10,000] by the Office, which is not provided for in the URC Law.

Specifically, which section 80(7) of the Utilities Regulation and Competition Law, 2016 (the 'URC Law') provides that *"a fixed penalty... shall not exceed three million dollars"*, the URC Law does not empower the Office to mandate a minimum penalty. Section 82(1) of the URC empowers the Office to *"prepare and publish rules providing the appropriate amount of any penalty"* but this does not give the Office power to establish minimum penalties. In Digicel's respectful submission this attempt to establish a minimum penalty is ultra vires the Office and unlawful.

In addition, it appears arbitrary to set such a high minimum penalty, which applies generally to any and all infringements, regardless of how serious or trivial in nature the infringement may be. The Draft Rules do not explain why the Office believes minimum penalties are required or how the levels of such minimum penalties were established. Digicel believes that even if the Office had the statutory power to set minimum penalties, it would not be appropriate to set a minimum penalty of approximately US\$12,000 [KYD\$10,000] for minor infringements that could be easily cured. Digicel request that the Office shares the method by which it has established such a high minimum penalty for review and comments.

Finally, the establishment of minimum penalties is contrary to international best practice and public policy. Many jurisdictions which have established penalties for breaches of competition law provisions operate leniency regimes whereby a person (i.e. a real person or a corporate entity) that is a party to an anti-competitive arrangement with others can inform the relevant competition authority of the arrangement and in exchange receive full or partial leniency from any penalty, provided that person is the first to inform the competition authority of the arrangement. This is a very efficient way of deterring and detecting anti-competitive arrangements as it incentivises the parties to such an arrangement to inform the competition authority. Indeed, a regime where minimum penalties may be imposed without the possibility of leniency would have the opposite effect of incentivising parties to an anti-competitive arrangement not to inform the competition authority. For this reason Digicel believes that minimum penalties are counter-productive and the Draft Rules should not be issued.

Question 3: Please provide your views on any other matters you consider relevant to this Consultation.

Wording of the Draft Rules is discriminatory and outdated

The Draft Rules only reference the application of penalties to "licencees". However, sections 66, 70 and 80 of the URC Law reference 'sectoral providers'. 'Sectoral Providers' are defined in section 2 of the URC Law as *"a person whether or not an authorization holder, who provides goods or services in a sectoral utility"* (underline added).

Draft Rules that limit the application of penalties to “licencees” are discriminatory and, again, are ultra vires the Office.

This approach is also out of step with modern electronic communications markets. In today’s world licencees compete with unlicensed service providers that provide voice and messaging services via the Internet, for example through messaging Apps that may be used on smartphones, tablets or computers, as well as other providers of electronic communications services. It is unconscionable that licencees should be subject to the burden of compliance with competition law provisions, and subject to penalties for non-compliance, when their competitors are not subject to the same provisions and penalties. Indeed, many such Internet based electronic communications services have refused to apply for licences in jurisdictions around the world and have been party to egregious breaches of competition law.

Digicel believes that guidance on how the URC Law, including the competition provisions and penalties, can be applied to providers of services provided through the means of electronic communications that are based outside of the jurisdiction is urgently required in order to ensure that the competition law provisions and penalties apply to all providers of services in a non-discriminatory manner.

Draft Rules do not provide sufficient guidance and legal certainty

Digicel is generally supportive of rules and guidelines that are provided by the Office and, which clarify the Office’s intended application of the relevant legislation. However, any such rules and guidelines should be relevant to the current market context and be responsive to specific issues or problems that have been identified. In this case, with respect, it is not clear if any such basis for the promulgation of the Draft Rules have been provided. Digicel therefore requests that the Office provides additional information showing why the Draft Rules are needed and what market issues or problems have been identified and how the Office believes they will be resolved through the adoption of the Draft Rules. In particular, Digicel is interested to review the Office’s analysis demonstrating why a high minimum penalty is required and setting out the legal basis for this.

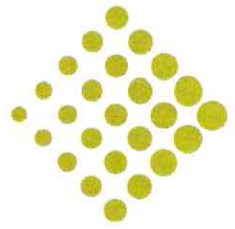
The Draft Rules should only seek to impose fines in serious cases of infringements, otherwise should set out more specifically the process that the Office will undertake in order to ascertain the gravity of infringements, and where it is not considered serious, set out other forms of penalties, for example, requirements for commitments, orders to stop the infringing act or behaviour, or publication of determinations and notices against the infringing provider. These have not been considered in the Draft Rules, where instead the Office has set an arbitrary range of the penalty amounts.

The Office has also not provided any basis for how it would calculate the penalty amount if a penalty is merited, and no analysis appears to have been done, for example by looking at certain principles for calculating fines, which may have included looking at the seriousness of the infringement, or the damage caused to the economy or to another person/entity, or even identifying an offenders’ individual situation.

While the Draft Rules does provide that any penalties imposed would be measured against the type or gravity of the infringement as well as the duration of the infringement, the Draft Rules fails to set out the parameters within, which these will be measured against or the factors that would be taken into consideration.

Digicel therefore welcomes the opportunity to review methods or guidelines the Office has identified that it would be guided by when calculating the amount to be imposed as a penalty especially given the high minimum penalty it has set under the Draft Rules. Digicel encourages the office to have regard to the need for transparency in applying any guidelines or processes.

For the reasons outlined above Digicel respectfully proposes that the Office reconsiders the Draft Rules.



May 18, 2018

Utility Regulation and Competition Office
PO Box 2502
3rd Floor, Alissta Towers
85 North Sound Road
Grand Cayman KY1-1104
CAYMAN ISLANDS

Re: OF 2018 – 1 – Consultation: Proposed Anti-Competitive Practice Rules

We refer to the OF 2018 – 1 Consultation launched by OfReg on March 23, 2018. Please find below the subject consultation response from DataLink, Ltd.

Question 1: What are your views on the proposed draft Anti-Competitive Practices Rules?

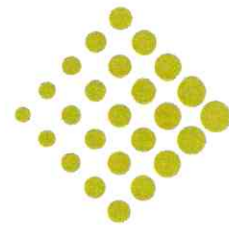
DL Response:

- 1) The factors which shall inform the perceived “*gravity and duration*” of an infringement are not stated. A set of criteria or ‘guidelines’ would be helpful. In this regard we note the separate but comparable ‘discretionary fine criteria’ which forms part of the recently introduced The Monetary Authority (Administrative Fines) Regulations, 2017. The ‘discretionary fine criteria’ beginning at Section 4 provides for general criteria which the Authority shall have regard to when exercising fine discretions and which we suggest is germane and accordingly an analogous set of criteria should be assigned to the draft Rules.

Question 2: Do you agree with the level of penalties specified in the draft Rules?

DL Response:

- 1) See response 1. It is not possible to comment on the appropriateness (or otherwise) of the level of penalties without understanding what criteria may apply to the Office’s determination of the amount of penalties attaching to certain infringements.



- 2) We consider that a minimum periodic penalty of \$5,000 per day may deprive the Office of the flexibility of imposing lower penalties on a licensee who commits either a minor infringement or where remedying an infringement may take a significant amount of time such that daily penalties of \$5,000 could be unreasonable. We note that section 4(3) provides for a lower total amount of periodic penalty to be imposed once a licensee has satisfied the relevant obligation. However, there does not appear to be a mechanism for a refund of any periodic penalties already paid in the interim period between the imposition of a penalty under 4(1) and a later determination that the total amount of periodic penalties should be lower under section 4(3). Removing the minimum level of periodic penalty and providing for a periodic penalty “up to \$25,000” will address these concerns.

Question 3: Please provide your views on any other matters you consider relevant to this Consultation.

DL Response:

- 1) Delete the definition of “*Affiliate*” as this does not appear elsewhere in the draft Rules.
- 2) Delete the definition of “*financial year*” as this does not appear elsewhere in the draft Rules.
- 3) Delete the definition of “*turnover*” as this does not appear elsewhere in the draft Rules.

Yours Sincerely,

Sacha Tibbetts

President & CEO

DataLink, Ltd.



May 18, 2018

Utility Regulation and Competition Office
PO Box 2502
3rd Floor, Alissta Towers
85 North Sound Road
Grand Cayman KY1-1104
CAYMAN ISLANDS

Re: OF 2018 – 1 – Consultation: Proposed Anti-Competitive Practice Rules

We refer to the OF 2018 – 1 Consultation launched by OfReg on March 23, 2018. Please find below the subject consultation response from Caribbean Utilities Company, Ltd (“CUC”).

Question 1: What are your views on the proposed draft Anti-Competitive Practices Rules?

CUC Response:

- 1) The factors which shall inform the perceived “*gravity and duration*” of an infringement are not stated. A set of criteria or ‘guidelines’ would be helpful. In this regard we note the separate but comparable ‘discretionary fine criteria’ which forms part of the recently introduced The Monetary Authority (Administrative Fines) Regulations, 2017. The ‘discretionary fine criteria’ beginning at Section 4 provides for general criteria which the Authority shall have regard to when exercising fine discretions and which we suggest is germane and accordingly an analogous set of criteria should be assigned to the draft Rules.

Question 2: Do you agree with the level of penalties specified in the draft Rules?

CUC Response:

- 1) See response 1. It is not possible to comment on the appropriateness (or otherwise) of the level of penalties without understanding what criteria may apply to the Office’s determination of the amount of penalties attaching to certain infringements.
- 2) We consider that a minimum periodic penalty of \$5,000 per day may deprive the Office of the flexibility of imposing lower penalties on a licensee who commits either a minor infringement or where remedying an infringement may take a significant amount of time such that daily penalties of \$5,000 could be unreasonable. We note that section 4(3) provides for a lower total amount of periodic penalty to be imposed once a licensee has satisfied the relevant



obligation. However, there does not appear to be a mechanism for a refund of any periodic penalties already paid in the interim period between the imposition of a penalty under 4(1) and a later determination that the total amount of periodic penalties should be lower under section 4(3). Removing the minimum level of periodic penalty and providing for a periodic penalty “up to \$25,000” will address these concerns.

Question 3: Please provide your views on any other matters you consider relevant to this Consultation.

CUC Response:

- 1) Delete the definition of “*Affiliate*” as this does not appear elsewhere in the draft Rules.
- 2) Delete the definition of “*financial year*” as this does not appear elsewhere in the draft Rules.
- 3) Delete the definition of “*turnover*” as this does not appear elsewhere in the draft Rules.

Yours Sincerely,

J.F. Richard Hew
President & CEO
Caribbean Utilities Company, Ltd.