



## Introduction

Do I agree or have comments regarding the draft Consultation on the proposed Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power? Please see my comments below as I have tried to be general to each question.

**QUESTION 1: Do you agree with the proposal to apply the principles in the Guidelines to both ex ante market reviews and ex post competition assessments? If not, please explain your reasoning in detail, along with providing supporting evidence.**

**Comment** -- I don't disagree, but to pull a true understanding of an ex ante and ex post market, there would need to be significant polling done to obtain an objective understanding of the market. Any assumptions made without true market understanding is subjective and will leave OFReg open to skepticism from peers, and market entrepreneurs.

**QUESTION 2: Do you agree with the Office's analytical framework for defining the relevant market (i.e. examining demand-side and supply-side substitution, and potential competition) and for determining the product and geographic dimensions of the relevant market? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**Comment** -- Again, this is the only way to fully understand the true dynamics of an industries market or potential market. But, where does the man power come from to capture and develop the analytics required to make such a determination? My only suggestion so far, is that if this document goes into legislation for approval, that there also be directives to staff this department with enough persons to effectively do the work required to develop the program and carry out the processes.

**QUESTION 3: In particular, do you agree with the proposal to use the SSNIP test to assess demand-side and supply-side substitution when defining the relevant market? If not, please explain your reasoning in detail, along with providing supporting evidence.**

**Comment --** I don't have a good answer for this part of the process, but there is no entity that can accurately forecast what a profitable move in price for product would be without intimate working knowledge of the businesses that make up the industry. Any attempt to do so would be purely subjective if the investigative entity.


**QUESTION 4: Do you agree with the Office's proposed competition analysis criteria or the framework methodology for determining Single Dominance? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**Comment --** There is no true method to ensure that each player gets an equal stake of the market demographics, but if everyone is playing by the same rules the market will divide itself up based on the ability of each entrepreneur's ability. This is especially true when a monopolistic finally falls to competition entering the market. Years of attrition will segregate the market.

**QUESTION 5: Do you agree with the Office's proposed competition analysis criteria or the framework methodology for determining Collective Dominance? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**Comment --** Again, the effects of this department will be solely based on the proper staffing of the department so that it can develop and manage the processes to achieve the desired results. Because making the determination on collective dominance is a tough practice in such a small demographic is a tough call. Again, the ability of a business to diversify is based strictly on its ability to fund the expansion to ensure growth. Growth is an indicator of a company's health, and a company this isn't growing is stagnate and soon to be declining. But, on the other hand, not every company wants to diversify, but to grow intrinsically for single dominance because of lack of funds or personal reasons. I don't have a solution to offer now.

**QUESTION 6: Do you agree with the proposal to use the HHI to gauge the degree of market concentration? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**



**Comment --** I agree, but with such a small market, the sampling could be potentially skewed and misleading with the results.

**QUESTION 7: Are there any other views that you consider relevant to the definition of relevant markets, the assessment of SMP and the scope of remedies? Please provide any other views you may have, along with any supporting evidence.**

**Comment --** We are a small country, with big regulation, and it appears that we have several government entities governing the same areas of market with conflicting regulations. From there regulation such as what is being proposed stifles business, and prohibits free market growth. I agree that regulation is needed to ensure that the market is being manifested fairly, but too much regulation can also cause a demographic, where only the strong can survive, which creates a monopolistic environment. We already see this in the automobile industry, chemical companies, and alternative energies. Most people would be shocked to know that everything being supplied to the world is controlled by a handful of meg-corporations. All I ask is that diligence and patience be exercised as this oversight department implements its processes.

## **Conclusion**

Albeit a great attempt to ensure there is market consistency, and opportunity for everyone in Cayman. There is still the issue of having the resources to roll out and implement this program throughout the Cayman Islands. If there is not extreme care given to foster this program, it will have a negative impact on businesses in Cayman and even make it harder for businesses in Cayman to be successful.



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June 1, 2017

Mr. J Paul Morgan  
Chief Executive Officer  
Utility Regulation and Competition Office  
3rd Floor, Alissta Towers  
85 North Sound Rd.  
Grand Cayman

Dear Mr. Morgan,

**Re: Consultation on Proposed Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power**

Digicel thanks the Utility Regulation and Competition Office ("OfReg") for the opportunity to submit its comments on the Consultation referred to at caption.

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

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

**Question 1: Do you agree with the proposal to apply the principles in the Guidelines to both ex ante market reviews and ex post competition assessments? If not, please explain your reasoning in detail, along with providing supporting evidence.**

We believe that the Guidelines can generally be applied to both ex ante and ex post forms of regulatory intervention. However, as in our observations in response to Question 7 below, although the Guidelines can be used for both purposes, we do not believe that the electronic communications market in the Cayman Islands are such that ex ante market reviews would necessarily be appropriate at this time

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

Given the dynamics of the market in Cayman, Digicel believes that an ex-post approach to competition law supervision would be sufficient to deal with any market failures or anti-competitive harms that might arise and would allow limited regulatory resources be focused on those areas of activity that serve to increase the levels of access to services throughout Cayman.

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

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

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

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

**Question 2: Do you agree with the office's analytical framework for defining the relevant market (i.e. examining demand-side and supply-side substitution and potential competition) and for determining the product and geographic dimensions of the relevant market. If not, please suggest a reasoned alternative approach along with any supporting evidence.**

Digicel agrees that it is necessary to first undertake a market definition exercise before OfReg engages in any ex ante market review and SMP assessment and before ex post interventions in relation to anti-competitive behavior. Any sensible theories that can be applied in these cases have as their implicit foundation an assumption about the number and identities of the main firms in the market. Digicel also agrees that any market definition exercise must take into consideration both demand and supply side substitution and potential competition and that these assessments must be made in relation to both the product and geographic dimensions.

However, although market definitions are critical, it is important to recognize that a market definition exercise is not an end in itself but merely a key step identifying competitive constraints. In addition, it must also be recognized that sometimes the borders that classify the various markets might be imprecise. Therefore, it might not always be appropriate to adopt the narrow approach that all the products in the relevant market must be substitutes for each other. Rather, the more useful approach would be to consider a full range of economic substitutes and to consider the aggregate effect of those substitutes in undertaking competitive analysis.

We also note the position set out in paragraph 5.6:

*From an economic perspective, in defining the relevant market, demand-side substitution represents the most immediate and effective disciplinary force on the supplier of a given product or service. The Office will therefore place significant importance on demand-side substitution when conducting a market definition exercise.*

In this regard, we wish to make the following points:

- The Guidelines must recognize more explicitly that market definition is an empirical and not a theoretical exercise. The definition of a market depends not only on the empirical magnitude of just how much substitution there would be but also on the precise level of marginal costs of the product in question. It is not necessary that all customers are able and willing to change from product A to product B in order for product B to be included in the same market as product A. As long as the number of customers who are ready to switch is sufficiently large to render a price rise unprofitable (i.e. where the volume of revenues lost exceeds any cost savings that might be incurred)
- Pricing decisions (where a firm must set a uniform price for all similarly situated users, such as the regulated ICT industry in Cayman) are essentially a trade - off between the set of marginal (price sensitive) customers and the set of infra-marginal customers (those who are not willing or able to switch to a substitute). A price increase leads to additional revenues from infra-marginal customers but at the cost of losing profits from the marginal customers. Therefore, when making an assessment as to demand-side substitution, it is important for OfReg to note that the individuals who count are those who would switch away in response to the price increase. With uniform pricing, the fact that the vast majority of customers would not switch in response to a 10% price increase does not mean that the supplier has market power. This is particularly important where survey data is used to establish market definition e.g. where based on a commissioned survey of 10,000 customers, 75% of customers said they had no choice to use product A as products B and C were not viable substitutes. To come to the conclusion that product A alone is a defined market would effectively ignore the 25% of persons who said that they would switch to products B or C and with the switch, the revenues lost from that 25% may cause the total revenues of the price raising firm to fall substantially to the point of unprofitability. This would depend, of course on the level of marginal costs saved as output falls.
- Geographic and product considerations are not the only dimensions that can be relevant to market definition. Since market definition is a way of classifying the dimensions of competition or anti-competitive conduct, OfReg should be open to the fact that other factors may be relevant and should be prepared to expressly recognize as many of these factors as possible in the Guidelines. One such factor is the time of service delivery. For example, in markets that are prone to hurricanes, the value of a fixed line telephone service to the consumer during the months of June to November may be very different than during the rest of the year.

As it relates to the geographic dimensions of the market, paragraph 7.1 of the Consultation document defines the *relevant geographic market as the area in which the undertaking/s concerned is/are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently*



*homogenous and can be distinguished from neighboring areas where the conditions of competition are appreciable different.*

Based on this definition and of the relative size of the Cayman Islands we are not sure as to the extent to which geographical considerations would be considered to be relevant from a geographical perspective, especially where the License conditions of electronic service providers contain provisions to ensure that minimum levels of service are provided notwithstanding geographical differences. Although we do not believe that geographical considerations would be entirely without value in the Cayman Islands, we wish to caution against the including in the Guidelines provisions which are likely to generate a reasonable expectation that geography is bound to be applied in any market analysis to the extent where the outcome is likely to be an artificial one or to distort market realities.

According to paragraph 6.10 of the Consultation document, *once the relevant product (or service) market is defined, the geographic market will be defined in order to properly assess the conditions of effective competition.* Based on this, it would appear that OfReg proposes to identify the product market and geographic market as two separate determinations.

Digicel considers that the SSNIP test should be applied to all applicable dimensions of a relevant market and in this regard, the determination of the product and geographic dimensions ought to be seen as an integrated process. Again using the simplistic example above, if a monopolist over Coke on the first floor of a shopping mall attempted to charge a premium, consumers may switch to either Pepsi on the first floor or Coke on the second floor. The substitution to Pepsi on the first floor would be a product dimension consideration while the substitution to Coke on the second floor would be a geographic dimension issue. Therefore, for the SSNIP to be accurate the product and geographic dimensions must be applied simultaneously.

**Question 3: In particular, do you agree with the proposal to use the SSNIP test to assess demand-side and supply-side substitution when defining the relevant market? If not, please explain your reasoning in detail, along with providing supporting evidence.**

We generally agree that the SSNIP test should be used to assess demand-side and supply-side substitution when defining the relevant market. We note the proposal to consider consumer reaction to a non-transitory price increase of 5-10% over a period of 12 months.

Our comments in relation to Question 2 above also apply here.

OfReg should recognize that the SSNIP test does not necessarily lead to a unique solution, especially since, in practice the next closest substitute is not always obvious. In addition, since market definition is not an end by itself, depending on the purpose of the market review e.g. ex ante assessment of SMP or an ex post investigation into an abuse of dominance, a different type of market definition might be appropriate.

Using a simplistic example, assuming that Coke and Pepsi are very close substitutes but there is also some competitive interaction with Sprite. The question to ask would be whether Coke could profitably charge a 5-10% price increase over a period of 1 year (or whether it would not be profitable to do so because customers would switch to Pepsi). If the answer is yes, then the market would be expanded to include Pepsi i.e. hypothetical monopolist over all branded premium cola drinks and the same question asked.

For an abuse of dominance investigation, it might make sense to start the SSNIP test with Coke, then add Pepsi, and then add Sprite. However, if there is a proposal for Coke to merge with Sprite, the better approach would be to apply the SSNIP test and ask the question in relation to a market consisting of Coke and Sprite (although Pepsi is the next closest substitute). It would not be logical to conclude that Coke and Pepsi allow a profitable SSNIP and therefore, there is no horizontal overlap because Sprite is not in the same market.

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

**Question 4: Do you agree with the Office's proposed competition analysis criteria or the framework methodology for determining Single Dominance? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

In paragraph 9.3, we note what appears to be the presumption of single dominance in the case of undertakings with market shares of over 40%. Paragraph 9.4 then goes on to list the criteria to be applied for a finding of single dominance. Although the Guidelines recognize that a determination of dominance cannot be made upon a consideration of market share alone, it appears that the proposal is to place undue emphasis on market share relative to the other factors listed.

Rather than placing additional weight on market share in finding of dominance, Digicel believes that greater emphasis needs to be placed on the assessment of barriers to entry and expansion. Barriers to entry are central to many competition issues that relate to concerns as to the effects of concentration of suppliers in a market. A lack of major impediments of barriers to entry or expansion would thwart any attempts to abuse or to persist in the abuse of market power. An efficient entrant would sooner or later challenge the person holding market power and bring about competition for the benefit of consumers. Therefore, these are the core issues that OfReg should try to detect and treat with under these Guidelines rather than market share.

**Question 5: Do you agree with the Office's proposed competition analysis criteria or the framework methodology for determining Collective Dominance? If not, please suggests a reasoned alternative approach, along with any supporting evidence.**

Throughout Part 10 of the Consultation document, it is not clear whether the intention is that an assessment of joint dominance would depend on the existence of at least tacit collusion between or among the market players. In our view, based on what is proposed i.e. what appears to be a random consideration of all the criteria listed in paragraph 10.3, it would, in fact, be possible for a finding of joint dominance to be made in relation to distinct market players who operate in the same market, each of whom could be considered to be dominant even if the other player did not exist.

Digicel believes that for a finding of collective dominance to be made, it is imperative that the collective exercise of market power must be as a result of explicit or tacit collusion between the parties. In this regard, three elements are required:

- i. Agreement about the nature of co-operation and objectives that can be achieved;
- ii. A mechanism or process to achieve the agreement; and



- iii. A need to monitor adherence to the agreement and a mechanism to punish anyone who deviates.

**Question 6: Do you agree with the proposal to use the HHI to gauge the degree of market concentration? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

Digicel generally agrees with the proposal to use HHI to assess market concentration. However, the Guidelines must also recognize that HHI does not provide a full picture of the competitive situation. For one, it does not take into account important features of a market such as barriers to entry or the extent of spare capacity or capacity constraints that can fundamentally affect the competitiveness of a market.

Consider for example three firms A, B and C with market shares of 60, 30 and 10 respectively. A merger of B and C would be a 3-2 merger that would increase the HHI from 4,600 to 5,200 with a delta of 600 and, as such would raise prima facie concerns. However, in markets where critical mass is important, it could be though that both firms B and C were weak players pre-merger and that the B/C merger created a more effective competitor to firm A, closing the gap from 30 % to 20 % and creating a more effective competitor to the dominant firm A.

Alternative methodologies such as using a Competitive Benchmark approach may yield more reliable assessments of market conditions.<sup>1</sup> As such the guidelines should not limit the consideration of market structure to measures of concentration using HHI.

**Question 7: Are there any other views that you consider relevant to the definition of relevant markets, the assessment of SMP and the scope of remedies? Please provide any other views that you may have, along with any supporting evidence.**

We wish to make the following general observations:

- i. Digicel recognizes that the URC Law makes provision for the publication of criteria relating to the definition of markets against which market power may be assessed for the purposes of a determination of significant market power (SMP). However, even after such criteria is published after this consultation process, we do not believe that it should be a priority for OfReg at this time to embark on ex ante market reviews and SMP determinations. These exercises are extremely time and resource-intensive both for OfReg and for the operators involved and at this stage of development of the electronic communications sector in the Cayman Islands, can only be justified to address market failure. Therefore, although it is commendable that OfReg proposes to establish these Guidelines at this time, we believe that they would be most justifiably applied ex post to the investigation of and the determination of possible occurrences of anti-competitive conduct.
- ii. Another general observation that we wish to make is that throughout the Consultation document, we note that OfReg has consistently reserved the right to change various aspects of the Guidelines upon mere notice or to consider any other criteria or items of evidence for which provision is not made in the Guidelines.

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<sup>1</sup> <https://www.criterioneconomics.com/docs/evaluating-market-power-using-competitive-benchmark-prices-rather-than-herfindahl-hirschman-index.pdf>

Although we agree that the Guidelines should be sufficiently dynamic to allow OfReg to regulate a rapidly evolving space, the purpose and intent of the Guidelines should be firstly to provide the industry and indeed the public as a whole with a minimum degree of certainty as to how OfReg proposes to regulate the markets that fall under its purview. These Guidelines should serve to provide the required degree of transparency into the OfReg's decision-making process thereby rendering its policies and determinations more robust and less susceptible to challenge. If after consulting on these Guidelines, OfReg may then arbitrarily change any of these Guidelines, merely by giving reasons, then the whole purpose of this Consultation would be defeated.

Therefore, although we recognize that these Guidelines are not binding, if there is a need to depart from the Guidelines in any material respect, there must be another consultation process by which amendments to these Guidelines are proposed and put out for comment. In addition, if OfReg wishes to consider other criteria other than those for which express provision is made in the Guidelines, there must be some measure, set out in the Guidelines, as to what would make such criteria "relevant". If there is no attempt to set these measures in advance, the opportunity would be too great for OfReg to arbitrarily apply any criteria which are not at all accounted for or prescribed by these Guidelines.

iii. We also note that the draft Guidelines provide that:

*It should be noted that the definition of SMP in the URC Law refers to a "sectoral provider" and other related provisions in the URC Law refer to "undertakings". The term "undertaking" is not defined in the URC Law. However, the term "sectoral provider" is defined in the URC Law as "a person, whether or not an authorization holder, who provides goods or services in a sectoral utility" and the term "sectoral utility" is defined as "a utility market or sector for which the Office has specific responsibility under any sectoral legislation".*

*The Office therefore considers an undertaking to be a person engaged in economic activity in a sectoral utility. The Office considers sectoral providers to be a type of undertaking and references in the draft Guidelines to the term "undertaking" should be taken to mean "sectoral provider" unless the context requires otherwise.*

If a sectoral provider need not be an authorization holder but must merely be person who provides goods or services in a sectoral utility, then any market definitions and SMP assessments conducted in accordance with these Guidelines must necessarily take into consideration the impact in the various markets of unregulated OTT service providers who provide services using the networks of licensed network operators in the Cayman Islands and the public demand for such services. Not only is this required by the URC Law but the market realities are such that the proliferation of unregulated OTT's have influenced the demand for different types of services and the development of new technologies and have essentially changed the paradigm of network/services markets to a converged space. Therefore, to ignore the effect of unregulated OTTs and their service providers in any market assessment would certainly result in an artificial outcome.

iv. These Guidelines make provision for:

- a. The definition of markets
- b. The conclusion of determinations, whether ex ante (SMP/dominance) or ex post (finding of anti-competitive conduct; regulatory approval of a merger etc.)

c. The imposition of remedies or conditions

It is our expectation that every stage of the process outlined above, as an administrative determination of public significance, should be subject to a separate consultation process.

Yours sincerely,



Raul Nicholson-Coe

CEO

**CABLE & WIRELESS (CAYMAN ISLANDS) LIMITED  
COMMENTS ON**

**PUBLIC CONSULTATION ON  
PROPOSED GUIDELINES ON THE CRITERIA FOR THE DEFINITION OF  
RELEVANT MARKETS AND THE ASSESSMENT OF SIGNIFICANT MARKET  
POWER**

(Ref: OF 2017-2 - Consultation)

By E-mail to: [consultations@ofreg.ky](mailto:consultations@ofreg.ky)

**01 June 2017**

## I. INTRODUCTION

Cable and Wireless (Cayman Islands) Limited, d/b/a FLOW (“**FLOW**”) is pleased to provide the following comments and responses to the questions presented in the Utility Regulation and Competition Office’s (“**Ofreg**”) consultation document “Proposed Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power” (OF 2017-2 – Consultation), dated 1 May 2017. In the following section, we identify the seven questions in the consultation document. Following each question, we provide our comments and responses to that question.

## II. CONSULTATION QUESTIONS

**QUESTION 1: Do you agree with the proposal to apply the principles in the Guidelines to both ex ante market reviews and ex post competition assessments? If not, please explain your reasoning in detail, along with providing supporting evidence.**

**FLOW response to QUESTION 1:** FLOW agrees that the proposed principles set forth in the Guidelines are relevant to both an assessment of SMP (ex ante market reviews) and an evaluation of alleged anti-competitive conduct (ex post competition assessments).

FLOW also agrees that an assessment of SMP must take “a forward-looking view of the relevant market, taking into account how competition within that market may develop over the review period” (Guidelines, ¶3.4). However, we disagree with the proposed conclusion in the Guidelines that ex post evaluations of alleged anti-competitive conduct are retrospective in nature. (Guidelines, ¶3.5 “Ex post competition assessments are therefore retrospective in nature.”)

Both an assessment of SMP and evaluation of alleged anti-competitive conduct are fundamentally informed by a market’s *future* prospects. Just as potential harm to consumers from SMP is predicated on a firm’s future ability to maintain dominance, an assertion of anti-

competitive conduct is only valid or credible if the strategy has a reasonably certain probability of subsequently succeeding.

For example, consider any type of exclusionary allegation. A strategy to exclude competition, such as predatory pricing, is only credible or, more importantly, harmful to consumers if the alleged predating firm has a sufficiently certain prospect of (1) actually excluding competition and (2) forestalling re-entry for the foreseeable future. Evaluation of these criteria require a forward-looking view of the relevant market. Any strategy with intent to exclude that does not also have a reasonable certainty of achieving both of these forward-looking criteria is not anti-competitive, but pro-competition and pro-consumer. After all, the purpose of the anti-competition measures in the Guidelines is not to protect competitors, but to protect and promote competition, and in no case can such a determination be made based only on retrospective information.

**QUESTION 2: Do you agree with the Office’s analytical framework for defining the relevant market (i.e. examining demand-side and supply-side substitution, and potential competition) and for determining the product and geographic dimensions of the relevant market? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**FLOW response to QUESTION 2:** FLOW agrees with the Office’s proposed analytical framework for evaluating demand-side substitution. We agree that the evaluation consider “a range of products or services” and “focus[] on the interchangeability of products or services from the (marginal) consumer’s point of view.”

This is an important principle and warrants elaboration. Identifying reasonable substitutes must not be limited to considering perfect substitutes, or identical services. After all, in very few (if any) cases are two services identical. All that is necessary to achieve demand-side substitution is that services be reasonably interchangeable in use.

Furthermore, it is the marginal consumer that is relevant. That is, it is not necessary for *all* customers to view two services as reasonably interchangeable for the services to be in the same



relevant product market or to provide effective competition. All that is necessary is that a sufficient number of customers, over time, would be willing to switch between the services so that the producers potentially exert competitive pressure on one another. For example, it is not necessary for every consumer to have a wireless connection, let alone to drop their wireline connection for wireless to be an effective substitute for wireline service in the market. While some customers may not consider wireless to be a good substitute or may never consider using wireless service, all that is necessary is that enough customers view them as substitutes to exert pricing discipline overall. One of the powerful virtues of competition is that when one service exerts competitive pressure on another, all consumers benefit, even those who would never consider switching. As explained by Bishop and Walker in one of the leading textbooks on competition economics:

*[I]t is not necessary for all or even most customers to switch, or for those customers that do switch to switch all of their purchases to render the attempted price increase unprofitable. It is sufficient that enough switching takes place so that the attempted increase in price is not profitable ... what matters is not the behaviour of “average” customers, but the behaviour of “marginal” customers (i.e. those most likely to switch in response to relative price changes).<sup>1</sup>*

FLOW agrees with the proposed analytical framework for evaluating potential competition and supply-side substitution. However, we believe that further elaboration or guidance on these principles in the Guidelines may be warranted. FLOW believes that an evaluation of supply-side characteristics of the market is central to an analysis of competition in telecommunications markets. In assessing the competitive discipline faced by a company in any market, but especially one with the dynamic characteristics such as telecoms, it is relevant to determine the “ability” of competitors to bring services to the market, either by entering the market as a newcomer, by growth, or by expanding from the provision of related services in the same area. In economic terms, such an inquiry is termed an assessment of barriers to entry or expansion.

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<sup>1</sup> Simon Bishop and Mike Walker, *The Economics of EC Competition Law*, Third Edition, paragraph 4-011.

It is important to consider entry and expansion barriers in evaluating competition because, as a general matter, when entry and expansion barriers are low, markets are often thought to be effectively competitive even if there is little observable competitive activity. Markets *can* be highly competitive even if entry barriers are substantial, which is why an examination of entry barriers alone is not generally dispositive of whether effective competition exists. When entry barriers are low, however, such measures are less important, and other information – particularly that which tests the lack of entry barriers – is much more relevant.

**QUESTION 3: In particular, do you agree with the proposal to use the SSNIP test to assess demand-side and supply-side substitution when defining the relevant market? If not, please explain your reasoning in detail, along with providing supporting evidence.**

**Flow response to QUESTION 3:** FLOW agrees with the Office’s proposal to use the SSNIP test as a framework to evaluate substitution when defining the relevant market. FLOW does not believe, however, that a highly quantitative application of the SSNIP test is practical or achievable in this context. That is, in many cases, it is difficult or impossible to determine quantitatively how responsive consumers are in their purchases of one product to a change in the price of another, because of the stringent data requirements for such an analysis. As a result, a pragmatic approach that is consistent with the SSNIP test and how we believe the Office is proposing to implement the SSNIP test is to focus on whether two services are reasonably interchangeable in function and use. Or to use the Office’s language, the purpose is to determine the “interchangeability of products or services from the (marginal) consumer’s point of view.”

We believe this means that the ultimate determinant of whether products are competitive substitutes is whether they have the ability – actual or *potential* – to take significant amounts of business away from each other. Thus, when determining the relevant market, and when determining whether a particular service “counts” or not, one needs to determine, from the consumer’s viewpoint, the extent to which one service may displace another and thereby serve as a constraint on pricing.

Criteria that are often employed to determine interchangeability of use, and which would be relevant to an evaluation of telecoms markets, are:

- Whether the services appear to serve the same or similar function from a customer's standpoint;
- Whether customers view them as reasonably equivalent; and/or
- Whether they are objectively similar from a technical standpoint.

Other relevant evidence includes:

- Whether they are sold in the same marketing channels;
- Whether competitors market their services as a substitute for those of the ILEC; and
- Whom the providers view their competitors to be.

**QUESTION 4: Do you agree with the Office's proposed competition analysis criteria or the framework methodology for determining Single Dominance? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**Flow response to QUESTION 4:** FLOW agrees with the Office's proposed competition analysis criteria for determining Single Dominance (Guidelines, ¶9.4), and conclusion that "a position of dominance cannot be established by solely considering market shares" (Guidelines, ¶9.3).

FLOW is concerned and confused, however, by the Office's statement that "concerns about dominance may occur without the existence of a large market share" (Guidelines, ¶9.3). The economics literature is clear on this issue; namely:

- while high market share is consistent with market power, such evidence, by itself, is not sufficient to conclude the presence of market power;
- in contrast, low market share (if properly estimated) is a sufficient indicator of a lack of market power and a lack of necessity for further analysis.

Therefore, we ask the Office to clarify this statement and identify the circumstances in which a firm with low market share may prompt concerns about dominance.

**QUESTION 5: Do you agree with the Office's proposed competition analysis criteria or the framework methodology for determining Collective Dominance? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**Flow response to Question 5:** FLOW does not have objections to, or questions or comments on, the Office's proposed competition analysis criteria for determining Collective Dominance.

**QUESTION 6: Do you agree with the proposal to use the HHI to gauge the degree of market concentration? If not, please suggest a reasoned alternative approach, along with any supporting evidence.**

**Flow response to QUESTION 6:** FLOW does not have objections to, or questions or comments on, the Office's proposal to use HHI to gauge the degree of market concentration.

**QUESTION 7: Are there any other views that you consider relevant to the definition of relevant markets, the assessment of SMP and the scope of remedies? Please provide any other views you may have, along with any supporting evidence.**

**Flow response to QUESTION 7:** At this time, FLOW has no other views or further comments on the Office's proposed Guidelines, other than those expressed above in our responses to questions 1-6.

### **III. CLOSING REMARKS**

70. Kindly send any communication in relation to this consultation to:

**Victor Salgado**  
[victor.salgado@cwc.com](mailto:victor.salgado@cwc.com)

**David Cox**  
[david.cox@cwc.com](mailto:david.cox@cwc.com)

**END DOCUMENT**



1 June 2017

VIA EMAIL

Utility Regulation and Competition Office ("URCO")  
85 North Sound Road  
Alissta Towers, 3<sup>rd</sup> Floor  
Grand Cayman KY1-1104  
Cayman Islands

Re: In response to OF 2017-2 Consultation – Proposed Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power.

Dear Sir/Madam:

On behalf of WestTel Limited (trading, and hereafter referred to, as "Logic"), we are writing this letter to provide comments regarding the subject matter raised in the "Consultation on Proposed Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power" dated 1 May 2017.

For ease of reference we adopt the defined terms set out in the Ofreg draft Guidelines.

Under the URC Law, we understand that certain regulatory powers and responsibilities are provided to Ofreg in respect of the ICT sector in the Cayman Islands. We further understand that the Guidelines for determining SMP are a prelude to multiple consultations that will actually determine the existence of SMP, the necessity of any remedies that might be needed to deal with SMP (whether they are ex ante or ex post), and the implementation of SMP remedies, if deemed necessary.

With regard to the Guidelines, we have no specific comment as to wording or concept. We do, however, want to provide general comments as follows:

- 1) ICT industries are constantly evolving and changing. Not too long ago, a cellular network only carried voice, as did traditional copper networks. Subscription TV ran over your dedicated coax/satellite connection to a television in your living room. In the last decade or so, those traditional technological paths have been disrupted. Fiber, copper, coax and wireless all carry data packets, and those packets may be voice, video (TV or streaming), music, and all other forms of content, that may be watched or heard on your phone, tablet or computer. In this converging dynamic environment, it is very difficult to apply static regulatory rules. By way of example, even if the Guidelines are used to determine SMP in markets as they are today, how long will that determination remain accurate? Less than 5 years ago, Netflix, YouTube, Apple TV and other platforms for streaming media (legally authorized or otherwise) were not perceived as direct substitutes for subscription TV over traditional network platforms. Today, they form

some of the most significant competitors to Logic's subscription TV offerings. Tomorrow, spectrum policy and advances in wireless could significantly change things again.

- 2) The regulatory regime being implemented, which includes the Guidelines and the SMP process, is demanding an increasing amount of resources from all industry players. Whether these resources are outsourced or internal, whether they are legal or operational, the burden of regulatory participation takes time, focus and funding away from the actual ICT operations. Participation in each consultation is a costly undertaking for all competitors, incumbent or otherwise. We wanted to raise this issue as it should be seriously considered as we commence what appears will be a very involved process.
- 3) In addition to the increasing burden of the regime, we are concerned that the Guidelines suggest an increasingly complex set of rules in a market that has previously thrived under a light touch regulatory approach. This is concerning as regulatory complexity inevitably leads to unintended consequences, and introduces uncertainty into investment decision-making. Our capital program has been predicated on the current regulatory regime, under which we are confident of our competitive advantage and market positioning. As the shift in policy seems to favour more interventionist policies, it is unclear whether we will be able to reap the benefits of our current and future investments.
- 4) As the Guidelines highlight, Part 7 of the URC Law provides for ex ante market reviews, which are different than the ex post competition assessments under Part 12. For the reasons cited above, we are reluctant to support a process leading to ex ante remedies. Our experience in other markets suggests that an ex ante regulatory regime tends to proactively protect those competitors who are not willing to invest in their own facilities. While we understand that the Guidelines are still only guidelines, and we are still a long way from determining the actual need for remedies, we wanted to clearly state our preference for an ex post approach over an ex ante set of rules. In our view, a lighter touch approach that is empowered by a strong commitment to ex post enforcement of competition rules is the right solution for the evolving ICT industry in the Cayman Islands. Ex ante remedies often seek to create unsustainable competitive models and should be avoided.

We look forward to working with the OfReg in this process and hope that the aforementioned points are duly taken into consideration.

Sincerely,



Rob McNabb  
CEO – Logic Communications