

CABLE & WIRELESS (Turks & Caicos Islands) Limited
Response to TCI Commission Consultation Document
On
Telecommunications (Competition) Regulations

May 31, 2017

Flow's Response
TCI Commission Consultation titled 'Telecommunications (Competition) Regulations'
May 31, 2017

SECTION I

1. INTRODUCTION

1.1. Cable & Wireless (Turks & Caicos Islands) Limited, trading as Flow, welcomes the Opportunity to respond to the Turks and Caicos Islands Telecommunications Commission (the “Commission”) Consultation Document on Telecommunications (Competition) Regulations (the Consultation) published April 19, 2017 and to which responses are to be submitted by May 19, 2017.

1.2 Cable & Wireless will also be denoted as ‘C&W’.

1.3 Flow expressly states that failure to address any issue raised in the Consultation Documents does not necessarily signify its agreement in whole or in part with any position taken on the matter by the Commission or respondents. Flow reserves the right to comment on any issue raised in the Consultation Document at a later date. The responses contained herein are preliminary and subject to change as better information becomes available.

1.4 All responses to this submission should be sent to Mrs. Delleriece Hall at delleriece.hall@cwc.com and Ms. Melesia Sutherland at melesia.campbell@cwc.com.

SECTION II

2. FLOW'S RESPONSE TO COMMISSION'S QUESTIONS

2.1 Flow's response to the Commission's questions will follow the pattern of stating the Commission's question and then responding as follows:

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

2.2 The Commission has cited the following failings of the existing competition framework in the Turks & Caicos Islands:

- i. The competition related provisions in the Ordinance are generally broad in scope and deal primarily with ex-ante regulatory and certain merger control measures.
- ii. The Ordinance is largely silent on ex-post regulatory measures related to anti-competitive conduct, although generally broad provisions to prohibit anticompetitive conduct are found in the telecommunications and spectrum licenses (the "Licences")
- iii. There is no competition legislation of general application in TCI and the Commission is unaware of any plans by the Government to enact such legislation or to establish a specialized Competition Agency ("CA") that would administer such legislation.

2.3 The Commission has stated that, in the context of paragraph 2.2, the objectives of the proposed regulations are to:

- i. provide a more comprehensive and unified competition legal framework for the telecommunications sector in TCI;
 - ii. provide a framework that reflects current internationally-accepted competition principles;
 - iii. provide a framework that is appropriate to the existing legal and administrative framework; and
 - iv. provide a framework that is proportionate to TCI's relatively modest size.
- (v) The Commission concludes that it *'considers that the adoption of the Proposed Competition Regulations will serve to fill a long-standing gap in the regulatory framework in TCI and, in doing so, it will provide the Commission with the tools required to better promote competition and the interests of consumers in TCI.'*

2.4 In Flow's assessment, the Commission already has the legal framework for a comprehensive and unified competition framework in the TCI as set out below:

2.5 With regards to this consultation, the relevant functions of the Commission in the Ordinance are:

Functions of Commission

4. (1) *The functions of the Commission are—*

(c) to regulate telecommunications in the Islands in accordance with the policy guidelines published in the Gazette from time to time and in accordance with the principle of technological neutrality;

(d) to facilitate, maintain and promote effective and sustainable competition in telecommunications;

(f) to promote the interests of consumers and to encourage licensees to operate efficiently;

(i) to give advice and directions to a licensee with respect to anticompetitive practice or behaviour;

(k) to instruct the Director General to conduct research into the quality and standard of service of a licensee, and into tariffs or any anti-competitive behaviour;

2.6 In relation to prohibiting ex-post anti-competitive conduct by any licensee, the Ordinance provides for the following conditions to be embedded in each licence:

Conditions in a licence

14. *A licence granted under section 13 shall include conditions—*

(a) which appear to the Commission to be appropriate;

(b) to prevent anti-competitive behaviour in telecommunications markets including—

(i) engaging in anti-competitive cross-subsidisation; and

(ii) not making available timeously to other licensees technical information about essential facilities and commercially relevant information which are necessary for them to provide telecommunication services;

2.7 With regards to a dominant licensee, the Ordinance provides for the following ex-post provisions:

Dominant licensee

16. (1) *The Commission may make a determination that a licensee is dominant in relation to the establishment, operation or maintenance of a telecommunications network or service.*

(2) *Before making a determination under subsection (1), the Commission shall—*

(a) *hold a meeting to consider the status of the licensee under this section;*

(b) *provide reasonable notice of the meeting to the licensee;*

(c) *provide the licensee with the opportunity to make submissions to the Commission regarding its status under this section; and*

(d) *provide the licensee with the reasons for any determination made with respect to that licensee under subsection (1).*

(3) *Where a licensee has been declared dominant by the Commission under subsection (1), the licensee may subsequently apply to the Commission to be classified as not dominant.*

Conditions in dominant licensee's licence

17. *Where the Commission decides in accordance with section 16 that a licensee is dominant in relation to the provision of telecommunications service or the establishment, operation or maintenance of a telecommunications network, the Commission may include in the licence conditions—*

(a) *regulating the operations of the licensee;*

(b) *regulating the rates which may be charged by that licensee for telecommunications services or a telecommunications network in accordance with section 28;*

(c) *requiring the licensee to publish its rates for telecommunications services or in relation to a telecommunications network, in the market in which the licensee is dominant;*

(d) *that rates for services, or in relation to a telecommunications network provided, to all users shall not be discriminatory; and*

(e) *with respect to the provision of international services and the settling of accounts with respect to those services.*

2.8 With regards to 2.2(i) and 2.2(ii) ,it is necessary for the competition provisions in both the Ordinance and the Licence to be sufficiently broad in scope to provide flexibility and allow for adaptation over time. So it is not a failing, as the Commission seems to think, that they are so structured. Under current provisions, the licence conditions imposed on Flow and other licensees in TCI permits the Commission to police anticompetitive conduct. The Terms of Cable & Wireless' Licence include both ex post and ex ante competition safeguards and also makes provision for the Commission to issue guidelines.

2.9 With reference to 2.2(iii), it is because of the absence of economy wide competition legislation that it became necessary for telecommunications sector specific competition regulations to be included in the Ordinance. This is generally the approach taken where economy wide competition regulations are absent. So, the absence of economy wide competition legislation does not deny the Commission the ability to implement competition safeguards for the telecommunications industry which are provided for in the sector specific competition provisions.

2.10 The Ordinance has empowered the Commission to promote effective competition and to embed conditions in each licence to achieve the objectives of the Ordinance. Indeed each licence issued in TCI has section 14(b) embedded. In Flow's view, the Commission already has a robust legal framework to address competition issues.

2.11 We take the view that the Commission does itself and policymakers in the TCI a disservice by making it appear that the competition provisions in the Ordinance are insufficient, lack robustness and do not provide the tools required by the Commission to promote and enforce competition

2.12 As we have outlined above, the current legislative framework provides broad and flexible rules for elaborating ex ante, sector specific rules which achieve the objective of promoting fair competition in the market. The Commission has not cited one specific instance of failure of market entry, or described any specific cases of market failure or collapse which could be directly attributable to the anti-competitive conduct of licensees so the more fundamental question is whether sector specific competition laws are required; whether the Commission would be the appropriate agency for implementation of enforcement of such laws; and finally whether there are any prevailing market conditions which justify the need for such laws. Flow's view is that the answer to each of the foregoing questions is "no."

2.13 Put simply, there appears to be no urgent legal or economic basis for the enactment or promulgation of economy-wide or even telecoms specific competition laws in the TCI as the Commission is proposing. . Moreover, the Commission should bear in mind that the creation of a slew of sweeping and specific anti-trust or competition law rules will result in a massive and substantial expansion in the scope and responsibilities of the staff of the Commission, requiring a significant influx of financial resources to enable the Commission to properly police this area of law. In short, new staff will need to be hired and training to develop the technical skills and expertise will be very expensive. Weighed against the likelihood of potential, occasional breaches, this would be a

significant waste of telecoms regulatory resources. These resources would no doubt need to be provided by the industry with higher fees, and lead to the ballooning of the Commission's budget which is not currently justified by prevailing market conditions.

2.14 In any event, even if the policy of the Government of the TCI were to introduce a competition authority of some kind, the telecoms regulator would not be the appropriate agency to discharge such a function. International best practice suggests that telecoms regulatory agencies should continue to be mandated to exercise a sector specific role, focus on regulation of the telecoms sector using a range of tools developed specifically for addressing the telecoms market. Economy wide or even sector specific competition law rules should never be the responsibility of a telecoms regulator. This would burden the telecoms regulator by significantly expanding the scope of its remit and responsibilities. It would dilute its focus away from pure telecoms regulation into areas of law which it would be ill-suited to police. And it would ultimately lead to inefficient regulation of the sector and higher costs for licensees. Under the Ordinance the Commission does have sufficient tools to promote competition but it was never intended that the Commission would become a competition authority.

2.15 Put simply, TCI does not need a competition authority at this time, but even in the event that such an authority was desired, it should be established as a separate institution with its own mandate, resources, and technical expertise, and its remit should include the entire economy of TCI, not just the telecoms sector. Prior to taking such a decision or considering whether such an institution should be set up, the Government of the TCI should think carefully about the cost of establishing and maintaining such an institution versus the practical instances in which it might actually be needed in TCI. Flow thinks such a body would have very limited opportunities to work.

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

2.16 Flow does not agree that regulations or guidelines would assist in further defining the scope of the competition provisions of the Ordinance and Licences. In our view, the existing legal framework is not lacking and that it a mischaracterisation for the Commission to make the framework appear disjointed and shambolic.

2.17 In terms of its preferred options, the Commission stated in its *‘Fixed Service Price Regulation Review’*, dated January 13, 2013 that ¹*...it plans to promulgate sector wide competition guidelines that would apply to all services provided under the Ordinance. The objectives of such competition guidelines would be to fill the legal gap in the telecommunications sector due to the absence of any economy-wide competition legislation in TCI.* Flow agrees that the Commission can issue Guidelines and as the Commission has acknowledged the issuing of regulations is reserved for *‘...the Governor, acting with approval of Cabinet...’* [Section 65(1)]. However, per our earlier comments, we do not regard these guidelines as necessary at this time, and further, we believe that articulating competition rules would result in an expensive and unnecessary expansion in the remit and mandate of the Commission that would detract from its core mission as a telecoms regulator and would do so in circumstances where the need for such new powers and responsibilities has not been established.

2.18 We do not believe that issuing Guidelines rather than Regulations does any violence to the Commission’s objectives as any Guidelines, like Regulations, would still have to be guided by the empowering Ordinance. Regulations cannot introduce rights, powers, requirements and consequences that are not already provided for in the Ordinance. In a similar fashion, the Commission cannot legally adopt guidelines giving it substantive powers in an area which is not expressly provided for in the Ordinance. For clarity, we agree that the current ordinance provides for the Commission to exercise certain ex ante powers which have the effect of promoting market competition and ensuring fair practices by licensees. The Commission can issue guidelines on these. However, the Commission is proposing adoption of ex post powers for the purpose of sanctioning and otherwise policing anti-competitive conduct in the market. The two things are related but not the same. We believe that the second type of authority is not expressly provided for in the Ordinance.

2.19 For the avoidance of doubt, Flow does not regard the issuance of either Regulations or Guidelines as legally permissible at this time, since the subject matter of Regulations or Guidelines would be to give the Commission substantive anti-trust/competition law competencies and powers which the Ordinance does not envisage. It would be unlawful to create or abrogate new powers for the Commission which are not explicitly covered by the enabling legislation. In any event, we do not believe such powers are desirable for a telecoms regulator, and further, that a competition authority

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or substantive competition rules are even required for TCI at this time. Put another way, we do not believe that the issues meets a basic cost versus benefits analysis, discussed in paragraphs 2.13 to 2.15 above.

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

2.20 To reiterate, the Commission does not have authority to issue Regulations or Guidelines since the subject matter of Regulations or Guidelines would be to give the Commission substantive anti-trust/competition law competencies and powers which the Ordinance does not envisage. All comments on the proposed Guidelines/regulations themselves are therefore without prejudice to this position.

2.21 Flow will address any structural issues in its comments on the various Parts.

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

2.22 Any provisions included in Part I must be such provisions that are already provided for in the Ordinance.

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

2.23 Any provisions provided for in this part must be compatible with the Ordinance, which is the enabling instrument. Flow's comments are as follows:

Section 4 – Determination of a Dominant Licensee

Section 16 of the Ordinance provides the pillars for assessing dominance:

Dominant licensee

16. (1) The Commission may make a determination that a licensee is dominant in relation to the establishment, operation or maintenance of a telecommunications network or service.

(2) Before making a determination under subsection (1), the Commission shall—

(a) hold a meeting to consider the status of the licensee under this section;

(b) provide reasonable notice of the meeting to the licensee;

(c) provide the licensee with the opportunity to make submissions to the Commission regarding its status under this section; and

(d) provide the licensee with the reasons for any determination made with respect to that licensee under subsection (1).

(3) Where a licensee has been declared dominant by the Commission under subsection (1), the licensee may subsequently apply to the Commission to be classified as not dominant.

2.24, dominance cannot be determined prior to following an established process. So the Commission cannot propose at paragraph 4(2) that a consideration for whether a provider is dominant is whether that provider is already dominant ‘*..in one or more relevant markets..*’ This would be pre-judging an outcome before even following the required steps. This is procedurally incorrect. Further 4(2)(b) of the proposed Regulations references an ex ante remedy for dominance, which is not itself a determinant of dominance. This provision is also incorrectly placed in the proposed Regulations. The Ordinance does not provide for dominance to be determined simply by making it a licence condition independent of following an agreed process. The exception is C&W’s agreed dominance designation which is pursuant to Section 62 of the Ordinance:

62. The Commission in the discharge of its functions under this Ordinance shall in relation to Cable and Wireless (West Indies) Limited act in accordance with the Agreement made between the Government and Cable and Wireless, (West Indies) Limited the date of which shall be published in the Gazette and Cable and Wireless (West Indies) Limited shall carry out its obligations, and duties under the said agreement.

2.25 Section 4(2)(b) should be removed in its entirety from the proposed Regulations because it is not in keeping with the Ordinance.

Section 7 – Dominance Assessment Criteria

2.26 All of Section 7, Dominance Assessment Criteria, are the considerations that impact on market definition and substitutability. These should properly be incorporated under Relevant Market Definition at Section 6 rather than appearing to be a new step in the process.

2.27 Section 7(1)(g) of the Regulations should be removed because it allows the Commission unqualified discretion. The particular methodology and approach to determining dominance could evolve over time but even so at no time should a determination of dominance be influenced by ‘*any other factors that the Commission considers appropriate*’.

Section 8 – Dominance Determination or Review Process

2.28 With regards to paragraph 8(1), the Ordinance does not provide for ‘any other person’ to initiate a dominance review. Accordingly this needs to be removed from the Regulations.

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

2.29 With regards to Forbearance the Ordinance establishes the following:

Forbearance by Commission

29. (1) The Commission may make a determination to refrain in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under this Part to a telecommunications service provided by a licensee, where the Commission finds as a question of fact that to refrain would be consistent with the telecommunications policy objectives of the Islands.

(2) Where the Commission finds as a question of fact that a telecommunications service provided by a licensee is or will be subject to competition sufficient to protect the interest of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under this Part in relation to the service.

(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service.

(4) The Commission shall declare that any provision of this Part does not apply to a licensee to the extent that the provision is inconsistent with a determination of the Commission under this section

2.30 The Ordinance makes provisions for both competition remedies and a forbearance provision. Neither invalidates the other. For reasons that are unclear, the Commission has labelled this a ‘dual approach’ and seeks comments on whether the Ordinance should be amended to simplify this ‘dual approach’. We do not believe that there is a ‘dual approach’ nor a ‘dual approach’ which the Commission’s question suggests could be conflicting. Flow does not see a conflict. The Ordinance provides various tools to deal with competition issues and provides a forbearance provision. Regulation is to be applied where it is warranted and forbearance is to be applied where it is warranted. There is nothing wrong with the Ordinance, in this regard, that would necessitate an amendment.

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

2.31 All provisions in Part IV, as with the other Parts, must be compliant with the Ordinance. If the Ordinance does not grant authority for the Commission to impose financial penalties, the Commission cannot impose such penalties. As the Commission is only empowered to issue Guidelines, it is hardly likely that any penalties could attach to the guidelines.

2.32 With regards to Section 5(b) the Ordinance does not give the Commission the ability to direct ‘...the divestiture of assets or shares...’ This provision is ultra vires the legislation.

2.33 Section 20, ‘Misleading Representations’, is outside the scope of the Proposal and should be removed in its entirety.

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

2.34 Part V is outside the scope of the Proposal. In any event there are no provisions in the Ordinance that deals with Mergers and so this entire section is ultra vires the Commission’s authority. Section 20 of the Ordinance addresses ‘*Transfer of Licence*’.

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

2.35 Flow has no additional proposals, at this time, for inclusions in the Proposed Regulations.

SECTION III

3. CONCLUSION

3.1 The Commission does have the tools, in the Ordinance and Licenses, that it needs to promote competition and to protect the interests of consumers in the Turks & Caicos Islands. The framework already exists. The Commission may choose to issue Guidelines, however the Commission does not have authority to issue Regulations or Guidelines where the subject matter of

Regulations or Guidelines would be to give the Commission substantive anti-trust/competition law competencies and powers which the Ordinance does not envisage.

END