Decision Notice 2017-10
Telecommunications Competition Guidelines

issued by the

Turks and Caicos Islands
Telecommunications Commission

November 30, 2017

1 Introduction

Together with this Decision, the Turks and Caicos Islands Telecommunications Commission (the "Commission") is issuing the Telecommunications Competition Guidelines 2017 (the "Guidelines"). With the issuance of the Guidelines, the Commission is furthering the overall objective of the *Telecommunications Policy 2013* (the "Policy"), namely to "ensure that all consumers and businesses in TCI have access to quality telecommunication services at reasonable rates, in a fully competitive marketplace".

The purpose of the Guidelines is to describe the Commission's general approach to exercising its jurisdiction over competition-related matters in telecommunications markets in the Turks and Caicos Islands ("TCI"). They complement existing competition-related provisions set out in the *Telecommunications Ordinance 2009* (the "Ordinance"), associated Regulations as well as the Telecommunications and Spectrum Licences ("Licences") issued pursuant to the Ordinance. The Guidelines develop the conceptual framework and criteria that the Commission will use in any future application of the above-noted competition-related provisions.

This Decision culminates a seven month proceeding that the Commission initiated on 19 April 2017 when it issued a consultation document on proposed *Telecommunications (Competition) Regulations* (the "Proposed Competition Regulations"). On 14 August 2017, the Commission issued a decision on the Proposed Competition Regulations and simultaneously initiated a follow-up consultation process on proposed Telecommunications Competition Guidelines (the "Proposed Competition Guidelines"), referred to herein as the "August Decision" and "August Consultation Document". As explained in the August Decision, the Commission decided not to proceed with the finalization and Government approval of the Proposed Competition Regulations, but to issue Telecommunications Competition Guidelines instead. The August Consultation Document sought parties' comments and suggestions regarding the Proposed Competition Guidelines.

In finalizing the Guidelines the Commission took into consideration parties' Responses to the August Consultation Document, which were received from the following two parties:[1]

- Cable & Wireless (Turks & Caicos Islands) Limited (referred to herein as "Flow"), dated 14 September 2017.

- Digicel TCI Ltd. ("Digicel"), dated 18 September 2017.

The Commission wishes to thank both Flow and Digicel for their detailed Responses to the August Consultation Document. Both parties offered a wide range of comments and suggestions regarding the Proposed Competition Guidelines that the Commission found to be very helpful, constructive and supportive in nature.

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[1] Copies of the Responses are available to the public on the Commission's website http://www.telecommission.tc/Completed-Consultations.html.

In the balance of this Decision, the Commission summarizes parties' comments and suggestions regarding (i) preliminary issues, (ii) general matters, (iii) structure of the Guidelines and (iv) specific proposed changes to the Guidelines. In each case, the Commission provides its response to and, as necessary, conclusions on parties' comments and suggestions. Where appropriate and to the extent relevant, the Commission has incorporated parties' suggestions in the final Guidelines. Each of these aspects of the Responses is addressed in following sections.

2 Preliminary Issues

Digicel noted in the cover letter to its Response that the Commission had failed to acknowledge in the August Decision that Digicel had filed a Reply Response in the consultation dealing with the Proposed Competition Regulations.

The Commission notes that it did receive an email from Digicel dated June 16, 2017 (two days after the reply comment filing deadline of June 14, 2017). In that email, Digicel stated that it "has no comments or submissions in addition to those submitted on May 31, 2017" (i.e., Digicel's initial Response to the consultation on the Proposed Competition Regulations). Digicel also reiterated two high-level summary points regarding its initial Response. Therefore, given that Digicel clearly stated in its email that it had no further comments or submissions on the Proposed Competition Regulations and, moreover, offered no reply comments on other parties' Responses, the Commission saw no reason to treat it as a formal Reply Response in the context of the consultation dealing with the Proposed Competition Regulations.

3 General Matters

In its Response, Flow reiterated its views initially expressed in the consultation on the Proposed Competition Regulations that a "sector-specific" approach to competition laws, regulations or guidelines is sub-optimal relative to a general-purpose or economy-wide approach. Further, Flow also suggested that the adoption of sector-specific competition laws, regulations or guidelines could potentially produce macro distortions to investment, innovation and economic development.

In response, the Commission agrees that it would be beneficial to have economy-wide competition laws, regulations or guidelines in place in TCI; however, the fact of the matter is that they do not exist at this point in time and, to the Commission's knowledge, will not be forthcoming in the near or intermediate term. At the same time, it must be recognized that there has been a long-standing gap in the Commission's regulatory framework with respect to the procedures to be followed to address competition-related matters. For instance, the Licences state that the Commission "will issue" Guidelines to address competition matters. The Guidelines that the Commission is now issuing with this Decision will serve this purpose, and they are also intended to provide greater regulatory clarity, certainty and transparency regarding the treatment of competition-related matters subject to the Commission's jurisdiction.

The Commission disagrees with Flow's assertion that sector-specific competition laws, regulations or guidelines would necessarily be sub-optimal or harmful at a macroeconomic level. No evidence or examples were provided by Flow to support this claim. In the Commission's view, competition laws, regulations or guidelines typically require some degree of modification to be properly adapted to sector-specific characteristics and circumstances. Any such modifications would be expected to improve their applicably and, therefore, would not be sub-optimal as suggested by Flow. The Commission developed these Guidelines so that they comply with the legal and administrative framework in TCI generally and existing competition-related provisions specifically, are proportionate to TCI's relatively modest size, and are consistent with current internationally-accepted competition principles. The issuance of competition guidelines is a common practice followed by regulatory authorities and competition agencies worldwide.[2] Therefore, the Commission does not agree with Flow's characterization of sector-specific competition laws, regulations or guidelines.

In the cover letter to its Response, Digicel acknowledged the "non-binding" nature of the Guidelines and also that the Commission would have the authority to review and amend the Guidelines as appropriate. Digicel also agreed that the Guidelines should be "… sufficiently dynamic to allow the Commission to regulate a rapidly evolving environment". However, Digicel also suggested that "… if there is a need to depart from the Guidelines in any material respect, there must be a subsequent consultation process by which amendments to these Guidelines are proposed and put out for comment". Further still, Digicel suggested that "… if the Commission 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'."

In response, the Commission agrees that if any substantive or "material" changes to the Guidelines were to be considered by the Commission in the future, it may well be appropriate to seek comment on any such changes through a public consultation process. At the same time, however, it should be recognized that the Guidelines are intended to provide sufficient flexibility for the Commission as well as interested parties to propose new factors or criteria that could be considered, where appropriate, in individual cases before the Commission. That is the nature of guidelines. Accordingly, the Commission does not consider that a separate, advance public consultation process to change the Guidelines would be necessary or appropriate in such cases.

4 Structure of the Guidelines

The first Consultation Question in the August Consultation Document asked parties to provide their views on the structure of the Proposed Competition Guidelines, indicating for instance whether any elements or sections could be added or deleted and, if so, supporting rationale for any proposed structural changes was also requested.

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[2] See footnote 11 in the August Consultation Document for a listing of examples.

4.1 Flow's Response

Flow offered several proposals regarding structural changes to the Proposed Competition Guidelines:

i) It claimed that the focus on "dominance" in the Guidelines is out of step with trends in the sector. It suggested that the focus should be on the sector trends toward increased competition and, therefore, "non-dominance". Consequently, it suggested that the Guidelines should focus on or include separate sections on "Non-Dominance Determinations" and "Forbearance Determinations".

ii) In this same regard, Flow suggested that a separate section for "Forbearance Determinations" should be included in the Guidelines, and the distinction between non-dominance and forbearance be clarified to a greater degree.

iii) Flow also suggested that the Section 3 on Ex-Ante Remedies and Section 4 on Anti-competitive Practices and Agreements be reversed. Flow was of the view that this structural revision would create a more logical ordering of the sections of the Guidelines.

In response to Flow's first suggestion, the Commission notes that Section 2 on Dominance Determinations is intended to apply equally or symmetrically in the case of dominance and non-dominance determinations. In other words, the Guidelines can equally be used to re-assess an existing dominance designation or conduct a dominance assessment where no dominance designation currently exists. Therefore, the Commission considers the current "Dominance Determination" labeling for Section 2 of the Guidelines to be appropriate as is and also consistent with standard competition-related terminology practice in other jurisdictions. That said, for the avoidance of doubt, the Commission has added a new provision to sub-section 2.2.2 of Guidelines clarifying, that the Guidelines equally apply to dominance and non-dominance determinations.

In response to Flow's second suggestion, the Commission disagrees that a separate section be created in the Guidelines for Forbearance Determinations. Section 3 of the Guidelines deals with ex-ante remedies which apply only in the case of a Licensee found to be dominant. Therefore, dominance is a prerequisite for the application of any ex ante remedy(s). At the same time, the existence of dominance in a relevant market does not imply that an ex ante remedy(s) must apply. It may be the case that the Commission finds that it is appropriate to refrain in whole or part from the application of ex ante remedies in a relevant market where dominance is found. Consequently, the Commission is of the view that the criteria relating to forbearance determinations appropriately belongs under the broader section heading of section on ex-ante remedies (i.e., Section 3 of the Guidelines). Accordingly, the Commission has made no changes to the structure of Section 3 of the Guidelines.

The Commission notes Flow's comments suggesting that further elaboration be provided on the distinction between non-dominance and forbearance – i.e., sub-section 3.3.4 of the Guidelines. The Commission has reviewed this sub-section and has made a number of corresponding clarifying changes. First it has made a clearer differentiation between the general factors that the Commission would take into account in considering whether to pursue a forbearance or a non-dominance approach (paragraph 57) and the specific considerations related to case at hand (new

paragraph 58). Further, the Commission has added a second consideration to paragraph 58 (in addition to the pre-existing data-related consideration) related to expected market trends.

In response to Flow's third suggestion, the Commission disagrees that a re-ordering of Sections 3 and 4 of the Guidelines would be helpful. Section 3 is directly related to Section 2 (on dominance determinations) in that it deals with ex-ante remedies applicable where dominance exists. On the other hand, Section 4 addresses matters related to the abuse of dominance as well as anti-competitive practices or agreements, which in the latter cases can apply to either dominant or non-dominant operators. In both cases, however, these types of anti-competitive concerns would be assessed on an ex-post rather than ex-ante basis. Therefore, the Commission considers the current ordering of Sections 3 and 4 to be appropriate.

4.2 Digicel's Response

For its part, Digicel also offered a number of proposals regarding structural changes to the Proposed Competition Guidelines:

i) In terms process-related matters, Digicel claimed that it is inappropriate or even unlawful to rely on or "extend the scope" of the *Telecommunications (Administrative Procedures) Regulations* (the "Administrative Procedures Regulations") to cover competition-related matters or proceedings addressed in accordance with the Guidelines. Digicel suggested that all procedural steps related to the application of the Guidelines should be set out in the Guidelines.

ii) Further to item (i) above, Digicel provided a set of detailed step-by-step dominance assessment procedures in an attachment to its Response – i.e., “Dominance Review Schedule” – that it proposed be included in the Guidelines.

iii) Digicel suggested that when competition-related matters are assessed in accordance with the Guidelines, the "market definition" phase of the exercise should be treated separately and be subject to a separate public consultation process. Once completed, the Commission could then move on to the "dominance assessment" phase of the exercise, which would be the subject of a separate, second public consultation process.

iv) Digicel also suggested that provision should be made for parties to propose alternative "market share" or "market concentration" measures that may be appropriate in a case at hand. At the same time, it also suggested that the Commission should give some form of prior indication as to how it plans to measure or take into account market share or concentration for a given case under consideration pursuant to the Guidelines.

v) Lastly, Digicel noted that mergers and acquisitions have the potential to substantially lessen competition and, therefore, should be reviewed by the Commission in a manner consistent with other potentially anti-competitive practices or agreements covered under the Proposed Competition Guidelines. While Digicel acknowledged that the Ordinance provides the Commission with this authority, it proposed that procedures to address such matters also be included in the Guidelines. In this respect, Digicel provided a "Mergers

and Acquisitions Review Guidelines Schedule" as an attachment to its Response that it proposed be included in the Guidelines.

In response to Digicel's first claim on process-related matters, the Commission notes that it did not intend to defer to or expand the scope of the Administrative Procedures Regulations to cover competition-related matters addressed under the Guidelines. The general procedures for addressing dominance, ex-ante remedy and forbearance reviews along with abuse of dominance and anticompetitive practice or agreement matters are set out in the Guidelines. As indicated in the Guidelines, the Commission expects that such procedures would be consistent, where applicable, with those stipulated in the Administrative Procedures Regulations. This would include, for instance, processes relating to providing directions on consultative procedures, the filing of evidence and the treatment of confidential information, among other things. The Commission sees no reason replicate these provisions in the Guidelines. That said, the Commission has made some modifications to the process-related language of the Guidelines to improve clarity, while at the same time recognizing that there must be flexibility to modify the procedures as required depending on the case at hand.

In regard to item (ii), Digicel also proposed that a very specific and detailed set of dominance assessment procedures, which are set out in its proposed Dominance Review Schedule be included in the Guidelines. The Commission first notes that paragraphs (1) and (2) of Digicel's proposed Dominance Review Schedule (on dominance assessment process steps) are effectively covered by sub-section 2.2.3 of the Guidelines and, therefore, are redundant. The balance of the proposed Dominance Review Schedule provides detailed step-by-step dominance assessment procedures along with associated timelines in most cases. In the Commission's view, Digicel's proposed process is too prescriptive and rigid in nature. The Commission considers that the Guidelines adequately describe the general framework for any review process and that any more specific procedural directions, as may be required, would be issued by the Commission on a case-by-case basis in order to properly reflect requirements at hand. That said, the Commission has taken Digicel's proposed Dominance Review Schedule into account and made some additions to the process-related sections of the Guidelines (i.e., sub-sections 2.2.5, 3.2.3, 3.3.5 and 4.4) in order to provide greater clarity on the review processes that would generally be followed by the Commission.

The Commission disagrees with Digicel's third proposal to separate a dominance assessment process into two parts – i.e., market definition and market assessment – as a standard method of procedure, with a separate consultation processes applying each case. The Commission considers that such a two-step process would be disproportionate to TCI's relatively modest size. Such an approach would be unnecessarily burdensome and time consuming for all parties involved, especially since much of the information relevant to the market definition exercise would also relevant to the market assessment exercise. In any event, the Commission notes as well that there is nothing in the Guidelines that would prevent the possibility of a further round of input from parties where further evidence on market definition and/or market assessment was considered necessary in a specific case under consideration. The process-related provisions included in the Guidelines allow for this option, if found to be necessary.

Regarding Digicel's fourth suggestion on the measurement of market share or concentration, the Commission notes that there is nothing in the Guidelines that would prevent the Commission

and/or an interested party from proposing any number of alternative measures in this regard. Under sub-section 2.2.4 of the Guidelines, the third dominance assessment criterion makes provision for the consideration of "market shares or concentration levels and trends as determined by reference to revenues, subscribers or other relevant metrics." Depending on the relevant market in question, one or more measures of market share or concentration may be relevant. As well, data availability may dictate what specific market share variables may be measurable. The Commission considers that dominance criteria such as market share or concentration should be broadly defined to allow flexibility when it comes to specific cases under consideration. Ultimately, parties will have an opportunity to comment on the any market share or concentration measures proposed by the Commission in a specific case and also provide proposals of their own with supporting rationale. Accordingly, the Commission does not consider that any changes to the Guidelines are warranted based on Digicel's comments.

Lastly, Digicel proposed that an additional section be added to the Guidelines to deal with the treatment of merger and acquisitions and, in this respect, it provided a proposed Mergers and Acquisitions Review Guidelines Schedule. The Commission notes that it had included a section on mergers and acquisitions in the Proposed Competition Regulations. Flow was opposed to the establishment of such provisions since, among other things, it argued that they would have amounted to an extension of the Commission's powers relative to the Ordinance. Digicel offered no comments on the section on merger and acquisitions in the Proposed Competition Regulations. Based on the comments received in that earlier proceeding, the Commission decided not to include a section on mergers and acquisitions in the Proposed Competition Guidelines. At this time, the Commission continues to be of the view that it would not be appropriate to include a mergers and acquisitions section in the Guidelines. Among other reasons, it would be unfair to Flow, which did have strong views about merger and acquisition issues, to include a section in the Guidelines, such as that proposed by Digicel, without seeking comments on these provisions from Flow. At some point in the future, the Commission may decide to add such a section, but it would do so through a further public consultation process.

5 Specific Proposed Changes to the Guidelines

Consultation Questions 2 and 3 in the August Consultation Document asked parties to provide suggested specific changes to wording of the Proposed Competition Guidelines as well as any comments or suggestions on any other aspect of the content and/or application of the Proposed Competition Guidelines. In both cases, parties were asked to provide supporting rationale for their proposals.

5.1 Flow's Response

In summary form, Flow offered the following proposed specific changes, comments and suggestions relating to the Proposed Competition Guidelines:

i) Re paragraph 23: Flow suggested that the terms immediate and intermediate be defined.

ii) Re paragraph 25: Flow noted that an incorrect reference is made to Annex 1 rather than Schedule 1.

iii) Re paragraph 26: As discussed above, Flow suggested that focus should be shifted from dominance to non-dominance determinations. Further, Flow suggested that the dominance criteria explicitly take into account the potential for "inter-modal competition" using different technologies such as fixed copper/fibre, cable, mobile and over-the-top competition, etc. As well, Flow noted that in addition to market data obtained from operators, consumer survey data should also be considered.

iv) Re paragraph 31: Flow suggested a clarification to the proposed notification process in the case of a dominance review.

v) Re paragraph 32: Flow suggested that any preliminary dominance determination issued by the Commission include "a robust explanation and include all evidence relied upon by the Commission".

vi) Re paragraph 40: Flow argued that when determining the need for and imposition of ex-ante remedies, the only relevant criterion is "whether harm to the consumer has occurred". This proposed criterion should, according to Flow, replace the full set of criteria currently set out in paragraph 40 of the Proposed Competition Guidelines.

vii) Re paragraph 41: Flow argued that a clear linkage should exist between any ex ante remedy imposed by the Commission and a specific harm to consumers that has occurred. Flow claimed that there is no indication or guidance in the Proposed Competition Guidelines as to how this linkage would be made and, therefore, they should be modified to do so.

viii) Re paragraph 55: Flow suggested that a clarification be provided stating that non-dominance is not a prerequisite for forbearance. It noted in this respect that forbearance from regulating a dominant licensee would be appropriate if it can be shown that doing so would not be harmful to competition or consumers. In this regard, Flow also commented on the issue of the sufficiency of market data used to support a non-dominance versus a forbearance determination. It was of the view even limited data may provide the basis for a clear determination in either case (it gave the example of the use of a consumer survey data to demonstrate substitutability for the purpose of product market definition).

ix) Re paragraph 64: Regarding the definition of abuse of dominance and the related examples provided in this paragraph, Flow suggested that greater emphasis be placed on potential harm to consumers rather than competitors, since competition can "impose some impediment or negative impact on competitors" and added that "that is the nature of competition".

In response, the Commission notes that a number of Flow's suggestions are relatively straightforward to address. These include items (i), (ii), (iv) and (v) above. The Commission has made changes to the corresponding paragraphs in the Guidelines to incorporate these suggestions.

The Commission has already addressed Flow's suggestion that the focus of the Guidelines should be on non-dominance rather than dominance, i.e., item (iii) above. As noted above, the Guidelines are intended to equally address non-dominance and dominance determinations. The Commission has added a clarification in this respect to sub-section 2.2.2. In addition, the Commission agrees with Flow's comments that competition in a relevant market can arise from a variety of sources using different technologies (potentially including fixed, cable, mobile and/or over-the-top). The Commission has incorporated this fact into the dominance assessment criteria in sub-section 2.2.4.

As noted in item (vi) above, Flow proposed that the set of criteria for the application of ex-ante remedies included in sub-section 3.2.1 should be replaced a single criterion based on "whether harm to the consumer has occurred". The Commission disagrees with this proposal to focus exclusively on whether harm to the consumer has occurred. While it is true that the Commission would place considerable weight on such a consideration, in the absence of such harm actually having occurred, it would also focus on whether there is a reasonably strong risk that such harm could occur in the future. More generally, the scope of any such actual or potential harm should also to extend to competitors and, more generally, competition in the market(s) under consideration. Therefore, in response to Flow's suggestion (as well as Digicel's similar suggestions discussed below), the Commission has added an additional criterion to the existing set of criteria for the application of ex-ante remedies – i.e., consideration of "whether harm to customers or to competition has occurred or is likely to occur as a result of the licensee's dominance absent ex-ante remedies".

Item (vii) above relates to sub-section 3.2.2 which deals with the determination of ex-ante remedies to be imposed. In this case, Flow suggested that guidance should be provided in the Guidelines on the linkages between any ex ante remedy and a specific harm that has occurred. In response, as set out above, the Commission considers that in principle any ex-ante remedy should relate to actual or potential harm, not just the former. More generally, however, the Commission considers that it would not be practical to include this level of detail in the Guidelines and, in any event, such guidance would at best be based on a set of hypothetical examples. Instead, the Commission considers that any determination involving the imposition of ex-ante remedies would explain the basis for and include the supporting rationale for the remedies. The Commission has made a modification to sub-section 3.2.2 to reflect this requirement.

In the case of item (viii), Flow requested that the Guidelines clearly state that non-dominance is not a prerequisite for forbearance. While the Commission considers that this distinction is clear from the Ordinance and the Proposed Competition Guidelines, for the avoidance of doubt, the Commission has modified paragraph 51 in sub-section 3.3.1 of the Guidelines to clarify this point.

Further on the matter on non-dominance versus forbearance determinations, which is addressed in 3.3.4 of the Guidelines, the Commission acknowledges Flow's comments on market data availability and sufficiency issues. As explained in that sub-section of the Guidelines, the Commission is of the view that a higher threshold must apply to justify a non-dominance compared to a forbearance determination; however, any such determination would ultimately depend on the availability and sufficiency of market data, including as may be applicable

consumer survey results, for a case in hand. The Commission would of course provide an explanation of the basis and supporting rationale for any non-dominance or forbearance determination it issued as required under sub-section 3.3.5 of the Guidelines. As discussed above, in addition to the data consideration, the Commission has also added the expected market trends consideration to this new paragraph of the sub-section.

Lastly, in item (ix) above, Flow suggested that any investigations relating to potential abuses of dominance should be triggered more so by the potential harms to consumers rather than competitors. The Commission disagrees with Flow's proposal in this case. The objective of the cited paragraph in sub-section 4.2 is to identify practices that could trigger an abuse of dominance investigation. These include a non-exhaustive list of practices that have had, are having or are likely to have the effect of preventing or substantially lessening competition in one or more markets. This could involve potential harm to competitors and/or consumers. In any event, this section of the Guidelines is simply meant to provide guidance on the nature of the triggers that could lead to the initiation an abuse of dominance investigation. Therefore, the Commission considers that no changes to the Guidelines are required in response to Flow's suggestions in this respect.

5.2 Digicel's Response

For its part, Digicel offered the following proposed specific changes, comments and suggestions relating to the Proposed Competition Guidelines:

i) Re sub-section 2.2.3: Digicel provided a number general comments on theoretical and practical matters relating to the definition of a relevant market, including potential difficulties associated with clearly defining market borders, variations in the degree of substitutability and other market characteristics. Otherwise, no specific changes to this subs-section of the Guidelines were proposed.

ii) Re sub-section 2.2.4: Digicel provided a number general comments on the application of individual dominance assessment criteria included in the Guidelines, primarily in relation to market characteristics in TCI. Otherwise, no specific changes to this sub-section of the Guidelines were proposed.

iii) Re sub-section 3.2.1: Digicel proposed that the criteria for the application of ex-ante remedies included in this sub-section be replaced with three new proposed criteria that focus on the "impact of the conduct on existing competitors" and "consumers" as well as "the degree of interference with competition".

iv) Re section 4: Digicel noted firstly that this section, which deals with anti-competitive practices and agreements, should state that "a trivial or de minimis degree of lessening of competition" would not be acted on by the Commission (i.e., would not trigger an investigation).

v) Re sub-section 4.2: In respect to potential abuse of dominance practices, Digicel provided a lengthy list of practices that would potentially constitute an abuse of

dominance, all of which generally apply to intercarrier operations, services and transactions.

In relation to items (i) and (ii) above, the Commission acknowledges the comments provided by Digicel on relevant market definition and dominance assessment criteria issues. While the Commission considers the comments to be helpful, they would more appropriately apply in the context of a specific dominance assessment review. The Commission considers that the relevant market definition and dominance assessment criteria included in the Guidelines (and as modified in response to Flow's comments) provide adequate flexibility to take into account the factors and considerations described by Digicel in its Response. Accordingly, the Commission does not consider that any further changes to sub-sections 2.2.3 or 2.2.4 of the Guidelines are required in response to Digicel's comments.

In regard to item (iii), the Commission notes that it has addressed this same issue above in respect of Flow's comments. To reiterate, the objective of ex-ante remedies is both to address actual as well as potential harm to consumers, competitors or, more generally competition. The criteria proposed by Digicel are exclusively retrospective in nature. Consequently, the Commission does not consider that Digicel's proposed criteria are appropriate for the purpose of determining whether ex-ante remedies should or should not be imposed on a dominant licensee. That said, as discussed above, the Commission has added an additional criterion to sub-section 3.2.1 to reflect the suggestions made in this respect by both Digicel and Flow.

In regard to Digicel's fourth comment above, the Commission notes that paragraph 77 already includes a provision indicating that potential abuse of dominance or other potential anti-competitive practice and agreement investigations would not be undertaken where the likely effect of such matters on competition would be considered *de minimis*.

Lastly, regarding item (v) above, the Commission notes that the list of potentially anti-competitive practices provided by Digicel on pages 5 and 6 of its Response deal primarily if not entirely with intercarrier operations, services and transactions – e.g., interconnection, access to essential facilities or other network facilities, access to rights-of-way and the bundling of network services and facilities. In the Commission's view most, if not all, of the listed practices are subject to the *Telecommunications (Interconnection and Access to Telecommunications Facilities) Regulations* (the "Interconnection Regulations"). In most cases, the listed practices are prohibited under the Interconnection Regulations (e.g., failing to supply interconnection or other essential facilities) and, therefore, failure to comply with those obligations would be addressed pursuant to the Interconnection Regulations. As a result, including the list of practices in the Guidelines would be redundant and also potentially create confusion. That said, the potential abuse of dominance and other potential anti-competitive practices explicitly listed in the Guidelines is not meant to be exhaustive. To the extent an intercarrier practice undertaken by an operator may have an anti-competitive effect contrary to the Guidelines, a party could file a complaint with the Commission pursuant to the Interconnection Regulations and/or the Guidelines.