



# Digicel

**DIGICEL'S RESPONSE TO THE PROPOSED REVIEW AND REVISIONS TO THE REGULATION OF  
RETAIL PRICES FOR SMP OPERATORS - RULES ECS 16/2013 (PREVIOUSLY PUBLISHED AS ECS  
15/2010)**

5<sup>th</sup> December 2013



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

We thank you for inviting Digicel to provide its comments. We are available for any questions you may have.

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## **A/ Introduction**

Digicel is grateful for the opportunity to respond to the Authority's consultation on the rules for the regulation of retail prices for SMP operators.

As a company keen to launch services in The Bahamas, and based on our experience as a market entrant in many countries, Digicel can appreciate the need to ensure that pricing by SMP operators is reasonable.

We agree that some ex ante pricing controls are necessary to ensure fair competition where there is for example, an existing monopoly. When a sector becomes more competitive or fully competitive it may be possible to relax a number of those controls. Incentive regulation may also have a useful role to play in this context.



## **B/ Response**

### **1/ General Comments**

#### **1A/ Projections and Forecasts**

There are a number of places throughout the document where the Authority has proposed a requirement on SMP operators to project service demand two years in advance. We appreciate what the Authority is trying to do with such requirements but we are not sure how practical it will be to implement and enforce such measures. An operator will naturally be incentivized to project to the Authority whatever will enable the operator to launch a service. Further, regardless of the operator's initial projection it is always possible several months later to state that the operator's plans have changed, or that it made a mistake in launching the service, and that it is therefore removing from the market a service that never made a profit. Consequently we believe that controls which are put in place for SMP operators should, to the extent possible, not depend on forecasts or projections.

We have similar concerns about the requirements to estimate the impact of promotions. Clear limitations on the periods for which an SMP operator can offer promotions, as the Authority has also proposed, and without addition, seem to us to be a better way forward.

#### **1B/ Interim Decisions and Proxies**

Digicel encourages the use of proxies and interim decisions where appropriate to determine quickly whether particular prices from SMP operators are prima facie reasonable or unreasonable and whether they should be permitted or not. There may be cases where intervention is clearly warranted, and circumstances where the case for intervention is less clear. In all events it is the speed of reaction by the Authority that is key in our view and particularly where a new entrant is coming in to the market place. It is better to arrive at an interim decision within a week or two that stops 75% of the damage occurring and which can be further refined later, than adopting an approach which lasts 6 months before any kind of decision can be reached. The damage can already have been done by that stage.

With respect to proxies it would be simpler for example to use, where possible, termination rates as the starting point for determining whether an SMP operator's retail price is prima facie



acceptable or not. In such a case the service would need to recover the termination rate plus the origination cost plus an additional margin. This will of course mean ensuring that an appropriate termination rate is determined to start with.

Another proxy that could perhaps be used to assess whether price reductions are not prima facie abusive would be to establish whether retail price reductions are matched by at least proportionate decreases in wholesale rates to competitors. In fact we would expect wholesale rates to be largely responsible for reductions (as retail costs are more likely to remain at the same level or to increase) so this would represent a minimum threshold to be passed.

Finally, and as supported by the Authority, we would encourage the use of benchmarks for wholesale and retail rates as prima facie evidence of the reasonableness or otherwise of pricing until the costs have been modeled.

In all cases, where the proxy test highlights a potential problem, the burden would be on the SMP operator which wishes to offer a particular price or promotion to demonstrate that concerns were not warranted.

For the sake of market certainty the Authority could perhaps publish its SMP operator proxies and then review them from time to time as it sees fit.

### **1C/ Retail Minus and Cost Based Approaches**

We believe that the Authority should have the option to implement wholesale price controls based on retail minus as well as cost based approaches depending on the service in question. The choice of control would depend inter alia on whether the wholesale service depends on depreciated network assets or whether it is a relatively new service.

Where an SMP operator provides a wholesale input it does not know, as appears to be a proposed requirement, whether a competing operator could match the SMP operator's retail price to the consumer. The retail costs of the competing operator may or may not be inefficient, and/or suffer or not from a lack of economies of scale. The SMP operator does not know what the retail costs of other operators are. All that the SMP operator can do it seems to us is to estimate its own efficient retail costs. This brings us to the approach known as the "equally efficient competitor" test which the Authority has also referred to in the context of predatory pricing.

The European Court of Justice, for example, in the TeliaSonera case, supported the use of the equally efficient competitor test in margin squeeze cases. This test takes account of the



dominant operator's costs and revenues. The Court nonetheless stated that it might be appropriate to take account of competitors' costs in certain circumstances, for example when: (1) the costs of the dominant undertaking are not precisely identifiable; (2) the dominant competitor's costs have been written off (such as the cost of access to infrastructure); or when (3) "the particular market conditions of competition dictate it," such as when the dominant operator's costs are a result of its dominant position.

In order to assess whether the retail costs of non SMP operators were efficient or not and whether they suffered or not from diseconomies it would be necessary independently to assess the retail costs of non-SMP operators. Those costs would then form the basis of an imputation test. This approach for non-SMP operators is not generally attempted in our experience and could place a large burden of regulation on competing operators as well as on the Authority. Therefore, for reasons of practicality, it will normally be the retail costs of the SMP operator that should be considered it seems to us and not the actual or possible retail costs of the non-SMP operators.

The Authority could reserve the right to use elements of the retail costs of non-SMP operators to assess the reasonableness of the SMP operator's prices where the SMP operator enjoys significantly lower retail costs for some non-replicable reason. However, if the SMP operator would otherwise be found to be in breach of its obligations solely by virtue of the additional costs of the non-SMP operator, then the SMP operator should be given a reasonable chance to comply with the Authority's findings before suffering a formal adverse ruling.

### **1D/ Margin Squeeze**

Consequently, and following on from the discussion above, when determining whether there is a margin squeeze we believe that at the retail level the Authority will either:

a/ have to determine what retail margin the SMP operator would have to apply if its retail costs were efficiently incurred and use that as the basis of its calculations;

or

b/ arrive at a price floor for retail costs.



## **1E/ Bespoke Business Deals**

We should be interested to know whether and what the Authority's plans are with respect to assessing whether offers made by SMP operators to businesses are reasonable. Typically an operator will verbally agree bespoke deals with business customers off the public record (there will be a contract but only the business customer and the operator will see it). This makes such agreements difficult to track and assess for things like unreasonable levels of subsidy and anti-competitive effects. One approach in this respect would be for the Authority to require that a list of all business customers of the SMP operator is provided to it, and for the Authority then to select a random sample for full assessment. Even a small random sample should be fairly effective at assessing the overall picture. We emphasise that the sample must truly be random<sup>1</sup> and not simply selected from a pile of paper contracts or an electronic list of files as any such selection process is not truly random.

## **1F/ Incentive Regulation**

We think that it would be useful to consider implementing incentive regulation on SMP operators. In this case certain price controls would be relaxed nationally or regionally if for example certain forms of access to the SMP operator's networks or infrastructure are provided by it nationally or regionally.

## **2/ Specific Comments**

Paragraph 15.1: in our experience, in respect of price rises by operators to price regulated services and bundles, and where there is regulation of notification periods for customers, we normally see a period of 30 days required. Ultimately it boils down to how much time customers themselves need to provide in order to terminate their contract (with payment for subsidies provided as appropriate) with the operator. For example, if the operator's terms and conditions state that the customer's notification period for termination is 30 days, then customers should have at least that much notification from the operator of a price increase.

Paragraph 15.2: 3 business days notification to the Authority for price changes to services and bundles not subject to price regulation may be more appropriate in the event of eg long holiday

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<sup>1</sup> The Authority's IT department can for example advise how it is possible to do this using Excel. The Authority may also want to seek statistical advice as to why this is so important and the reason that it makes so much difference.



weekends, otherwise URCA may find itself with 8 hours to make a decision on whether a service should be permitted or not.

Paragraph 22 - we are not sure this permits for the period of public consultation permitted within Paragraph 14. Perhaps it should say “..subject to Paragraph 14..” rather than “..consistent with..”?

Paragraph 43 – we suggest clarifying that this paragraph, which deals with the circumstances in which the Authority can regulate when an SMP operator may withdraw a service, applies only to services that are not significantly loss making. This is because we think that it is questionable whether it would be possible to enforce any requirement that requires an operator to provide a large subsidy for a service that potentially could, inter alia, place a business at risk and conflict with shareholder rights. The meaning of “significantly” could be assessed on a case by case basis. The Authority could place the burden of proving a significant loss on the operator if it wished to do so.