Response to the Telecommunications Regulatory Commission's Consultation on the Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks

Response from: Digicel (BVI) Ltd

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Summary

Digicel is grateful for the opportunity to respond to the Commission's consultation on a market analysis of wholesale call and SMS termination on mobile and fixed networks.

We believe that the Commission should avoid going down a market analysis and assessment of dominance route. If the analysis and assessment was carried out in what we would consider to be a fashion that could provide a dependable result, it would be very different from what has been suggested by the Commission. In fact, in our respectful opinion, and considering the way that consultation has been drafted, the Commission is attempting to take a short cut.

The Commission's document does not have a sufficient foundation for the analysis or the assessment, as the market place has not been researched adequately. There are many factors which have the potential to undermine the conclusions that have been drawn. The BVI will not be a mirror image of other countries, and indeed it will differ very markedly in from some. Every market has its own characteristics. It is not in our view possible, as the Commission appears to have done, to refer to conclusions that may have been drawn in some other countries about markets and dominance assessments and therefore to conclude that the same applies the BVI. The rules of market analysis themselves prevent this as the Commission is attempting to define, and confine, the market geographically to the BVI. So the Commission cannot look outside the BVI for answers.
The Commission quotes readily from European Commission (EC) recommendations but TRC knows that its document does not deal with the factors that the EC's recommendation, or that the approaches of well known regulatory bodies, require to be considered. It is not possible to do so unless the market is researched first.

In order to assess whether any of the markets suggested in the consultation really exist the Commission would as a minimum:

1/ need to carry out statistically meaningful surveys of the population in the BVI to determine how they actually behave in response to products and services in their market place what their views are for example on the substitutability of particular services. It may seem attractive in terms of the amount of time that will be involved to assume that BVI customers will behave like customers in some other countries which have gone through a detailed market analysis. However, neither the Commission nor any of the other market participants have, to the best of our knowledge, ever established what the facts are in the case of the BVI. Therefore neither the TRC nor ourselves can say whether we <u>know</u> whether there are demand side constraints in BVI on termination pricing or not. At the moment we can only speculate.

Furthermore, in our own experience it is very surprising just how differently markets in different countries may behave. So the experiences in other markets may be of limited or no use in the BVI. We do not know based on the information at our disposal;

and,

2/ review the full range of technical measures or market circumstances which may impact on termination rates. There is one obvious potential circumstance which could render suggestions of dominance in termination redundant. That is where customers have multiple handsets and callers regulate their call patterns to make the cheapest calls. In this event there would be no dominance on single networks for termination and the market would as a minimum have to include termination on all networks. We are not aware that the Commission has examined the use of multiple handsets in the market place. However based on our own information we believe that the level of

penetration of handsets to be about 190% of the population. This would mean that most customers may have two phones and some may have three all connected to different networks. In this event any suggestion of dominance on individual networks may be unsustainable.

Another technical development is VOIP calls usage. In other words operators providing VOIP services or subscribers using Skype type service. This is a very significant development which could also render the dominance analyses partly and eventually entirely redundant going forward. Again we are not aware that the Commission has investigated the potential in this regard, and we are not sure what the Commission deems to be the relevant time horizon for the market analysis. Dual SIM phones are a further technical possibility which could undermine any dominance analysis;

and,

3/ look at aggregate effects – the combined impact of all demand and/or supply side factors has to be taken in to account. Again we see no evidence that the Commission has attempted to undertake this work.

As for the way in which dominance assessments should be carried out: we know that the Commission is aware what factors should be considered, but for example these would include market shares, countervailing buying power, control over sales and distribution networks, and absence of potential competition among many others. We are sure that the Commission has the full list, but we can certainly provide the full list if required. The only references that the Commission makes on the issue of dominance in its own document are based on a not fit for purpose market analysis in our view, so the conclusions drawn with respect to power are not legitimate and therefore without legal foundation.

We are keen to avoid the kind of resource intensive and costly exercise that would be involved in full market analyses and dominance assessments, especially in a country with a population of only around 26,000 people. Therefore we would urge the Commission to determine whether instead it has the jurisdiction to adopt a benchmarking approach to interconnection rates in the absence of a finding of dominance and take that route rather than the time and cost intensive exercise that would be involved for everyone in going through an approach which relied on a market analysis and the assessment of significant market power.

Question 1 a): Do you have any objections to the above definitions?

As indicated we strongly believe that there is absolutely no basis for any of these definitions unless a market analysis is undertaken which finds out what people actually think or do and which takes a detailed look at what demand and/or supply side constraints are or could be possible and what future developments could impact any such analysis. Currently all the conclusions in the document speculate on possible markets based on findings in other countries. But the BVI is not subject to the regulatory jurisdiction of those other countries and BVI people and the BVI market place (speaking in a general sense) may have individual characteristics. Indeed the near 200% penetration rate is flagging just this possibility.

Question 1 b): Do you see calling someone on their fixed phone as an equal substitute to calling someone on their mobile phone?

We can speculate about this but the only way to find this out is to carry out a statistically significant and properly conducted survey of the population in this regard. Frankly we do not know and do not think it would be productive or legitimate to use some findings in other countries. We imagine that at least some customers will consider it a substitute, but we do not know how many.

Question 1 c): If the price of sending an SMS to either CCT, Digicel or LIME increased by 5-10% would you a) switch to making voice calls to CCT, Digicel and LIME mobile or b) switch to making voice calls to fixed lines?

Again we can only speculate. In any event a more relevant question perhaps would be to ask if the price of sending SMS to a particular network rose by 5 to 10% would customers be able to send an SMS to the same customer if that customer owned another handset. Also for example there are masses of smartphone applications/services which let people "SMS" or message people using VOIP. So there is no case for dominance in SMS termination that we can see for anyone with a smartphone. We are not clear what proportion of the population has these kinds of phones and neither is the Commission to the best of our knowledge. The market for smartphone owners would include messenger platforms including Microsoft Messenger and Blackberry Messenger. Again, however, the only way to find out is to survey the market and look at the technical options available.

Question 2: Do you agree with our view that the geographic market for each of our proposed markets should be the Territory of the VI?

We think this is probably right, unless some illegal services are being provided.

Question 3: Do you agree that each operator is dominant in the respective termination markets

We note that the Commission has referred to the European Commission's view on what market shares constitute evidence of dominance. In the USA of course an organisation must have least 60 to 70% of the market before the market share can be considered as a possible indicator of dominance.

As indicated previously there are various possible factors which could render this analysis redundant. Multiple handset ownership is just one of those.

1) **Wholesale mobile voice call termination provided by Caribbean Cellular Telephone Ltd**
2) **Wholesale mobile voice call termination provided by Digicel (BVI) Ltd**
3) **Wholesale mobile voice call termination provided by Cable and Wireless (BVI) Ltd**
4) **Wholesale fixed voice call termination provided by Cable and Wireless (BVI) Ltd**
5) **Wholesale SMS termination provided by by Caribbean Cellular Telephone Ltd**
6) **Wholesale SMS termination provided by Digicel (BVI) Ltd**
7) **Wholesale SMS termination provided by Cable and Wireless (BVI) Ltd**

In the absence of any research in to the actual market we could only speculate about the existence of the above markets, and we do not think that it would be helpful to do so. There is no evidence in the BVI that mobile termination rates are too high. In the contrary the domestic mobile termination rate has been well below cost model outputs and benchmark outputs in the region (especially since the domestic mobile termination rate was reduced to 5 US cents just before Digicel entered the market). The only evidence in fact is that domestic mobile termination rates in particular have been below cost. In contrast fixed termination rates look to be in the region of 50 to 100% above cost model and benchmarked outputs. So they are a possible candidate for analysis.

The Commission has not mentioned a possible transit market – for transiting international inbound calls from LIME's fixed to LIME's mobile network. We note that the Commission has said that LIME should not charge anything for transiting the calls from switch to switch.

Ultimately there is some miniscule cost for LIME to transit the calls but that is not to say that any charge is justified currently. If the cost for accepting inbound international traffic via Digicel to LIME mobile was recovered in a single charge and a realistic transit charge was added this would result in an explicit asymmetric (a very small asymmetry with a realistic charge) international mobile termination rate in LIME's favour. This would be as opposed to the implicit asymmetric international mobile termination charge which exists now, and which is concealed by referring to the asymmetric element as a transit charge, when in fact most of the transit charge is simply a top up to LIME's international mobile termination rate. But if costs are being addressed at this kind of level, then spectrum cost advantages held by LIME for example could be used to offset any possible actual and very small transit charges.

Consequently, we agree that the transit charge should be reduced to zero.

Question 4: Do you agree that SMS termination rates should remain unregulated? However, the TRC is of the view that it is essential, to protect the interests of both wholesale and retail customers, to address the issue of fixed and mobile call termination rates.

As indicated, for smartphone customers there is in our view clearly no issue of dominance in the market which must include instant messaging alternatives. We are not sure how many customers do not have smartphones at the current time, but irrespective of this the SMS interconnect rate being charged is at the regional benchmark, and technology is rapidly eroding any possible cost issue around text messages. We think therefore that the Commission's time would be better spent on other issues and that text messaging rates should not be regulated.

Question 5: Do you agree that the TRC should address the issue of fixed and mobile termination rates?

As described above domestic mobile termination rates have been very low for a number of years and indeed we believe have resulted in under recovery of costs for Digicel as a new entrant. The domestic rate has been below regional cost model outputs and benchmarks. Even international mobile termination rates are within the regional range. Moreover declines in international mobile termination rates would only harm the BVI. This can be seen from the attached table of mobile retail rates which shows that AT&T customers (in Miami) pay 89 US cents to call the BVI – in other words if the international mobile termination rate was reduced it would just enrichen operators like AT&T. Therefore we can see no point in undertaking any work in terms of national or international mobile termination rates. The issue could be reviewed depending on the general regional trend in mobile termination rates.

Fixed termination rates are as indicated around 50 to 100% more than regional figures so that is a potential red flag. The Commission may wish to look in to this.

Question 6: Please give your view on Bill and Keep. Do you think it is an appropriate to apply a bill and keep model to fixed /or mobile voice call termination in the VI?

Absolutely not.

Moving to a bill and keep arrangement would also necessitate a move to a system where the receiving customer pays to receive calls – a Receiving Party Pays (RPP) system. Otherwise receiving networks could not recover the cost of the calls they transmit over their network.

We are sure that the vast majority if not all consumers would be opposed to an RPP environment. A 2003 report[1] showed that at least 27 countries had moved from RPP to CPP environments by that time. None had moved from CPP to RPP. Perhaps the reason for this is simply that people prefer to take the decision themselves about whether they have to pay for something and do not like others' views about the value of the call, and the cost, being imposed on them.

A person receiving a call may not value it as highly as the caller, and may not wish to have forced on him the caller's decision about the worth of that call, and the associated cost. At the same time he may feel reluctant for other reasons not to receive the call thus feel compelled to answer the call end up paying for calls they do not truly appreciate or simply blocking calls. There may be partial exceptions to this problem eg where calls are inbound from family and if the parents are paying for all calls, but some or many other inbound calls may be something of an imposition rather than welcomed in which case the recipient certainly will not appreciate paying for them. There is also a simply issue of habituation – if you expect not to pay for receiving calls and have never done previously so you will probably not want to have to do so in future. Moreover if recipients have to pay for calls they receive it encourages cold calling by marketers.

The evidence seems to be that mobile penetration has generally grown significantly slower overall in countries with RPP systems. This means that in those countries significant numbers of people have not had the benefits of mobile service for substantial periods of time in comparison with Calling Party Pays (CPP) environments. To quote but one example in Pakistan - after the replacement of RPP with a CPP system mobile penetration trebled in just one year.

We think that RPP systems are also less appropriate in poorer countries as the recipient may struggle to pay his phone bills and may therefore simply refuse to answer the call or turn off the phone. This may not be as applicable to BVI given the GDP per capita but we have not seen a full socio economic breakdown of the population in BVI so we cannot rule it out as a factor. RPP systems prevent the parties making an arrangement whereby the party that can afford the call makes the call. We think that any move to a bill and keep system would therefore be in conflict with a desire for universal service and would discriminate against poorer individuals in society. This is even more so in countries such as BVI where universal service is in fact provided via the mobile networks and not via the fixed network, as in the US and Europe.

We believe that it is economically inefficient to adopt a system of receiving party pays for reasons mentioned above. The calling customer is able to judge whether the value of the call to him justifies

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[1] Stefan Zehle, "CPP Benchmark Report", Coleago Consulting Ltd, 23 February 2003.21 of these countries are from Central and South America and the Caribbean; the remaining six in chronological order are Czech Republic, Mongolia, Cambodia, Romania, Pakistan and India.

the cost of making it. The receiving party may not value the inbound call or even find it has negative utility ie the customer is worse off for answering. The receiving party should not be forced to pay for a call he values less than the cost of paying for it, or values not at all, or values negatively. The counter argument is sometimes made that the recipient might value the call more highly than the caller therefore making the calling party pay might also discourage the calling party from making a call the receiving party wants. However, in our view, it is best that the person who is making the call should determine its worth and whether it should be made and that person's view should not be imposed on another, or force them in to a situation where they feel forced either to pay for a call they don't want, or to reject the inbound call. Further, if the call is internationally originated there may be no CLI attached to the call and the recipient in an RPP environment will have no idea whether he wants to speak to the caller. Thus he would be unable even to make an informed decision about whether to reject the call.

Legally speaking an attempt to move to bill and keep would mean outlawing payments between operators for interconnection which would be an unconstitutional interference in settled business arrangements.

Question 7: Do any stakeholders feel that a LRIC modelling exercise should be undertaken for the VI and have the resources to provide inputs to a LRIC model?

The Commission should certainly not embark on a cost modelling exercise. The total cost of doing so will be in excess of any benefits that could be derived from the exercise considering:

1. the cost to the Commission and the operators of paying for very expensive consultants (operators pay the Commission's costs);
2. the time and resources and effective cost that will have to be expended by the Commission internally, which will also naturally prevent it dealing with other matters it could otherwise have managed during that time and with those resources;
3. the time and resources and effective cost that will have to be dedicated by operators which will distract and hinder them from competing and providing services to the public.

All of costs will one way or another ultimately be passed on to the consumer through retail prices.

The overall cost of a LRIC exercise seems likely to run to between one (1) and two (2) million dollars perhaps more if there are disputes and points of contention. Put another way it is the equivalent of billing every man, woman and child in the BVI between about forty (40) and eighty (80) dollars. For a country the size of BVI, if there is any regulatory intervention in termination rates, it makes sense to use benchmarks to arrive at interconnection rates, and not cost models.

The result from a benchmarking will be almost as good and perhaps better (since neither cost modelling nor benchmarking is an exact science), and the exercise will involve a fraction of the cost and time involved. Digicel has no wish to become embroiled in another modelling exercise for a small island state that will consume a huge amount of management time, could take years to complete, and will arrive at numbers which could have been derived in a few months through benchmarks. Other small countries have become bogged down in modelling minutae at great cost to their citizens and the industry, and we do not want the BVI to fall in to the same trap. This form of modelling came out of Europe and there is no reason to adopt such that regulatory approach in the BVI. It is simply inappropriate given the size of the population.

Question 8: Do you think it is appropriate for the TRC to follow a benchmarking exercise as the chosen regulatory approach to determining the termination rates for the VI. If not, why not?

As indicated we believe that if there is any regulatory intervention in termination rates then benchmarking is the best approach subject to the Commission's locus for intervention.

There are other considerations which have now arisen. The Commission has commenced a proceeding based on an allegation by CCT that Digicel has unfairly used cost advantages that it may enjoy to compete in the market place. Consequently, it is Digicel's view that all cost impacts must be put on the table at this time otherwise CCT may perceive that it has a chance of keeping cost advantages associated with its monopoly holding of 900MHz spectrum <u>and</u> preventing other operators from competing with CCT in any other way.

Furthermore, given that CCT is currently paying nothing for its superior spectrum it will be extremely reluctant to give up its cost and competitive advantage.

A way of counterbalancing CCT's spectrum advantage would therefore be to allow for that cost advantage in termination rates. While we have carried out some limited research in this respect, not all of the information on cost differences based on spectrum allocations appears to be readily available publicly and would probably require expenditure on consultants to obtain it. We are also pressed for time in terms of a response in this case. However we have seen one set of figures in terms of a difference from OFCOM for pure 2G networks of about 12% in its 2007 mobile termination statement. This contrasted the lower termination costs of Vodafone and O2 in the UK (5.63 pence per minute) which had 900 MHz with the higher costs of the 1800MHz operators (6.31 pence per minute).

This is indicative of cost differences. While cost differences based on different spectrum allocations may or may not have declined elsewhere, it must be borne in mind that this reflects heavily depreciated mobile network costs in other countries due to networks that have been in place for decades. In contrast Digicel BVI only launched in November 2008 and is still attempting to recover its investment.

If the Commission will contemplate an asymmetric mobile termination then Digicel could undertake expenditure to obtain further information on the cost differences on spectrum, probably from an expert consultant.

Question 9: Do you think it is appropriate for the TRC to benchmark against countries following the European Commission methodology taking account of an appropriate adjustment for VI operators ? If not, why not?

Absolutely not. The European Commission recommendation on termination rate policy is based on politics in our view and certainly does not reflect the outcome of a competitive market. The EC recommendation would force a network operator to recover all common network costs itself and therefore effectively has to pay itself more for each minute of traffic to cover those costs than is charged to a competitor. In other words a network operator must sell its services to its competitor at a price cheaper than can be provided to the network operator's own customers. This will clearly cause a market distortion, and would conflict the principle of encouraging efficient investment. We note that the EC's recommendation is under challenge in the UK at least. We also underline that the recommendation is just that, it has absolutely no legal force.

The EC is not infallible and has made a significant mistake here in our view. The Caribbean region's policies which allow for a fair spread of common costs across all network products is in contrast far more sensible. Furthermore, risks are far higher in the Caribbean due to smaller markets, natural disasters and political and economic factors. Therefore it is much more important to encourage significant investors. If network investors are to be encouraged to come to the BVI, the EC's approach must be avoided.