



BERMUDA  
**REGULATORY  
AUTHORITY**

Fairness ~ Innovation ~ Integrity

**RAA Section 87 Concentration  
Application**

**Proposed Change of Control pursuant  
to ECA Section 18(6)**

**Transactions Concerning Barrie Holdings Limited,  
Bermuda Telephone Company Limited,  
Telecommunications (Bermuda and West Indies)  
Limited, and Digicel Group Limited**

**Final Decision**

Date: 11 May 2015

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## 1 Definitions

1. In this Final Decision, unless the context otherwise requires:

“[...]” means portions of the decision which have been redacted;

“**A&I**” means access and interconnection;

“**Authority**” means Regulatory Authority of Bermuda;

“**Barrie Holdings**” means Barrie Holdings Limited;

“**Bermuda Company**” means any company registered as carrying out a commercial activity in Bermuda;

“**BCV**” means Bermuda Cablevision Limited;

“**BDB**” means BDB Ltd. 2013;

“**BDC**” means Bermuda Digital Communications Limited (also known as CellOne);

“**BMD**” means Bermudian dollars;

“**BTC**” means The Bermuda Telephone Company Limited;

“**CEO**” means Chief Executive Officer;

“**Companies Act**” means the Bermuda Companies Act 1981;

“**D-BTC Affiliate**” means Barrie Holdings and The Bermuda Telephone Company Limited following the close of the Proposed Transaction i.e. whereby they are wholly owned by Digicel Mobile but subject to the hold separate condition set out in Section [8.1.1] of this Decision pending the conclusion of the Market Review Proceedings;

“**Decision**” means this Final Decision issued by the Authority approving the Proposed Transaction subject to conditions;

“**Digicel Mobile**” means Telecommunications (Bermuda and West Indies) Limited, providing mobile services in Bermuda under the authority granted to it by its ICOL and trading as Digicel;

“**Digicel Group (Bermuda)**” means Wireless Holdings (Bermuda) Limited and all corporate entities under its control which, depending on the context, may refer to the group prior to or after closing of the Proposed Transaction;

“**Digicel Group Global**” means:

(a) the Digicel Group Limited that is wholly owned by Mr. Denis O’Brien and all corporate entities under its control; and

(b) any entity that directly or indirectly owns, is directly or indirectly owned by, or is under common ownership with, the Digicel Group Global as identified in subsection (a) above, as evidenced by the ownership of five per cent or more of the shares, stock or other securities or voting rights of the owned entity, through an agreement or arrangement of any type;

“**ECA**” means the Electronic Communications Act 2011;

“**Fixed Network Assets**” means any and all transmission, switching and other equipment, facilities or assets that are used by BTC or its successor in interest to provide electronic communications services including voice telephony, leased line and broadband services

over its fixed PSTN or fixed Internet Protocol-based network, including both core and access networks;

[...]

“**Government**” means the Government of Bermuda;

“**ICOL**” means an Integrated Communications Operating Licence;

“**ISP**” means an Internet service provider;

[...]

“**iTech**” means iTech Bermuda Limited;

“**KeyTech Group**” means:

- (a) any of the following companies: BCV, BDC, BDB Ltd., Cable Co. Ltd., and Logic Communications Ltd.; and
- (b) any entity that directly or indirectly owns, is directly or indirectly owned by, or is under common ownership with, any of the ICOL holders identified in subsection (a) above, as evidenced by the ownership of five per cent or more of the shares, stock or other securities or voting rights of the owned entity, through an agreement or arrangement of any type;

“**Link**” means LinkBermuda Limited;

“**Logic**” means Logic Communications Limited;

“**Longtail**” means Longtail Limited;

“**Market Review Proceedings**” means any relevant market review(s) and/or public consultation(s) that will be undertaken by the Authority pursuant to ECA Sections 23 and 24 to consider (1) the competition effects of recent significant changes in electronic communications markets in Bermuda, including concentration in the relevant markets, updated information on market shares and other relevant competitive factors, and (2) the adequacy of *ex ante* remedies that currently apply to operators designated with SMP and the efficacy and continued need for any provisional merger-related conditions that have been imposed by the Authority, and to determine (1) the measures that should be imposed indefinitely, modified or withdrawn, and (2) whether other sectoral participants should be subject to the same or similar obligations;

“**Merged Entities**” means Wireless Holdings (Bermuda) Limited and all corporate entities under its control following the close of the Proposed Transaction, as described in paragraph [18] of this Decision i.e. Wireless Holdings (Bermuda), Digicel Mobile, Transact, and the D-BTC Affiliate (including Barrie Holdings);

“**Minister**” means the Minister of the Government responsible for the electronic communications sector;

“**Minister's Approval Letter**” means the letter from the Minister to the Chairman of the Authority approving those conditions imposed in this Decision which require the Minister's consent pursuant to RAA Section 87(11)(c), ECA Section 18(6) and Condition 20 of the ICOL awarded to BTC, appended to this Decision at Annex C;

“**MVNO**” means mobile virtual network operator;

**“Other Digicel Affiliates”** means the Merged Entities excluding the D-BTC Affiliate i.e. Wireless Holdings (Bermuda), Digicel Mobile and Transact;

**“Parties”** means Digicel Mobile and BTC;

**“Proposed Transaction”** means the notified purchase by Digicel Mobile of BTC;

**“PSTN”** means public switched telephone network;

**“RAA”** means the Regulatory Authority Act 2011;

**“RAIO”** means reference access and interconnection offer;

**“Remedies Final Decision”** means the Final Decision, Order and General Determination, Obligations for Operators with Significant Market Power, dated 7 August 2013, Matter: RM01/13-1040;

**“Remedies General Determination”** or **“GD”** means the General Determination, Obligations for Operators with Significant Market Power, dated 7 August 2013, Matter: RM01/13-1040;

**“Representations”** means the representations of intent made to the Authority by the Digicel Group (Bermuda) and Digicel Mobile, set out in Section [6.2] of this Decision, which the Authority has taken into account and were critical to the analysis in considering whether to approve the Proposed Transaction;

**“Section 87(3) Notification”** means the RAA Section 87(3) Notification filed by Digicel Mobile to the Authority regarding the Proposed Transaction;

**“SMP”** means significant market power;

**“SMP Final Decision”** means the Authority's Consultation Summary, Final Decision, Order and General Determination; Market Review Process (Part B) – Significant Market Power – Confidential Version; Matter MR01/13 - 862; dated 29 April 2013;

**“TBI”** means TeleBermuda International Limited;

**“Transact”** means Transact Bermuda Limited; and

**“Wireless Holdings (Bermuda)”** means Wireless Holdings (Bermuda) Limited.

2. All other terms, words or expressions shall, except insofar as the context otherwise requires, have the meaning, if any, assigned to them by the RAA, the ECA, the Interpretation Act 1951, and the Remedies General Determination.

## 2 Executive Summary

3. Digicel Mobile has sought the Authority's approval of the Proposed Transaction as required by RAA Section 87(3).
4. Digicel Mobile, together with its local affiliate, Transact, currently provides various electronic communications services in a number of local markets. BTC also provides various electronic communications services in a number of local markets.
5. The Authority has undertaken a detailed review and analysis of the Proposed Transaction and given careful consideration to the information provided by Digicel Mobile and BTC, and to the comments received from other interested parties, in order to determine:
  - (a) whether, in accordance with RAA Section 87(10), the Proposed Transaction would likely have the effect of:

- (i) creating an entity with a dominant position or enhancing an existing dominant position in any relevant market;
    - (ii) substantially lessening competition in any relevant market; and/or
    - (iii) harming the public interest; and, if so;
  - (b) whether the Authority should reject the Proposed Transaction, or approve the transaction unconditionally or approve the Proposed Transaction subject to one or more of the following conditions permitted under RAA Section 87(11):
    - (i) compliance with any of the *ex ante* remedies specified in the ECA;
    - (ii) partial divestiture to a purchaser approved by the Authority; or
    - (iii) any other condition that the Authority, with the approval of the Minister, may adopt.
6. The Proposed Transaction will also involve a change of control in BTC, an ICOL holder, within the meaning of ECA Section 18(7). In considering whether to approve a proposed change of control in an ICOL holder, the Authority, in consultation with the Minister, must determine whether the proposed change of control in the ICOL holder is compatible with the objectives of the ECA, in particular, the purposes set out in ECA Section 5.
7. Based on the Authority's review and analysis of the information provided by the Parties and/or the Representations made by the Digicel Group (Bermuda) and Digicel Mobile, and in order to ensure that the Proposed Transaction is compatible with RAA Section 87(10)(c) and ECA Sections 5 and 18(6), the Authority has decided to approve the Proposed Transaction subject to the conditions established in this Decision at Section [8] below. A copy of the Minister's Approval Letter is appended to this Decision at Annex C.

### **3 Introduction**

8. On 16 January 2015, Digicel Mobile informed the Authority that it intended to acquire BTC through a merger with BTC's immediate parent company, Barrie Holdings.
9. Following from this and in anticipation of receipt of a completed notification, the Authority issued an invitation to the general public to comment on the Proposed Transaction on 23 January 2015. Section [7] below summarizes the comments received from interested parties.
10. On 20 February 2015, the Authority considered Digicel Mobile's notification complete within the meaning of RAA Section 87(9), and confirmed in writing to Digicel Mobile that the review period would commence from that date.

#### **3.1 The Parties**

##### **The Digicel Group (Bermuda)**

11. The Digicel Group (Bermuda) currently comprises a holding company registered in Bermuda (Wireless Holdings (Bermuda)) together with the following two group affiliates that are under the sole ownership of the holding company: Digicel Mobile and Transact.
12. The Digicel Group (Bermuda) is a part of the larger Digicel Group Global, which is an electronic communications service provider with operations in 33 separate markets in the Caribbean, Central America, and the Asia Pacific region. Digicel Group Global is wholly owned by Mr. Denis O'Brien.

13. Digicel Mobile is one of two mobile phone network providers and operators in Bermuda, the other of which is BDC.
14. Transact is an ISP, and a provider of international long distance telephony services. Transact is a minor operator in both of these markets.

#### **Barrie Holdings**

15. Barrie Holdings is a local Bermuda Company and is vested with a foreign ownership licence. Barrie Holdings is owned by six persons who are noted as the sellers in the Proposed Transaction. Barrie Holdings is the immediate parent company of BTC, and owns a controlling 100% of the share capital of that company.

#### **Longtail**

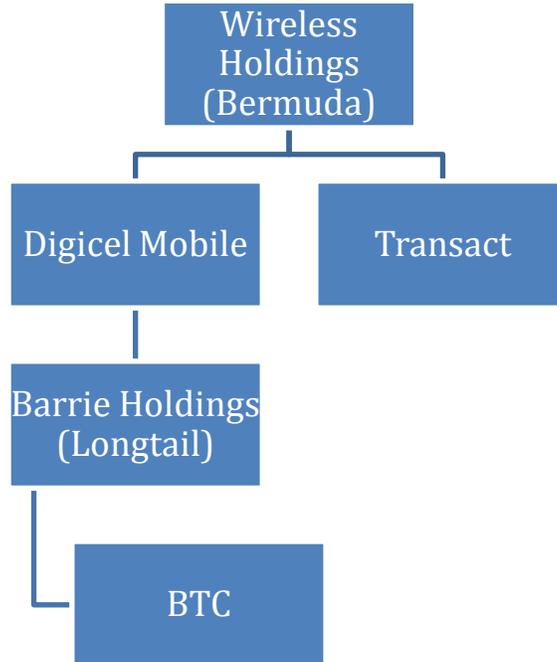
16. Longtail, a local Bermuda Company and wholly owned subsidiary of Digicel Mobile, is the nominated Digicel Mobile entity that will carry out the ultimate acquisition of BTC through a merger with BTC's immediate parent company, Barrie Holdings.

#### **BTC**

17. BTC is one of Bermuda's oldest operating electronic communications service providers. BTC provides voice and data fixed wireline access services via its country-wide fibre and copper based fixed wireline access network. BTC is active in several wholesale and retail markets for fixed wireline electronic communications services in Bermuda. In particular, BTC provides retail fixed telephony and broadband access services, leased line services, wholesale fixed telephony and broadband access services and wholesale leased line services.

#### **The Merged Entities**

18. On completion of the Proposed Transaction, Longtail will acquire 100% of the issued share capital of Barrie Holdings by way of a combination and merger of Longtail and Barrie Holdings. Barrie Holdings will remain as the surviving company following completion of the Proposed Transaction, the effect of which is that BTC will then become a wholly owned subsidiary of Digicel Mobile, and part of the Digicel Group (Bermuda). BTC will remain licensed and registered as a Bermuda Company.
19. The resultant structure of the post-merger Digicel Group (Bermuda) (including all parent companies and subsidiaries) upon completion of the Proposed Transaction, is illustrated in the chart [overleaf]:



## 4 Legal Framework of the Review and Analysis

### 4.1 RAA Section 87

20. RAA Section 87(3) stipulates that:

*“No sectoral provider [...] shall close any transaction that would constitute a concentration without notifying the Authority and obtaining the Authority’s prior written approval.”*

21. RAA Section 87(4) states that:

*“A transaction shall be deemed to constitute a concentration if it results in –*

*(a) a lasting change in control of a sectoral provider as a result of:*

*(i) a merger involving one or more previously independent sectoral providers; or*

*(ii) the acquisition of direct or indirect control of one or more sectoral providers [...].”*

22. RAA Section 87(10) directs the Authority to review and analyse any proposed concentration to ensure that it will not likely result in “one or more” of the following effects:

- (a) create an entity with a dominant position or enhance an existing dominant position in any relevant market;
- (b) substantially lessen competition in any relevant market; or
- (c) harm the public interest.

23. In analysing a proposed concentration under subsections (a) and (b) of RAA Section 87(10), the Authority conducts an economic assessment of the likely effects of the merger.

24. In applying the public interest test under RAA Section 87(10)(c), the Authority may take into account the factors that it deems relevant at the time, given the particular circumstances of each transaction. In doing so, the Authority is guided by the Government's policies and the objectives established by ECA Section 5, which sets out the basic purposes of the regulatory framework, i.e., to:
- (a) ensure access to reliable and affordable electronic communications services (ECA Section 5(1)(a));
  - (b) enhance Bermuda's competitiveness globally (ECA Section 5(1)(b));
  - (c) encourage development of the sector, consumer choice and innovative services (ECA Section 5(1)(c));
  - (d) encourage development and rapid migration of innovative electronic communications services (ECA Section 5(1)(d));
  - (e) promote orderly development of the electronic communications sector (ECA Section 5(1)(e));
  - (f) encourage sustainable competition in the sector (ECA Section 5(1)(f));
  - (g) encourage development and maintenance of resilient and fault-tolerant communications infrastructures (ECA Section 5(1)(g));
  - (h) promote investment in the sector to stimulate the economy and employment (ECA Section 5(1)(h)); and
  - (i) promote Bermudian ownership and Bermudian employment at all levels of the sector (ECA Section 5(1)(i)).
25. The Authority will consider these and other relevant public interest factors when evaluating a proposed concentration for the purposes of RAA Section 87(10)(c). The Authority will take similar public interest considerations into account when examining a proposed change of control under ECA Section 18(6) and ICOL Clause 20 (see below) but may consider a broader range of issues relevant to promoting the public interest as well as preventing harm to it.

#### **4.2 Relevant ECA Provisions**

26. ECA Section 12 requires all operators of electronic communications networks and providers of electronic communications services to secure a licence, of which ICOLs are a particular type granted to entities identified in Schedule 1 of the ECA. BTC provides various electronic communications services in a number of local markets in accordance with the authority granted under its ICOL.
27. Pursuant to ECA Section 18(6), any change of control in the holder of an ICOL, within the meaning of ECA Section 18(7), must be approved by the Authority in advance, in writing, acting with the written consent of the Minister. ICOL Condition 20 imposes the same requirement.
28. Further, ICOL Condition 20 prohibits a change in control in the holder of an ICOL without prior written authorization of the Authority acting with the written consent of the Minister.

### 4.3 Imposition of conditions on the parties to a proposed concentration

29. RAA Section 87(11) provides that the Authority may, when necessary to prevent a concentration from having any of the effects listed in RAA Section 87(10), approve a concentration subject to one or more of the following conditions:
- (a) compliance with any of the *ex ante* remedies specified in sectoral legislation (RAA Section 87(11)(a));
  - (b) partial divestiture to a purchaser approved by the Authority (RAA Section 87(11)(b));  
or
  - (c) any other condition that the Authority, with the approval of the Minister, may adopt (RAA Section 87(11)(c)).
30. Further, in accordance with ECA Section 18(6) and Clause 20 of the ICOL held by the company to be acquired, authorization of a change in control in the licence holder may be withheld unless the Authority is satisfied that the transaction is compatible with the ECA.
31. RAA Section 87(11)(a) allows the Authority to impose, in the context of a concentration review, any of the types of conditions listed as *ex ante* remedies in sectoral legislation (i.e., the ECA), without the Minister's approval if justified by the Authority's economic assessment of the competition effects identified in RAA Section 87(10)(a) and (b).
32. ECA Section 24(1) sets out the types of *ex ante* remedies that can be imposed by the Authority in the electronic communications sector, which include, by way of example:
- (a) an obligation to establish and maintain a cost accounting system in accordance with cost allocation and separation rules that are stipulated or approved by the Authority (ECA Section 24(1)(i));
  - (b) an obligation not to unreasonably bundle other services with a service that is subject to *ex ante* regulation (ECA Section 24(1)(k)); and
  - (c) an obligation to offer specified access and interconnection facilities and services through a functionally separate and independently operated business (ECA Section 24(1)(m)).
33. Likewise, RAA Section 87(11)(b) allows the Authority to impose a condition requiring the parties to a proposed concentration to partially divest certain assets without the Minister's approval.
34. If the condition does not concern a type of *ex ante* remedy that is identified in ECA Section 24(1), or is not a divestiture remedy, it may be imposed by the Authority provided that the Minister gives his written approval pursuant to RAA Section 87(11)(c).
35. Further, any condition that the Authority intends to impose pursuant to ECA Section 18(6) and ICOL Clause 20 requires the Minister's approval.
36. In considering whether to approve a proposed concentration, with or without conditions, or to decline such approval, the Authority is guided by the relevant regulatory principles set out in RAA Section 16. Without detracting from the importance of any of these, the Authority is particularly mindful in this context of its obligations to rely on market forces where practicable and to act in a reasonable, proportionate and consistent manner, without favouritism or unreasonable discrimination in regard to any sectoral participant.

## 5 Competitive Effects of the Proposed Transaction

### 5.1 Conglomerate mergers and their associated benefits

37. The type of concentration being effected by Digicel Mobile and Barrie Holdings/BTC is often referred to as a conglomerate merger. Conglomerate mergers are mergers between firms that are active in closely related or complementary markets. For example, the Merger Assessment Guidelines of the UK competition authority state that such mergers:

*“do not involve a direct loss of competition between firms in the same market and it is a well-established principle that most are benign and do not raise competition concerns.”<sup>1</sup>*

38. As illustrated in the table below, the Parties operate in separate relevant product markets.

39. Wireless Holdings (Bermuda)'s subsidiary, Transact, operates in the ISP market. However, as noted in the Remedies Final Decision, there is no SMP designation in the ISP market and, therefore, any competition concerns in the context of this transaction are minimal.

Market No.	Relevant Product Markets	Digicel Mobile	BTC	Entity with SMP
<b>RETAIL MARKETS</b>				
1	A national market (excluding Southside) for the supply of Retail fixed narrowband access lines and local calls to residential customers	✘	✔	BTC
2	A market for the supply of Retail fixed narrowband access lines and local calls to business customers outside of Southside and the City of Hamilton and contiguous suburbs	✘	✔	BTC
3	A national market (excluding Southside) for the supply of Retail fixed Broadband Access Services and ISP Services to residential customers	✘	✔	BTC
4	A market for the supply of Retail fixed Broadband Access Services and ISP Services to business customers outside of Southside and the City of Hamilton and contiguous suburbs	✘	✔	BTC
5	A national market for the supply of Retail mobile services, including voice and data	✔	✘	Digicel Mobile
6	A market for the Retail supply of low-speed Retail Leased Lines in the City of Hamilton and contiguous suburbs	✘	✔	BTC

<sup>1</sup> Joint Competition Commission and Office of Fair Trading September 2010 revised Merger Assessment Guidelines, OFT1254, paragraph 5.6.1;

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284449/OFT1254.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf)

Market No.	Relevant Product Markets	Digicel Mobile	BTC	Entity with SMP
7	A market for the Retail supply of low-speed Retail Leased Lines outside of the City of Hamilton and contiguous suburbs (excluding Southside)	X	✓	BTC
8	A market for the Retail supply of high-speed Retail Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	X	✓	BTC
9	A national market for the supply of Retail Subscription Television Services (excluding Southside)	X	X	Neither Party
<b>WHOLESALE MARKETS</b>				
10	A Wholesale market for the supply of fixed narrowband access and local calls in the City of Hamilton and contiguous suburbs	X	✓	BTC
11	A Wholesale market for the supply of fixed narrowband access and local calls in areas outside of Southside and the City of Hamilton and contiguous suburbs	X	✓	BTC
12	A Wholesale market for the supply of fixed Broadband Access Services in the City of Hamilton and contiguous suburbs	X	✓	BTC
13	A Wholesale market for the supply of fixed Broadband Access Services in areas outside of Southside and the City of Hamilton and contiguous suburbs	X	✓	BTC
14	A national market for the supply of Wholesale access and local call origination on mobile networks	✓	X	Digicel Mobile
15	A national market for the supply of Wholesale origination of international calls on mobile networks	✓	X	Digicel Mobile
16	A Wholesale market for the origination of international calls on fixed networks in the City of Hamilton and contiguous suburbs	X	✓	BTC

Market No.	Relevant Product Markets	Digicel Mobile	BTC	Entity with SMP
17	A Wholesale market for the origination of international calls on fixed networks in areas outside of Southside and the City of Hamilton and contiguous suburbs	X	✓	BTC
18	A market for the Wholesale supply of low speed Leased Lines in the City of Hamilton and contiguous suburbs	X	✓	BTC
19	A market for the Wholesale supply of low speed Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	X	✓	BTC
20	A market for the Wholesale supply of high speed Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	X	✓	BTC
21	A market for the Wholesale supply of access to facilities used to construct fixed local access networks	X	✓	BTC
22	A market for the supply of access to facilities used to construct wireless radio access networks	✓	X	Neither Party
23	A Wholesale market for the transmission facilities used to deliver Subscription Television Services to end users in addition to the Subscription Television Services themselves	X	X	Neither Party

40. In light of the lack of horizontal overlap in these relevant product markets, the Proposed Transaction will not lead to any anti-competitive effects that are caused by a reduction in the number of competitors in any of these markets. The Proposed Transaction will, in essence, provide the Digicel Group (Bermuda) with sole control of an ISP (Transact), a mobile network operator (Digicel Mobile) (both already part of the Digicel Group (Bermuda)), and a fixed wireline network operator (BTC). Following completion of the Proposed Transaction, the Digicel Group (Bermuda) will be in a position to offer innovative bundles of services involving all of these products, which in general is a positive development for consumers. The Merged Entities will, therefore, arguably, be better able to compete on an equal footing with the KeyTech Group, which also owns, in part or in whole, an ISP (Logic), a mobile network operator (BDC), and a fixed wireline network operator (BCV).

41. The Authority recognizes, however, that, following completion of the Proposed Transaction, the Digicel Group (Bermuda) and the KeyTech Group will each hold, directly or indirectly, one of the two existing cellular mobile operators in Bermuda. At present, fixed network operators that are not affiliated with one of these two groups have no ability to provide mobile services as operators or as resellers (or MVNOs). That is because they are not authorized to use spectrum suitable for mobile communications and there are no wholesale mobile access products available in Bermuda from the existing mobile licensees. As a

result, customers may be deprived of even more robust competition in the provision of fixed and mobile services as packaged or bundled offerings in the absence of expanded opportunities for other fixed network operators to compete in the provision of mobile services.

42. These issues are discussed in the following section.

## **5.2 Addressing the risk of anti-competitive effects of conglomerate mergers pursuant to RAA Section 87(10)(a) and (b)**

### **5.2.1 Competitive concerns**

43. As determined in the Authority's SMP Final Decision, BTC has significant market power in the provision of fixed wireline services,<sup>2</sup> whereas Digicel Mobile has significant market power in the provision of mobile services.<sup>3</sup> Fixed and mobile services are complements, and the significant market power that the Parties hold, respectively, in these markets may give rise to competitive concerns that are sometimes described as the "portfolio effect."
44. For example, the possibility to more efficiently bundle complementary goods and services that is brought about by a conglomerate merger may give the Merged Entities the ability and incentive to leverage a strong position in one market (the tying market) to another (the tied market) by means of tying (i.e., only selling complementary products together) or bundling (i.e., increasing the selling price of complementary products when sold on a stand-alone basis, compared to the true price of these products when bought together). Such behaviour could have the effect of harming competition in a particular market, or markets.
45. The tying of products involves the supply of two complementary goods exclusively as a bundle, without also offering the stand-alone product (such as mobile voice and fixed broadband). The Authority does not consider tying behaviour to be a concern with the Proposed Transaction, particularly because there are adequate *ex ante* regulatory safeguards in place under the Remedies General Determination which expressly prohibit this type of activity.<sup>4</sup>
46. The ability to leverage into other markets via bundling activity is, however, a source of real concern. In general terms, bundling differs from tying insofar as the individual products (such as mobile voice and fixed broadband) may be available separately on the market, but the discounted price of the tied bundle may be so low as to be anticompetitive. In particular, the Authority is concerned about the Merged Entities' enhanced ability, and incentive, to leverage its strong position in mobile markets into fixed line markets, as well as its ability to leverage BTC's SMP in fixed line markets into mobile markets.
47. Although the circumstances presented by every proposed concentration are unique in nature and in time, the Authority recognizes that the concerns raised by a particular transaction may sometimes reflect systemic or industry-wide issues that are best dealt with in a wider industry review. In the context of the electronic communications sector, the avenues available to the Authority to address such issues include a sectoral review pursuant to RAA Section 17, a consultation pursuant to RAA Section 85(6)(a) or a market review proceeding pursuant to ECA Section 23. The Authority has concluded that a number of the competition-related concerns raised by the Proposed Transaction require the

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<sup>2</sup> See Table 1 of the SMP Final Decision.

<sup>3</sup> See Figure 3 of the SMP Final Decision.

<sup>4</sup> See paragraph 98 of the Remedies General Determination.

imposition of various conditions on the Parties in order to prevent likely competitive harm, pending an in-depth review of the issues. These conditions shall remain in effect until the conclusion of a relevant Market Review Proceedings.

### **5.2.2 Conditions to address competitive concern**

48. The Authority has therefore decided to impose certain obligations on the Parties as a condition for its approval of the Proposed Transaction, pending the conclusion of the relevant Market Review Proceedings. These conditions, which are aimed at addressing the potential anti-competitive effects that could result from the Proposed Transaction, are as follows:

- (a) The Merged Entities shall maintain the D-BTC Affiliate as a functionally separate subsidiary of Digicel Mobile subject to a separate ICOL pursuant to the hold separate condition established in Section [8.1.1] of this Decision. This hold separate condition will, among other things, require the Merged Entities to obtain prior written approval from the Authority for the transfer of any ownership right or interest in the D-BTC Affiliate, or the transfer/outsourcing of any commercial activity by the D-BTC Affiliate to any of the Other Digicel Affiliates.
- (b) The D-BTC Affiliate shall retain and continue to apply its existing financial and cost accounting principles and methodology and shall not use any portion or aspect of the information accounting systems utilized by the Other Digicel Affiliates, unless otherwise approved in writing by the Authority.
- (c) The Merged Entities shall obtain the Authority's prior written approval of certain service bundles it proposes to offer in accordance with the requirements and procedures set out in Annex B to this Decision.
- (d) The Digicel Group (Bermuda) shall comply with all SMP obligations imposed on BTC in the Remedies General Determination in respect of any fixed wireline services that it elects to provide, while the D-BTC Affiliate shall likewise comply with all SMP obligations imposed on Digicel Mobile in the Remedies General Determination in respect of any mobile services that it elects to provide.

### **5.2.3 Rationale for the conditions**

#### ***Hold Separate Condition***

49. The Authority considers the continued operation of the D-BTC Affiliate as a separate entity to be an important competitive safeguard, at least pending the conclusion of a relevant Market Review Proceedings, and therefore has decided to formally impose a "hold separate" condition on the Merged Entities. The Authority is of the view that a hold separate condition is necessary to ensure, among other things, the efficacy of the accounting separation and no unreasonable bundling conditions set out below.

50. This obligation also addresses the concern that the Merged Entities' fixed network operations may unfairly favour its mobile affiliate or operations by making technical information relating to interconnection of fixed network planning available to them before this competitively important information is provided to unaffiliated third parties. It will also facilitate the transparency of other transactions between the D-BTC Affiliate and the Other Digicel Affiliates, such as those covered by the accounting separation condition set out below.

51. The specific requirements of the hold separate condition are listed in Section [8.1.1] of this Decision. These requirements prohibit any integration between the D-BTC Affiliate and the Other Digicel Affiliates following the completion of the Proposed Transaction without obtaining the prior approval of the Authority, and also require that the D-BTC Affiliate is maintained as a viable commercial entity pending the outcome of the relevant Market Review Proceedings.
52. Digicel Mobile and the D-BTC Affiliate must, also maintain separate ICOLs in order to ensure arm's length treatment and application of the licence conditions, particularly those relating to SMP operators (Condition 11.2), as between the separated entities.
53. The Authority believes that these measures will greatly mitigate any anti-competitive effects that might arise due to service bundling, with one exception: the provision of mobile-fixed bundles by the Merged Entities.
54. The hold separate condition is a form of functional separation, which is a type of *ex ante* remedy specified in ECA Section 24(1)(m). This condition is being adopted by the Authority pursuant to RAA Section 87(11)(a), and will remain in place until the completion of the Market Review Proceedings.

#### ***Cost Accounting and Accounting Separation Condition***

55. Where a bundle is offered, it must be determined that the bundle price covers the wholesale cost of the SMP product(s), the retail costs of the bundle, and the cost of any non-SMP product included in the bundle.<sup>5</sup> The Authority is concerned that the mobile operations of the Merged Entities may be able to engage in internal transfer pricing arrangements that do not properly incorporate the regulated wholesale prices for fixed services that are charged to unaffiliated third parties.
56. In order to promote transparency and facilitate the accurate measurement of the relevant costs for the purpose of determining whether the Merged Entities have been engaging in unreasonable bundling, the Authority has decided that the accounting information systems of the D-BTC Affiliate that BTC used prior to the close of the Proposed Transaction must be kept entirely separate from the accounting information systems utilized by the Other Digicel Affiliates and that the D-BTC Affiliate shall not use the accounting systems utilized by the Other Digicel Affiliates unless approved in writing by the Authority.
57. The cost accounting and accounting separation condition is a type of *ex ante* remedy specified in ECA Section 24(1)(i) which is being adopted by the Authority pursuant to RAA Section 87(11)(a), and will remain in place until the completion of the Market Review Proceedings.

#### ***Condition not to unreasonably bundle***

58. Where a mixed bundle is offered, the bundle price must cover the wholesale price of the SMP product(s), the retail costs of the bundle, and the cost of any non-SMP product(s) included in the bundle.<sup>6</sup> Otherwise, the Merged Entities will be able to use the creation of discounted bundled services to evade the SMP obligations that have been imposed on BTC pursuant to the Remedies General Determination.

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<sup>5</sup> See paragraph 56 of the Remedies General Determination.

<sup>6</sup> See paragraph 56 of the Remedies General Determination.

59. To ensure the Merged Entities comply with the relevant SMP obligations concerning unreasonable bundling, the Authority will require the Merged Entities to comply with the procedures set out in Annex B to this Decision. Annex B requires the Merged Entities to obtain the Authority's prior approval of certain service bundles it proposes to offer until the conclusion of the relevant Market Review Proceedings.
60. This no unreasonable bundling condition will help ensure that the D-BTC Affiliate will be constrained in its ability to price bundle services anti-competitively post-merger, insofar as the Merged Entities must:
- (a) provide separate access to all components comprising a bundle to any retail customer that wants them; and
  - (b) provide other operators with wholesale access to all SMP products comprising a bundle and provide wholesale access to the bundle itself for any bundle comprised solely of SMP products originating from markets in respect of which wholesale access obligations have been imposed.
61. The condition not to unreasonably bundle is a type of *ex ante* remedy specified in ECA Section 24(1)(k) which is being adopted by the Authority pursuant to RAA Section 87(11)(a), and will remain in place until the conclusion of a relevant Market Review Proceedings.

#### ***Continued Application of SMP Obligations***

62. The Authority also wishes to ensure that all of the SMP obligations that currently apply to BTC under the Remedies General Determination will continue to apply with full force to the Merged Entities. Similarly, any obligations that currently apply to Digicel Mobile should also apply to the fixed network operations previously operated by BTC should it choose to offer mobile services as well. For the sake of clarity, the application of the respective SMP obligations of the Merged Entities are set out in Annex A to this Decision.

#### ***Consideration of Potential Condition Concerning Wholesale MVNO Access***

63. Finally, the Authority considered imposing, as an additional condition for the approval of the Proposed Transaction, the requirement that the Merged Entities forebear from providing bundles of mobile and fixed wireline services, until it first makes available a wholesale MVNO service to all other ICOL holders.
64. The Authority notes that the Remedies Final Decision acknowledges the risk that Digicel Mobile and BDC could leverage their SMP in the mobile market into fixed wireline markets (voice, broadband, etc.) by providing fixed and mobile bundles. Such bundles could not be replicated by other competitors, unless these competitors were provided with wholesale access to either BDC's or Digicel Mobile's mobile networks.<sup>7</sup> For this reason, the Authority concluded that it would closely monitor the market to ensure this type of behaviour did not result in serious competition problems.
65. The Authority considers this issue of MVNO access to be an increasingly important question in light of developments in the sector, including but not limited to the Proposed Transaction. Because of its broader implications, including the impact on demand by

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<sup>7</sup> This could be achieved by making use of fixed line wholesale access products, including wholesale line rental and local calls.

potential new entrants for mobile spectrum that is expected to become available in the near term, the Authority has decided to defer consideration of this issue to the Market Review Proceedings and/or an industry consultation on the assignment of High Demand Spectrum pursuant to the Minister's Spectrum Policy Statement.<sup>8</sup> The Authority considers that, pending the outcome of those proceedings, the conditions imposed by this Decision will adequately protect competition in the affected relevant markets and that, in these circumstances, the Authority's approval of the Proposed Transaction will not significantly alter the *status quo ante* in this regard.

#### 5.2.4 Conclusion on competitive effects

66. Digicel Mobile and BTC do not compete with each other in any relevant product markets. The Authority has concluded that competition is likely to be increased by the Proposed Transaction in a number of relevant markets because the Digicel Group (Bermuda) will be on a more equal footing vis-à-vis the KeyTech Group. It will then be in a better position to compete effectively, especially in respect of the provision of bundles of complementary products and services. The Authority is therefore of the opinion that the Proposed Transaction will, to that extent, be pro-competitive as it will possibly facilitate the creation of a counterweight to the KeyTech Group's dominance in a number of markets. However, for the reasons discussed above, the Authority has determined that a number of competitive conditions must be imposed until the Authority completes the Market Review Proceedings, taking into account recent significant changes in electronic communications markets in Bermuda, including completion of the Proposed Transaction.
67. The Authority notes that there would be a risk that the Proposed Transaction could lead to a position of joint dominance (i.e. duopoly) if it were likely that, following the Proposed Transaction, the Digicel Group (Bermuda) and the KeyTech Group would refrain from competing aggressively against each other, and engage in tacit coordination or collusion in the setting of prices, division of markets or otherwise. On balance, however, the Authority does not consider this to be a likely scenario, particularly given the Representations made and the business and market development objectives of the Parties that are set out in the Section 87(3) Notification. Given the investment in upgrades and extensions that are being proposed by the Digicel Group (Bermuda) in the Section 87(3) Notification, the Authority expects that, following the completion of the Proposed Transaction, the Digicel Group (Bermuda) will attempt aggressively to challenge the position of the KeyTech Group and other competitors in many of the markets. The result can be expected to be more robust competition in price, service quality and innovation, which will be to the benefit of the people of Bermuda.
68. For this reason, the Authority does not propose to make this Final Decision subject to any approval conditions aimed at addressing a tacit collusion outcome. However, the Authority intends to re-examine the potential of this effect thoroughly during the relevant Market Review Proceedings and has the power to address this issue in other ways in the unlikely event that its expectation should prove overly optimistic.

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<sup>8</sup> Spectrum Policy Statement By Dr. the Hon. E. Grant Gibbons, JP, MP Minister of Education and Economic Development, 22 September 2014.

## **6 Public Interest Analysis**

### **6.1 Overview of analysis**

69. RAA Section 87(10)(c) requires the Authority to ensure that the Proposed Transaction does not harm the public interest. As noted in paragraph [25] above, the Authority's investigation has taken into consideration the objectives set out in ECA Section 5 when determining whether or not the Proposed Transaction is likely to harm the public interest. These include, for example, the objectives to:

- (a) ensure access to affordable and reliable electronic communications services;
- (b) enhance Bermuda's competitiveness globally;
- (c) encourage development of the sector, consumer choice and innovative services;
- (d) encourage sustainable competition in the sector;
- (e) promote investment in the sector to stimulate the economy and employment; and
- (f) promote Bermudian ownership and Bermudian employment at all levels of the sector.

70. The Proposed Transaction will also involve a change of control in BTC, an ICOL holder, within the meaning of ECA Section 18(7). In considering whether to approve a proposed change of control in an ICOL holder, the Authority considers whether the proposed change of control is compatible with the objectives of the ECA in keeping with the public interest.

71. In order to ensure that the Proposed Transaction does not harm the public interest and that the associated change of control is compatible with the purposes of the ECA, the Authority has decided to impose certain conditions on the Parties. As set forth in Annex C, these conditions have been approved by the Minister in accordance with RAA Section 87(11)(c) and/or ECA Section 18(6) and ICOL Condition.

### **6.2 Representations made by Digicel Group (Bermuda) and Digicel Mobile**

72. The Digicel Group (Bermuda) and Digicel Mobile have made a number of representations of intent to the Authority, which have been taken into account, and were critical to the analysis in considering whether to approve the Proposed Transaction. The Authority considers these Representations to be very important to its assessment of the impact of the Proposed Transaction on the public interest and the objectives of the ECA.

73. The Representations made to the Authority in relation to the Proposed Transaction are summarized below:

- (i) The Merged Entities will increase employment in the D-BTC Affiliate by as much as [...] jobs in technology, customer service, sales and marketing after the closing of the Proposed Transaction, with the new hires being predominantly Bermudian.
- (ii) The Digicel Group (Bermuda) does not expect any job losses at the D-BTC Affiliate to result from the close of the Proposed Transaction.
- (iii) [...];
- (iv) Subject to an approved business plan and detailed technical survey and design (estimated to be completed [...] after completion of the Proposed

Transaction), the Merged Entities will invest in the order of BMD [...], with a substantial amount being invested within [...], into the D-BTC Affiliate by way of upgrades to the D-BTC Affiliate's [...] and other operational investments into the D-BTC Affiliate. This investment will result in the [...].

74. Adherence to these Representations by the Merged Entities will be closely monitored by the Authority and by the Department of Telecommunications. As indicated in the Minister's Approval Letter (appended to this Decision at Annex C), adherence to these Representations by the Merged Entities will be taken into account by the Minister, pursuant to Section 114B of the Companies Act, when considering the terms on which he may decide to renew Digicel Mobile's Section 114B licence, in particular with respect to the desirability of retaining the economic resources of Bermuda in the control of Bermudians.<sup>9</sup>

### **6.3 Analysis of ECA Section 5 objectives**

75. In this section, the Authority considers in general terms whether the Proposed Transaction is likely to be in the public interest and meet the objectives of the ECA. In general, the Authority concludes that, provided that the Merged Entities adhere to the Representations made to the Authority and meet the conditions set out in this Final Decision, the Proposed Transaction will not harm the public interest and will be compatible with the objectives of ECA Section 5.

#### **6.3.1 The Proposed Transaction is expected to ensure access to affordable and reliable electronic communications services**

76. The Digicel Group (Bermuda) has represented that it will be investing significant amounts of capital into BTC's legacy network [...], thus significantly improving its performance and reliability (as set out in paragraph [73(iv)] above.) This Representation was instrumental to the Authority's assessment that the Proposed Transaction is compatible with this objective of the ECA.
77. The Authority has no evidence on which to conclude that the Proposed Transaction is likely to result in higher prices for Bermuda consumers. As discussed in paragraphs [46] and [55] above, however, there is a significant concern that the unfettered ability of the Merged Entities to provide discounted service bundles will result in below-cost pricing, to the detriment of competitors and, ultimately, consumers. The conditions set forth in Section [8.1] below are designed to alleviate the competition concerns.

#### **6.3.2 The Proposed Transaction is expected to enhance Bermuda's competitiveness globally**

78. As noted above, the Digicel Group (Bermuda) has represented that it will invest in the upgrading of BTC's legacy network infrastructure [...] following completion of the Proposed Transaction. This Representation has persuaded the Authority that the Proposed Transaction will do much to enhance Bermuda's competitiveness globally by making it an even more attractive place for the financial services industry and other technology-dependent industries to invest.

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<sup>9</sup> Section 114B(3)(d) of the Companies Act.

### **6.3.3 The Proposed Transaction is expected to encourage development of the sector, consumer choice and innovative services**

79. The Proposed Transaction will allow the Digicel Group (Bermuda) to compete more effectively against the other strong market players by enabling it to more closely match, and compete against, the range of products and services currently being offered, thereby enhancing consumer choice. This increase in competition in the sector will likely be a positive step, although the Authority recognizes that ICOL holders that are not affiliated with either the Digicel Group (Bermuda) or the KeyTech Group may be at a competitive disadvantage without regulatory intervention. The conditions set out in Section [8.1] below are meant to protect competition across the sector pending the completion of the Market Review Proceedings by the Authority.
80. Furthermore, the upgrading of BTC's legacy network infrastructure [...] will encourage further development of the sector. The Digicel Group (Bermuda) has also stated that it intends to utilize these planned network upgrades and enhancements for the development and delivery of innovative products and services into Bermuda's electronic communications sector. The Authority believes that these assertions are fully consistent with the dynamic of increased competition in the marketplace.

### **6.3.4 The Proposed Transaction is expected to encourage sustainable competition in the sector**

81. The development of the sector and the promotion of consumer choice and innovative services discussed in Section [6.3.3] above, coupled with the promotion of investment in the sector as described in Section [6.3.5] below, all strongly suggest that the Proposed Transaction will generally encourage sustainable competition in the sector, provided that the Merged Entities fully comply with the conditions stipulated in Section [8.1] below above pending completion of the Market Review Proceedings.

### **6.3.5 The Proposed Transaction is expected to promote investment in the sector to stimulate the economy and employment**

82. In the short term, the Merged Entities will employ more people to carry-out the significant network upgrades and enhancements that it intends to undertake in respect of BTC's legacy copper network (see Section [6.3.1] above). Further, the Digicel Group (Bermuda) has made Representations to the Authority that it will increase employment in the D-BTC Affiliate by as much as [...] jobs in technology, customer service, sales and marketing after the closing of the Proposed Transaction, with the new hires being predominantly Bermudian (see Section [6.3.6] below). In the long term, an upgraded, faster, more enhanced network will be highly attractive to international businesses and local entrepreneurs, and so will likely increase levels of employment in the electronic communications sector more broadly as well as in other areas of the economy.

### **6.3.6 The Proposed Transaction is expected to increase Bermudian employment and ownership**

83. The Authority has some concern as to how the Proposed Transaction will affect the level of employment in the electronic communications sector in Bermuda over the next one to two years. However, the Digicel Group (Bermuda) has made Representations to the Authority that it does not expect any job losses at the D-BTC Affiliate to result from the close of the Proposed Transaction and, in fact, intends to increase employment in the D-BTC Affiliate by as much as [...] jobs in technology, customer service, sales and marketing after the closing of the Proposed Transaction with the new hires being predominantly Bermudian.

## **6.4 Addressing the public interest concerns**

### **6.4.1 Public interest concerns**

84. As discussed in the previous section, the public interest concerns that are raised by the Proposed Transaction are largely addressed by the Representations that have been made by the Digicel Group (Bermuda) and Digicel Mobile.
85. However, BTC has historically played an important role as the incumbent provider of fixed voice and data services in Bermuda's telecommunications ecosystem, and it continues to do so. As a consequence, the Authority wishes to ensure that BTC's acquisition by a predominantly mobile communications operator with a global focus does not result in any deterioration in the provision of basic fixed telecommunications services in Bermuda. Such an outcome would be incompatible with ECA Section 5(1), subsections (a) through (h).
86. The Authority also wishes to ensure that the Merged Entities have every incentive to adhere to the Representations that have been made to the Authority. The conditions set out below are intended to address these public interest concerns.

### **6.4.2 Conditions to address public interest concerns**

87. The Authority has decided to impose on the Merged Entities the obligations set out below as a condition of the grant of its approval pursuant to RAA Section 87(11)(c) and/or ECA Section 18(6) and ICOL Condition 20:

- (a) The Merged Entities shall obtain prior written approval for the transfer out of the D-BTC Affiliate of any ownership right or interest in the Fixed Network Assets, or the transfer/outsourcing of any commercial activity from the D-BTC Affiliate.

In any case, the Authority reminds both Digicel Mobile and BTC of the following ICOL Conditions that are pertinent and applicable to the Parties to the Proposed Transaction:

- (i) the standard ICOL licence states that neither assets nor personal data can be moved abroad without first obtaining the permission of the Authority and the Minister;<sup>10</sup> neither can the licence be moved abroad without the Authority's and the Minister's approval;<sup>11</sup> and
- (ii) ICOL Condition 7.4 requires that the individual licensee shall:
1. maintain in Bermuda the original files of all personal data relating to the provision of the authorized electronic communications service; and
  2. ensure that all such personal data are capable of being accessed by the Government in real time.
- (iii) ICOL Condition A5.2 states that until such time as the Authority makes a General Determination to the contrary, the Licensee shall provide the Authority with no less than 120 days advance notice, or such other notice

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<sup>10</sup> ICOL, Annex A, Transitional Provisions, Provision A5.1.

<sup>11</sup> ICOL Conditions 19 and 20.

as the Authority may determine, before employing outside of Bermuda any personnel, Electronic Communications Network facilities, Associated Facilities and Associated Services relating to the provision of the Electronic Communications Services authorized by this Licence.

- (b) The Digicel Group (Bermuda) shall procure that D-BTC Affiliate shall regularly report to the Authority on the progress of the Merged Entities towards fulfilling the Representations, in a format to be stipulated by the Authority, as set out in Section [8.2] below.

88. These conditions have been approved in writing by the Minister in accordance with RAA Section 87(11)(c) and/or ECA Section 18(6) (and ICOL Condition 20).

## 6.5 Rationale for the conditions

### ***No Transfers or Asset Stripping***

- 89. The Authority is of the view that it is in the commercial interests of the Digicel Group (Bermuda) to expand, upgrade and enhance the fixed network and services currently provided by BTC. However, given the nature of the Proposed Transaction (namely the acquisition of the incumbent fixed operator in Bermuda by a predominantly mobile communications operator with a global focus), there is a concern that the concentration could result in the deterioration of basic fixed telecommunications services in Bermuda. This could happen, if, for example, the Fixed Network Assets of the D-BTC Affiliate are sold. Such an outcome would be incompatible with ECA Section 5.
- 90. Given the importance of BTC as Bermuda's historic provider of fixed voice telephony services and the "carrier of last resort" for the basic telecommunications needs of many residents, it is important that the D-BTC Affiliate be maintained as a viable commercial entity.
- 91. The Authority is also concerned that post-merger, there is the possibility that the Fixed Network Assets of the D-BTC Affiliate could be transferred outside of Bermuda. This outcome would likely also be incompatible with ECA Section 5(1)(i).
- 92. The obligation on the Merged Entities not to transfer the Fixed Network Assets of the D-BTC Affiliate addresses these concerns by requiring the Authority's written approval to be obtained prior to any such transfer.

### ***Reporting Obligation on the Parties Representatives***

- 93. As indicated above, the Digicel Group (Bermuda) and Digicel Mobile have made a number of representations to the Authority, which have been taken into account and were critical to the analysis in considering whether to approve the Proposed Transaction. The Authority considers that these Representations to be very important to its evaluation of the impact of the Proposed Transaction on the public interest and the objectives of the Electronic Communications Act 2011. For these reasons, the Authority plans to monitor the progress of the Merged Entities towards fulfilling the commitments embodied in its Representations. To this end, the reporting obligation imposed on the Digicel Group (Bermuda) in Section [8.2] of this Decision requires the Digicel Group (Bermuda) to submit specific information to the Authority on a regular basis that will facilitate the ability of the Authority to monitor developments in this regard.

94. The Authority also notes that Digicel Mobile has been granted a Section 114B Licence (dated 15 April 2015) to carry on business as a local company in Bermuda which, with regard to Section 114B of the Companies Act, exempts Digicel Mobile of the generally applicable obligation requiring a company to have 60% Bermudian ownership.
95. The Authority will closely monitor adherence to these conditions by the Merged Entities and stewardship of the D-BTC Affiliate's Fixed Network Assets and employees that Digicel Mobile is acquiring through the Proposed Transaction. The Minister will take such matters into account when considering the terms on which Digicel Mobile's Section 114B licence may be renewed when it expires on 31 May 2020.

## **6.6 Conclusion on the public interest analysis**

96. For the reasons set out in Sections [6.3.1] through [6.3.6] above, the Authority concludes that, on balance, and subject to adherence to the Representations by the Merged Entities and the conditions set forth in Section [8.2] below, the Proposed Transaction is unlikely to harm the public interest and is compatible with the public interest objectives of the ECA.

## **7 Section 87 Public Comments**

97. On 23 January 2015, the Authority published on its website an invitation to comment on the Proposed Transaction. By the close of the comment period on 6 February 2015, the Authority had received comments from four parties active in the electronic communications sector (Link, TBI, BDC, and iTech), and eight comments from individual members of the general public.
98. The comments received are summarized and addressed below.

### **Link**

99. Link has no objection to the Proposed Transaction, but expressed its concerns about the ability of the Merged Entities to offer bundles that could not be matched by others. Link asked the Authority to evaluate appropriate SMP obligations to ensure that the "retail minus" delta (the margin within which alternative operators must effectively compete) is not subverted by bundled offerings that could get around the minimum retail minus margin (and thereby create an anticompetitive margin squeeze).

### **TBI**

100. While TBI does not oppose the Proposed Transaction *per se*, it urges the Authority to impose various conditions, in order to preserve a "level playing field" for all participants, including:
- (a) prohibiting the bundling of mobile with residential or business data offerings;
  - (b) imposing immediate and mandatory MVNO wholesale offers; and
  - (c) imposing the same type of obligations on BTC, once it becomes a member of the Digicel Group (Bermuda), as it was subject to as a member of the KeyTech Group.

### **BDC**

101. While BDC does not oppose the Proposed Transaction *per se*, it expresses concerns that the Merged Entities may:
- (a) act to limit competition and innovation; and

- (b) constrain access to, or increase the cost of, providing fixed circuits and facilities to other ICOL holders for which acceptable substitutes may not exist, such as in the City of Hamilton, that are necessary to maintaining existing services.

### **iTech**

102. iTech opposes the merger on the basis that it will create a duopoly. In 2012, BTC stated that it wanted to act as a wholesale access provider for other ICOL holders. iTech is concerned that Digicel Mobile does not have a similar interest in being a wholesaler, and that it will therefore effectively shut out other carriers. iTech is also concerned that Digicel Mobile will have too much market power over its rivals “since their networks are currently intertwined with BTC’s core [network]”.

### **Members of the general public**

103. Of the eight comments submitted by members of the general public, six respondents oppose the Proposed Transaction, while one respondent is neutral and one is in favour of it. Those opposed to the Proposed Transaction are opposed on the following grounds:

- (a) **Loss of employment:** One respondent, a former Digicel Mobile employee, expressed concern that, once the Proposed Transaction is completed, Digicel Mobile would move certain jobs, such as customer service jobs, off-shore as it allegedly did when it purchased Transact.
- (b) **Blockage of competing services:** One respondent noted that in Jamaica, members of the Digicel Group Global, together with Lime, have allegedly blocked access to various texting and voice applications such as Skype, WhatsApp, and Viber. This respondent expressed the concern that, once Digicel Mobile acquires control of BTC’s broadband access network, it will engage in similar blocking activities in Bermuda.
- (c) **Poor service quality:** A number of respondents expressed concern about Digicel Mobile’s quality of service, which they consider to be sub-standard. These respondents were concerned that the sub-standard quality of service they experienced with Digicel Mobile would be extended to BTC’s operations if the merger was permitted to go through.
- (d) **The Proposed Transaction will have an anti-competitive effect:** Two respondents opined that the Proposed Transaction would be ultimately anti-competitive in that it would result in a market split between two highly concentrated electronic communications service providers, the Digicel Group (Bermuda) and the KeyTech Group, which would divide the market between them to the detriment of consumers.

104. The respondent in favour of the Proposed Transaction supports it on the grounds that the Merged Entities would provide BCV, BDC, and Logic with some much needed competition and, hopefully, would result in lower prices and better service quality for consumers.

## **7.1 The Authority’s Analysis and Response**

105. With respect to the concern that Digicel Mobile may block access to certain services and applications, the Authority notes that it has at its disposal ample regulatory tools to deal with anticompetitive behaviour of this kind pursuant to RAA Sections 85 and 86. In any event, the Authority plans to address this issue on an industry-wide basis in a forthcoming consultation on the need for “Net Neutrality” rules and related concerns.

106. Regarding the concern expressed that jobs might be moved abroad as a result of the Proposed Transaction, the Authority has addressed this issue with respect to all ICOL holders. The Transitional Provisions of the ICOL prohibit the movement of assets and personnel abroad, without first obtaining the permission of the Authority and the Minister.<sup>12</sup> The ICOL also prohibits the movement abroad of the licence, without the approval of the Authority and the Minister.<sup>13</sup> In addition, as discussed above in Section [6.2] above, the Digicel Group (Bermuda) has made representations to the Authority of its intention to, among other things, create jobs in Bermuda as a result of the Proposed Transaction and the planned upgrades to the BTC Affiliate's network.
107. Furthermore, in its Section 87(3) Notification, Digicel Mobile stated that it:
- "[...] currently locates employees relating to its Bermuda operation largely in Bermuda and there is no current plan to change this approach with respect to the acquisition of BTC. As an example, unlike some competitors, Digicel maintains a local call centre which manages the majority of customer enquiries in Bermuda and is staffed by Bermudians."*<sup>14</sup>
108. While the Authority makes no comment about the quality of service offered by Digicel Mobile, it is to be expected that the nature and type of the network upgrades proposed by Digicel Mobile will improve the speed and quality of data transmissions.
109. Concern was expressed that, by acquiring BTC, Digicel Mobile will be able to engage in "exclusionary practices". This refers to any conduct by an operator with market power that has the effect of hampering or eliminating effective access by actual or potential competitors to necessary supplies or markets. Such conduct can have a detrimental impact on the competitive process, as it may lead to the marginalization and ultimately to the exclusion of competitors from the market. Any reduction in effective competition in this manner can, in turn, have a detrimental impact on customers, where it enables the operator with market power to profitably increase prices, restrict choice and/or lower quality, efficiency and productivity in the market.
110. The Authority believes that this concern is largely alleviated by the condition imposed in Section [8.1.4] of this Decision. In this regard, and should any of the Other Digicel Affiliates choose to provide fixed wireline networks or services in respect of which an SMP finding has been made, the Digicel Group (Bermuda) is required to comply with all of the SMP obligations imposed on BTC in the Remedies General Determination in respect of its fixed wireline network or service. Likewise, the D-BTC Affiliate must comply with all of the SMP obligations imposed on Digicel Mobile in the Remedies General Determination in respect of any mobile network or service offerings that part of the business may elect to provide.
111. The Authority further notes that exclusionary behaviour on the part of an SMP provider, which Digicel Mobile and BTC both are, is expressly prohibited under RAA Section 85(5) (prohibition of the abuse of a dominant position). These concerns will be addressed by the affiliate transaction rules that will be part of the hold separate condition set out in Section [8.1.1] of this Decision.

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<sup>12</sup> ICOL, Annex A, Transitional Provisions, Provision A5.1.

<sup>13</sup> ICOL Conditions 19 and 20.

<sup>14</sup> Annex [A], page 2.

112. A major concern of the operators is that Digicel Mobile will bundle products in an anti-competitive manner. The Authority believes that this risk is adequately addressed under the condition imposed in Section [8.1.3] of this Decision. Once again, the Authority points out that the Market Review Proceedings will consider, among other things, the possible existence of a new market for bundles. As part of those Proceedings, the Authority will consider whether additional regulatory remedies are required.

## **8 Final Decision**

1. This Final Decision is made on the basis of the information provided by the Parties to the Authority and/or the Representations made by the Digicel Group (Bermuda) and Digicel Mobile to date, which were critical to the Authority's analysis and decision. This Final Decision is subject to change (without limitation), before or after completion of the Proposed Transaction, in the event the information provided and/or Representations made are found to be materially inaccurate or incorrect, or if there is a material change in any respect. In particular, the Authority reserves the right to withdraw its approval, or modify the conditions of its approval, in the event the final terms and conditions of the underlying agreement to the Proposed Transaction or any information and/or Representations provided by the Parties is materially different to that originally presented to the Authority by the Parties, or if the information and/or Representations made by the Digicel Group (Bermuda) and Digicel Mobile are determined to have been false.
2. Based on the analysis presented above, and after taking into account the various comments received by the Parties and interested members of the public as well as the Representations made (identified in Section [6.2] above), the Authority has decided to approve:
  - (a) Digicel Mobile's acquisition of BTC, through a merger with BTC's immediate parent company, Barrie Holdings, subject to the conditions imposed pursuant to RAA Section 87(10) and RAA Section 87(11)(a) and (c), which are set out in Sections [8.1] and [8.2] below; and
  - (b) the change of control in BTC, as an ICOL holder, subject to the conditions imposed pursuant to ECA Section 18(6) and ICOL Condition 20, which are set out in Section [8.2] below.
3. These conditions, which are being imposed pursuant to RAA Section 87(8)(b) and ECA Section 18(6) are intended to address the likely adverse effects that the Proposed Transaction would otherwise have on the competitive process and the public interest.
4. The conditions established by this Decision are divided into two parts: (1) those addressing competition concerns, and (2) those that address public interest concerns. A copy of the Minister's written approval of the relevant conditions, pursuant to RAA Section 87(11)(c) and/or ECA Section 18 (6) (and ICOL Condition 20) is provided for reference at Annex C to this Decision.

### **8.1 Conditions addressing competition concerns**

5. The following conditions are imposed on the Parties pending the conclusion of the relevant Market Review Proceedings:

### 8.1.1 Hold Separate Condition

6. The Merged Entities shall ensure and procure that BTC's core, fixed wireline business shall be carried on by a standalone legal entity (the "D-BTC Affiliate") separately from the other entities that comprise the post-merger Digicel Group (Bermuda) (the "Other Digicel Affiliates").
7. The Merged Entities shall ensure and procure that the D-BTC Affiliate shall continue to operate under its separate ICOL, which, among other things requires that the obligations contained in BTC's existing ICOL at Condition 11.2 shall continue to apply in respect of the fixed network operations of the D-BTC Affiliate following completion of the Proposed Transaction, as follows:

*“With regard to any fixed-line market in which the BTC has been determined to possess Significant Market Power, the Digicel Group (Bermuda) shall comply with the following requirements unless they are specifically waived by an Administrative Determination of the Authority:*

- (a) not to unduly discriminate in relation to the provision of Interconnection or Access, in particular, by applying equivalent conditions in equivalent circumstances to Other Licensees providing equivalent services, and providing them with services and information (including technical specifications and network-related information) under the same conditions and of the same quality as it provides for its own services or those of its Affiliates, subsidiaries, other business units (including the mobile business operations) and partners; and*
- (b) not to adopt any technical specifications that would unreasonably or unnecessarily obstruct or impede the ability of Other Licensees to interconnect with the former BTC fixed line facilities or Access parts of the fixed line network that are subject to Ex Ante Remedies previously imposed on BTC pursuant to Sections 23 and 24 of the ECA.”*

8. Save in the ordinary course of business, the Merged Entities shall be prohibited from transferring, by whatever means, any ownership right or interest of whatever nature in any of the D-BTC Affiliate's Fixed Network Assets (whether tangible or intangible), functions (including by means of outsourcing or service agreements or arrangement), that was under the ownership, control or operation of BTC prior to the completion of the Proposed Transaction, from the D-BTC Affiliate to any of the Other Digicel Affiliates without the prior written approval of the Authority.
9. The Merged Entities shall maintain the D-BTC Affiliate as a viable and functioning going concern, and ensure that sufficient resources are made available to it for the development of the D-BTC Affiliate's business.
10. The Merged Entities shall ensure that all customer contracts of BTC at the time of the closing of the Proposed Transaction continue to be serviced by the D-BTC Affiliate.

### 8.1.2 Cost Accounting and Accounting Separation Obligation

11. The D-BTC Affiliate shall retain and continue to use its existing financial and product accounting information systems pending completion of the Market Review Proceedings. The D-BTC Affiliate shall not use any portion or aspect of the accounting systems utilized by the Other Digicel Affiliates. These separate systems shall not be merged pending the

conclusion of the Market Review Proceedings, or without first obtaining the prior written approval of the Authority.

12. Transfer charges between Digicel Group Global and the D-BTC Affiliate for internal use shall be the same as the price that would be charged for the product and service if it were being sold to a third party.
13. To the extent to which there are costs common to Digicel Group Global and the D-BTC Affiliate, these costs shall be split between the two companies based on relative use. Documentation should be developed and retained that shows the basis for common cost assignment. For example, to the extent that an officer works for both firms, the officer's fully loaded salary will be split between the two companies based on relative hours spent working for each entity. Documentation should be developed and retained that tracks time spent on each business.

### **8.1.3 Obligation Not to Unreasonably Bundle**

14. The Merged Entities shall obtain the Authority's prior review of certain service bundles it proposes to offer in accordance with the requirements and procedures set out in Annex B to this Decision.

### **8.1.4 Continued Application of SMP Obligations**

15. The Digicel Group (Bermuda) shall comply with all SMP obligations imposed on BTC in the Remedies General Determination in respect of its fixed wireline service. Likewise, the fixed network operations owned by BTC prior to completion of the Proposed Transaction (however constituted within the Digicel Group (Bermuda) following completion) shall be required to comply with all of the SMP obligations imposed on Digicel Mobile in the Remedies General Determination in respect of any mobile network or service offerings that part of the business may elect to provide.

## **8.2 Conditions addressing public interest concerns**

### **8.2.1 No Transfer of Assets or Asset Stripping**

16. Save in the ordinary course of business, the Merged Entities shall be prohibited from transferring out of the D-BTC Affiliate, by whatever means, any ownership right or interest of whatever nature in any of the Fixed Network Assets (whether tangible or intangible), functions (including by means of outsourcing or service agreements or arrangement) that were under the ownership, control or operation of BTC prior to the completion of the Proposed Transaction, without the prior written approval of the Authority.

### **8.2.2 Reporting Obligations on Representations Made by the Digicel Group (Bermuda) and Digicel Mobile**

#### ***Representations made by the Digicel Group (Bermuda) and Digicel Mobile***

17. The Digicel Group (Bermuda) and Digicel Mobile have made a number of representations of intent to the Authority, which have been taken into account, and were critical to the analysis in considering whether to approve the Proposed Transaction. The Authority considers these Representations to be very important to its assessment of the impact of the Proposed Transaction on the public interest and the objectives of the ECA.
18. The Representations made to the Authority in relation to the Proposed Transaction are summarized below:

- (a) The Merged Entities will increase employment in the D-BTC Affiliate by as much as [...] jobs in technology, customer service, sales and marketing after the closing of the Proposed Transaction with the new hires being predominantly Bermudian.
- (b) The Digicel Group (Bermuda) does not expect any job losses at the D-BTC Affiliate to result from the close of the Proposed Transaction.
- (c) [...]
- (d) Subject to an approved business plan and detailed technical survey and design (estimated to be completed [...] after completion of the Proposed Transaction), the Merged Entities will invest in the order of BMD [...], with a substantial amount being invested within [...], into the D-BTC Affiliate by way of upgrades to the D-BTC Affiliate's [...] and other operational investments into the D-BTC Affiliate. This investment will result in the [...].

***Reporting Obligations on Representations***

19. The Digicel Group (Bermuda) shall procure that the D-BTC Affiliate regularly collects the information set out below and that it shall report to the Authority on the progress of the Merged Entities towards fulfilling the Representations, in a format to be stipulated by the Authority, as follows:

- (a) no later than [90] days following the close of the Proposed Transaction, the D-BTC Affiliate shall submit to the Authority the following information, which shall be accompanied by confirmation in writing by the CEO of Digicel Mobile that the information reported is true and complete:
  - i. employment figures and projections, including any planned hiring, redundancies or terminations;
  - ii. [...]; and
  - iii. a complete copy of the business plan and detailed technical survey and design of the upgrades and improvements to the D-BTC Affiliate's Fixed Network Assets and the provision of [...] services.
- (b) Thereafter, the D-BTC Affiliate shall provide reports to the Authority every six months (or at such other intervals as may be approved by the Authority), which shall contain the following information (and any other information that the Authority may from time to time request), accompanied by confirmation in writing by the CEO of Digicel Mobile that the information reported is true and complete:
  - i. current employment figures and projections, including any planned hiring, redundancies or terminations;
  - ii. [...]
  - iii. the amount of all relevant investments made to date, broken down by reporting period (or as otherwise agreed with the Authority) that the Merged Entities have made in the Fixed Network Assets of the D-BTC Affiliate, or in [...] services that will make use of these Fixed Network Assets, and/or any plans relating to such investments, including:
    - A. the specific network expansion or improvements achieved or in progress, including the number of [...] deployments;

- B. the resulting improvements in the quality of fixed broadband service, speed and/or coverage in each Parish of Bermuda;
  - C. the status of [...] development plans, investments and roll-out; and
  - D. the amount of the relevant investments made and/or forecast; and
20. By 31 May 2019, Digicel Mobile shall file with the Authority and the Minister a comprehensive report, which contains a full accounting of the achievements of the Merged Entities in fulfilling the Representations to date and a full explanation of any failure to fulfil the Representations. The report shall also identify any investments approved by the Digicel Group (Bermuda) and/or Digicel Group Global and committed for the period covering 1 June 2019 through 31 May 2020. The reported information shall be confirmed as true and complete by the CEO of Digicel Mobile and will be taken into account by the Minister, pursuant to Section 114B of the Companies Act 1981, when considering the terms on which he may decide to renew Digicel Mobile's Section 114B licence, in particular with respect to the desirability of retaining the economic resources of Bermuda in the control of Bermudians.

**Annex [A]—Clarification of *Ex Ante* Regulatory Remedies Applicable to the Merged Entities Following Completion of the Proposed Transaction**

**Part 1: Remedies that shall continue to apply to the Merged Entities following completion of the Proposed Transaction**

1. In accordance with the Remedies General Determination, the obligations imposed on BTC shall continue to apply to the D-BTC Affiliate and shall also apply to any service provided by any of the Other Digicel Affiliates if the service falls within a relevant market for which BTC has been found to have SMP. In the event of any ambiguity, the matter shall be referred to the Authority for a decision on the applicability of the relevant obligation. The relevant obligations imposed upon BTC by the Remedies General Determination are presented in summary form in the table below.

<b>(A) Retail Obligations</b>		
<b>Relevant BTC Product Markets</b>	<b>Retail Obligations</b>	<b>Relevant GD Section</b>
1 – 4 & 6 - 8	Obligation to continue offering existing Retail products.	4.1.1
1 – 4 & 6 - 8	Obligations to abide by the relevant price caps imposed by the Authority in each of the relevant product markets.	4.1.2
1 – 4 & 6 - 8	Obligation to file all existing tariffs with the Authority within 30 calendar days of the GD becoming effective.  Obligation to notify the Authority concerning: <ul style="list-style-type: none"> <li>(a) all new tariffs, tariff changes and extensions to special promotions;</li> <li>(b) non-standard pricing arrangements;</li> <li>(c) new Retail Service offerings; and</li> <li>(d) planned service withdrawals.</li> </ul>	4.1.3
<b>(B) Wholesale Obligations</b>		
<b>Relevant BTC Product Markets</b>	<b>Wholesale Obligations</b>	<b>Relevant GD Section</b>
10 – 13 & 16 - 21	Obligation to abide by all applicable Wholesale Access service provisioning determinations arrived at by the Authority concerning the imposition of Wholesale Access remedies to the various relevant product markets.	4.2.1
10 - 13 & 18 - 21	Obligation to abide by all applicable Wholesale Access service pricing determinations arrived at by the Authority and the application of those same determinations to the provisioning of Wholesale Access services in the various relevant product markets.	4.2.2
10 - 13 & 16 - 20	Obligation to abide by the Authority's determinations concerning the provisioning of Retail and Wholesale bundles containing SMP Products including, for example, the determinations stating that: <ul style="list-style-type: none"> <li>(a) SMP Products in bundles must be made available on standalone basis to Retail and Wholesale customers;</li> <li>(b) bundles or sub-bundles composed solely of SMP Products must be made available on a Wholesale basis; and</li> </ul>	4.3.2

	(c) at the request of the Authority, demonstrate that a bundled service offering does not impose a Price Squeeze.	
10 - 13 & 18 - 20	<p>Obligation to abide by the Authority's determinations concerning the provisioning of New Retail Services, which state, in part, that:</p> <p>(a) BTC may not market or commercially launch any New Retail Services in Markets 10 through 13 and 18 through 20 unless and until, in the opinion of the Authority, a fit for purpose equivalent Wholesale service has been fully tested and is commercially available to Access Seekers throughout Bermuda.</p>	4.3.2.1
10 - 13 & 18 - 20	Obligation to abide by the Authority's determinations concerning the model A&I approval process.	5.1.1
10 - 13 & 18 - 20	Obligation to abide by the Authority's determinations concerning the RAIO process.	5.1.2
10 - 13 & 16 - 20	<p>Obligation to abide by the Authority's determinations concerning the ring-fencing of information flows between BTC's Wholesale and Retail operations by, among other things:</p> <p>(a) ensuring that any proprietary information it obtains from or about its Wholesale customers relating to the provision of regulated Wholesale services is kept confidential by BTC personnel involved with providing and maintaining those services;</p> <p>(b) ensuring that such information is not shared, made accessible to or otherwise disclosed to anyone involved with providing the sale, marketing, and/or supply of BTC's Retail services; and</p> <p>(c) executing and filing with the Authority a semi-annual declaration confirming that adequate physical, technical and/or organisational measures are in place and that reasonable training and notice have been provided to relevant Wholesale personnel ensuring that steps (a) and (b), above, are being complied with.</p>	4.3.3

<b>(C) Other Obligations</b>	
<b>Other Obligations</b>	<b>Relevant GD Section</b>
Obligation to abide by the Authority's determinations concerning call termination on fixed and mobile networks:  (a) in accordance with ICOL Transitional Condition A2.3(a), parties are required to not increase the rates for Wholesale termination of domestic and international calls on their Electronic Communications Networks.	4.2.3
Obligation to, at all times, comply with all applicable provisions of ICOL Condition 11 (SMP).	4.3.1

2. In accordance with the Remedies General Determination, the obligations imposed on Digicel Mobile shall continue to apply to Digicel Mobile and shall also apply to the D-BTC Affiliate if the service falls within a relevant market for which Digicel Mobile has been found to have SMP. In the event of any ambiguity, the matter shall be referred to the Authority for a decision on the applicability of the relevant obligation. The relevant obligations imposed upon Digicel Mobile by the Remedies General Determination are presented in summary form in the table below.

<b>(A) Retail Obligations</b>		
<b>Relevant BDC Product Markets</b>	<b>Retail Obligations</b>	<b>Relevant GD Section</b>
5	Obligation to file, on a quarterly basis, information on traffic flows and customer connections in the format described at paragraph 37 of the GD.	4.1.4
<b>(B) Wholesale Obligations<sup>15</sup></b>		
<b>Relevant Product Markets</b>	<b>Wholesale Obligations</b>	<b>Relevant GD Section</b>

<sup>15</sup> As stated at paragraph 44 of the GD, if Digicel Mobile commences provision of a Wholesale mobile service to another Operator, the following obligations will apply:

1. the imposition of the Wholesale Access obligations discussed at Sections 4.2.1 (paragraph 44) of the GD;
2. the imposition of the model A&I and RAIO remedies discussed generally at Section 5.1 of the GD;
3. the remedies concerning the provisioning of Retail and Wholesale bundles imposed at Section 4.3.2 of the GD; and
4. the remedies concerning the ring-fencing of information flows imposed at Section 4.3.3 of the GD.

15	Obligation to abide by all applicable Wholesale Access service provisioning determinations arrived at by the Authority concerning the imposition of Wholesale Access remedies to the various relevant product markets.	4.2.1 paragraphs 42 and 44
15	Obligation to abide by all applicable Wholesale Access service pricing determinations arrived at by the Authority and the application of those same determinations to the provisioning of Wholesale Access services in the various relevant product markets.	4.2.1 paragraphs 42 and 44
<b>(C) OTHER OBLIGATIONS</b>		
<b>Remedies imposed</b>		<b>Relevant GD Section</b>
Obligation to abide by the Authority's determinations concerning call termination on fixed and mobile networks:  (a) in accordance with ICOL Transitional Condition A2.3(a), parties are required to not increase the rates for Wholesale termination of domestic and international calls on their Electronic Communications Networks.		4.2.3
Obligation to, at all times, comply with all applicable provisions of ICOL Condition 11 (SMP).		4.3.1

3. For the avoidance of doubt:

- (a) Pursuant to paragraph [56] of the Remedies General Determination, the D-BTC Affiliate may provide its regulated wholesale offerings to the Other Digicel Affiliates and they may bundle these services together with other services offered by them, provided that the D-BTC Affiliate makes equivalent regulated wholesale services available to its unaffiliated wholesale customers at the same time and on terms and conditions that are no less favourable than those pursuant to which it makes these services (or their equivalent) available to the Other Digicel Affiliates.
- (b) Pursuant to paragraph 44 of the Remedies General Determination, Digicel Mobile may offer a regulated wholesale mobile service to the D-BTC Affiliate, provided that it makes an equivalent wholesale (MVNO) service available to unaffiliated third parties on terms and conditions that are no less favourable than those pursuant to which it makes these services (or their equivalent) available to the D-BTC Affiliate.
- (c) The pricing and offering of the bundles are subject to the conditions set forward in Annex B to this Decision.

**Part 2: Remedies previously applicable to Barrie Holdings/BTC that shall not apply to the Merged Entities following completion of the Proposed Transaction**

- 4. The Authority has determined that in light of the changed circumstances, the following conditions that previously were imposed on Barrie Holdings/BTC are no longer relevant, necessary or proportionate, and so:
  - (a) The requirement to disclose to the Authority any negative pledge and/or change of ownership control conditions that may be imposed on the Merged Entities or that the Barrie Holdings/BTC are currently under which were previously unknown to the Authority is hereby removed;

- (b) The requirement to submit an annual budget for the D-BTC Affiliate (and/or the fixed wireline network holdings Digicel Mobile is acquiring through its purchase of Barrie Holdings) to the Authority is hereby removed;
- (c) The requirement to submit to the Authority, on an annual basis and in a timely manner, the management accounts, by product line, for the D-BTC Affiliate (and/or the fixed wireline network holdings Digicel Mobile is acquiring through its purchase of Barrie Holdings) along with an annual financial report which must include reporting on revenues, expenditures, assets, cash, and debt to equity ratios of said fixed wireline network is hereby removed;
- (d) The requirement to report, on a quarterly basis, the total number of subscribers to all services provided by the D-BTC Affiliate (and/or the fixed wireline network holdings Digicel Mobile is acquiring through its purchase of Barrie Holdings) is hereby removed;
- (e) The requirement that within three months after the date of BTC's acquisition, Digicel Mobile (or the management team (or their representatives) responsible for the fixed wireline network operations of the Merged Entities) must enter into a discussion with the Authority concerning its plans for the continual rollout of high-speed fixed broadband access service is hereby removed.

**Annex [B] — No Unreasonable Bundling Obligation**

Pending the conclusion of the Market Review Proceedings:

1. The Merged Entities shall not advertise, sell, offer or provide a package of services consisting of fixed (PSTN) voice and/or fixed broadband services bundled together with (1) mobile voice, and/or (2) mobile data, and/or (3) ISP services (a "Regulated Bundle") unless:
  - (a) the Regulated Bundle was already being provided by Digicel Mobile, BTC or Transact as of [15 April] 2015; or
  - (b) the Merged Entities obtain the Authority's approval in writing prior to implementing:
    - i. any change in the terms and conditions (including price) of a Regulated Bundle falling within Section 1(a) above; or
    - ii. the advertisement, sale, offer or provision of any new Regulated Bundle, i.e., one that does not fall within Section 1(a) above.
2. In the case of Section 1(b) above, the Merged Entities must, [...] in advance of the proposed effective date of any change in the existing terms or conditions (including price) of a Regulated Bundle or the offer of a new Regulated Bundle, provide supporting evidence to the Authority sufficient to demonstrate that:
  - (a) the proposed price of the Regulated Bundle fully recovers the cost of the services contained within the bundle plus a reasonable margin in accordance with the principles set out in paragraph 56(c) of the Remedies General Determination ("Cost Data");
  - (b) the proposed price is not predatory; and
  - (c) the terms and conditions of the offer are not otherwise anticompetitive.
3. The Cost Data shall be provided in an auditable format and contain an explanation of the methodology and assumptions utilized in developing the associated Retail costs of the bundle as well as the non-SMP Product related costs;
4. In considering the evidence provided in conformity with Section 2 above:
  - (a) the Authority will consider, among other factors, the amount by which the price of the Regulated Bundle deviates from the sum of the stand-alone prices of the bundle's individual components; and
  - (b) the burden shall be on the Merged Entities to prove its case based, among other things, on credible accounting data and/or relevant price benchmarks as determined by the Authority.
5. In accordance with paragraph 56(c) of the Remedies General Determination, the Cost Data submitted pursuant to Section 2 above must demonstrate that:
  - (a) for any Regulated Bundle composed solely of SMP Products, the difference between the Retail and Wholesale price of the bundle is not less than the Retail price multiplied by the Avoidable Cost discount factor of 15%; and
  - (b) for any bundle containing SMP and non-SMP Products in the same bundle:
    - i. the Retail price of the bundle is not less than the sum of the Wholesale prices of any SMP Products contained in the bundle; and

- ii. the difference between the Retail price of the bundle and the sum of the Wholesale prices of any SMP Products contained in the bundle is such that it recovers the cost of providing the non-SMP Products contained in the bundle, as well as the associated Retail costs of the bundle.
- 6. If the price of the Regulated Bundle is less than the sum of the prices of the stand-alone components, the Merged Entities must identify and measure the cost savings achieved (and realized by the Merged Entities) through bundling, as well as the additional costs incurred through the provision of the Regulated Bundle.
- 7. If mobile voice and/or data services are included in a Regulated Bundle, the relevant component cost for the mobile service is the retail price of the equivalent mobile service. This cost proxy can be reduced to the extent that the Merged Entities can identify savings associated with bundling.
- 8. The Authority may, on its own initiative or following a timely objection raised by any interested party, issue a direction to the Merged Entities in connection with a notification pursuant to Section 2 of this Annex B above, requiring the Merged Entities to suspend the proposed effective date of (i) any change in the existing terms or conditions (including price) of a Regulated Bundle, or (ii) the offer of a new Regulated Bundle, until the Authority has investigated any relevant concerns raised and issued an administrative determination approving, modifying or rejecting the proposal of the Merged Entities. The Merged Entities shall immediately comply with any such direction issued by the Authority. For good cause shown, the Authority may elect to issue an administrative decision allowing (or allowing with modifications) a proposed change in the existing terms or conditions (including price) of a Regulated Bundle to come into effect or allowing the Merged Entities to offer a new Regulated Bundle without reviewing the Cost Data.

**Annex [C] — Copy of Minister's Approval Letter**



*Government of Bermuda*  
Ministry of Economic Development

**OFFICE OF THE MINISTER**

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May 7, 2015

Mr. Carl Musson – Chairman, Regulatory Authority of Bermuda  
3<sup>rd</sup> Floor Cumberland House  
Victoria St., Hamilton HM 11

Dear Mr. Musson:

**Re: Proposed Merger of Telecommunications (Bermuda and West Indies) Limited with Bermuda Telephone Company Limited (BTC)**

For the purposes of this letter, I adopt the definitions set out in Section 1 of the Authority's Final Decision in this proceeding.

Having reviewed the Authority's decision to approve the referenced merger subject to certain conditions, and having considered the proposed conditions pursuant to Section 87(11)(c) of the Regulatory Authority Act 2011, Section 18(6) of the Electronic Communications Act 2011 (ECA), and Condition 20 of the Integrated Operating Licence awarded to BTC, I hereby approve those conditions proposed by the Authority.

In approving these conditions, I note the importance of the role that BTC has historically played, and continues to play, in Bermuda's telecommunications ecosystem. These conditions are intended to prevent harm to the public interest and ensure that the core objectives of the ECA continue to be met. In particular, they are intended to ensure that the merger will not result in any deterioration in the provision of basic fixed telecommunications services in Bermuda nor negatively impact employment in the sector, but instead will increase investment in next generation technologies and employment, to the benefit of the citizens and residents of Bermuda.

Adherence to these conditions by the Merged Entities and their stewardship of BTC's Fixed Network Assets and employees that are being acquired through this merger will be closely monitored by the Authority and will be taken into account pursuant to Section 114B of the Companies Act 1981, when considering the terms on which Telecommunications (Bermuda and West Indies) Limited's Section 114B licence may be renewed, in particular with respect to the desirability of retaining the economic resources of Bermuda in the control of Bermudians.

Accordingly, the conditions are hereby approved.

Sincerely,

Sen. Michael M. Fahy, JP  
Acting Minister of Economic Development