



REGULATORY  
AUTHORITY

**Advisory Guidelines on the  
Applicability of the BR 79/2013 - 2013  
*General Determination: Obligations  
for Operators with Significant Market  
Power***

Date: 18 December 2017

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## 1 PURPOSE OF ADVISORY GUIDELINES

1. The purpose of this Advisory Guidelines document is to issue advisory guidelines pursuant to section 68 of the RAA, in response to the 2017 Judgment, which shall:
  - (i) confirm how the Authority will treat the 2013 *ex ante* remedies imposed on SMP operators during the period from now until they are modified, replaced or withdrawn by the results of the 2017 Market Review;
  - (ii) clarify that, subject to the results of the 2017 Market Review, the remaining SMP Obligations will continue to be enforced;
  - (iii) clarify the application of the SMP Obligations on certain affiliates;
  - (iv) clarify whether or not the SMP Obligations operate to prevent any of the SMP operators from offering bundled services; and
  - (v) clarify whether or not the SMP Obligations operate to require any SMP operators to offer broadband services on a wholesale basis at retail minus 15%.

## 2 EXECUTIVE SUMMARY

2. The Authority concludes:
  - (i) Any ICOL holder is invited to contact the Authority to make a representation that a particular SMP Obligation should not be enforced during the interregnum period before the conclusion of the current market review process. Any such representations will be considered by the Authority and a decision made by the Authority as to whether such obligations have been found to no longer fulfill their purpose and will not be enforced.
  - (ii) Subject to the results of the process described in 2(i) above, the Authority will continue to expect all of the 2013 SMP Obligations to be adhered-to, and will be subject to enforcement in the normal way.
  - (iii) The SMP Obligations do not prevent any operator from offering bundled services, but operators should be mindful of the requirements under their respective merger decisions which require the prior approval of the Authority before offering broadband bundles.
  - (iv) The merger decisions impose SMP Obligations on respective affiliates of the relevant SMP operators.
  - (v) Any of the 2013 SMP obligations which apply to "fixed broadband" will apply to fiberoptic broadband of any form and speed. This means that SMP Operators in broadband markets must offer wholesale services at a price of retail minus 15%.

### 3 BACKGROUND

#### 3.1 2013 Determination

3. Following a consultation process, on 7th August 2013 the Regulatory Authority of Bermuda (the "**Authority**") issued a General Determination (matter RM01/13-1040) (the "**Remedies General Determination**") imposing a set of *ex ante* regulatory obligations on operators found to have Significant Market Power (SMP) in relevant markets ("**SMP Obligations**").
4. Under the Remedies General Determination, the Authority imposed SMP Obligations on operators, including Bermuda Telephone Company Limited ("BTC") and Bermuda Cablevision Limited ("BCV"), that the Authority determined had significant market power in various markets.
5. These remedies include, for example, requirements on SMP operators in fixed wholesale and retail broadband markets for consumers and businesses<sup>1</sup> to comply with price caps, to file tariffs in advance, to offer wholesale access at retail minus 15%, to "unbundle" their product bundles and offer their components separately at a retail and wholesale level.
6. The SMP Obligations also include (at 4.3.2 of the Remedies General Determination) an obligation not to offer any "new retail service" (meaning any service which customers would perceive as new or materially different from other offers in terms of broadband speed or functionality) without first having obtained the Authority's confirmation that the equivalent wholesale service is fit for purpose.

#### 3.2 Past Concentration Applications

7. In May 2015 and April 2016, the Authority published final decisions (the "**Merger Decisions**"<sup>2</sup>) approving the proposed concentration applications made by Telecommunications (Bermuda and West Indies) Limited and Atlantic Tele-Network, Inc. (together with KeyTech Limited) respectively, subject to certain conditions.
8. These conditions included the "Hold Separate Condition" (section 8.1.1 and 12.1.1 of the respective Merger Decisions) which requires that the core fixed line businesses of the merged entities should be held in a separate standalone entity as well as conditions requiring the Merged Entities<sup>3</sup>, for an interim period (until a

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<sup>1</sup> BTC and BCV have SMP in markets 3 and 13 - fixed retail broadband for consumers outside Southside and fixed wholesale broadband outside Southside and Hamilton; and BTC alone has SMP in market 4- fixed retail broadband for businesses outside Southside and Hamilton and in market 12 - wholesale fixed broadband in Hamilton

<sup>2</sup> <http://www.rab.bm/index.php/determinations/1330-final-decision-btc-digicel-non-confidential-version-5-11-15/file> and <http://www.rab.bm/index.php/tele-admin-determinations-menu/1378-16-04-27-keytech-atn-final-decision-redacted-non-confidential-fnl/file>

<sup>3</sup> Which 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 DBTC Affiliate (including Barrie Holdings)" in relation to Digicel Group; and "KeyTech Limited and all corporate entities under its control following the close of the Proposed

new market review process is complete) not to offer bundles including broadband without the Authority's approval in accordance with certain requirements and procedures (section 8.1.3). The Authority reminds the Merged Entities of their responsibility to comply with the obligations set forth in the Merger Decisions.

### 3.3 2017 Review

9. On 17 October 2017 the Authority published a *Review of the Electronic Communications Sector* which constitutes the start of the new market review (the "2017 Review") process as required by the Electronic Communications Act 2011.
10. At the time of publishing this Advisory Guidelines document that 2017 Review is ongoing.

### 3.4 2017 Judicial Review

11. On 14 November 2017 the Supreme Court of Bermuda issued a decision on Case no:231 *One Communications (and others) v Regulatory Authority of Bermuda*<sup>4</sup> (the "2017 Judgment").
12. The 2017 Judgment concluded that the Authority was in breach of its duty to complete a market review within 4 years of the initial market review which was completed on 29 April 2013.
13. Pending the conclusion of the 2017 Review the 2017 Judgment stated that any enforcement action by the Authority for non-compliance with the SMP Obligations imposed by the 2013 Remedies General Determination would be invalid (para 64) "*but only to the extent that such enforcement action relates to an alleged failure to comply with any of the said remedies which are no longer 'necessary to prevent or deter anti-competitive effects' as required by section 24 (1) of the Electronic Communications Act 2011.*"
14. The 2017 Judgment continues at paragraphs 65 and 66:

65(2) *this Court hereby expresses the strong provisional view that the RA is not only legally bound by the promise to only enforce "a minimum set of existing obligations", but as a consequence of that promise, is also legally required to identify within a reasonable time and with due specificity precisely which obligations it intends to enforce during the interregnum period.*

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Transaction, as described in paragraph 10 of this Final Decision, including BDC/CellOne, Logic and Cable Co." in relation to One Communications.

<sup>4</sup> reported at [2017] SC (Bda) 97 Civ (14 November 2017) -

<https://www.gov.bm/sites/default/files/Judgment-One%20Communications%20Ltd-%20et%20al-v-The%20Regulatory%20Authority%20%281%29.pdf>

66 *With the benefit of the declarations granted, it ought to be possible in any event for the providers affected to notify the RA that they believe that certain [of the SMP obligations] ought no longer to be enforced, requiring the RA to either counter that position or waive (either actively or passively) any non-compliance which thereafter occurs.*

15. At paragraph 67 it continues:

67 *... the starting position is that all of the ex ante remedies are still in force and assumed to be enforceable unless the contrary is established.*

#### **4 TREATMENT OF 2013 SMP OBLIGATIONS DURING THE "INTERREGNUM PERIOD"**

16. In light of the 2017 Judgment, the Authority has considered the best course to follow in order to determine which of the 2013 SMP Obligations should continue to be enforced until they are modified, replaced or withdrawn by the results of the 2017 Review.
17. This "interregnum period" is expected to last for a short time until a final decision is issued in relation to SMP obligations going forward.
18. During this interregnum period ICOLs should have the opportunity to make representations as to which 2013 SMP obligations should be enforced.
19. The Authority therefore proposes, in line with the suggestion at paragraph 66 of the 2017 Judgment, to consider and respond to any representations received that may seek to justify and demonstrate that any specific 2013 SMP Obligations should not be enforced during the interregnum period. The Authority believes that the process described herein will enable the Authority to identify precisely which 2013 SMP Obligations should be enforced in any particular case during the interregnum period.
20. The Authority therefore invites any interested party to contact the Authority to make a representation that a particular SMP Obligation should not be enforced during the interregnum period. All representations should be provided to the Authority by 26 January 2018.
21. Any such representations received by the Authority will be considered as to whether or not the SMP Obligation in question is in fact necessary to prevent or deter anti-competitive effects. The Authority will then, in its sole discretion, modify this Advisory Guidelines document to confirm which SMP Obligations will not be enforced.
22. The Authority confirms that, subject to the results of representations made, if any, it will continue to expect the 2013 SMP Obligations to be adhered-to, and will enforce them in the normal way. This includes the obligation to provide wholesale services to any ICOL holder that requests such services, and that such provision should enable such ICOL holders to offer equivalent retail services (to those SMP operators) on a competitive basis.

## **5 DIGICEL GROUP**

23. The Merger Decision relative to Digicel Group states, at section 8.1.4:

*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.*

24. Annex A paragraph 1 also states:

*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.*

25. The Authority notes that the SMP Obligations apply equally to all affiliates of the Digicel Group, which include the following ICOL holders: Telecommunications (Bermuda and West Indies) Limited (trading as Digicel), Transact Bermuda Limited, and BTC.

## **6 ONE COMMUNICATIONS**

26. The Merger Decision relative to One Communications states, at section 12.1.4:

*The ICOL holders controlled by KeyTech shall comply with all SMP obligations imposed on them (or their predecessor companies) in the Remedies General Determination following completion of the Proposed Transaction.*

27. The Authority notes that the SMP Obligations apply equally to all affiliates of the One Communications (formerly KeyTech Limited) group, which include the following ICOL holders: Logic Communications Ltd. (formerly Bermuda Cablevision Limited now trading as One Communications), Bermuda Digital Communications Ltd. (trading as One Communications), and Cable Co. Ltd.

## **7 OFFERING BUNDLED SERVICES**

28. For the sake of clarity, the Authority also confirms that the SMP Obligations do not prevent any operator from offering bundled services, but they do impose an obligation on SMP operators to offer bundled components on a standalone basis at both the retail and wholesale levels, and to ensure that no price squeeze is in operation.

29. **Any SMP operator offering bundles** of fixed voice or broadband with (1) mobile voice; (2) mobile data; or (3) ISP Services may only provide such bundles on the basis that they do not constitute a margin squeeze, in the context of any wholesale service provision to other ICOL holders.
30. The Authority also confirms that the SMP Obligation to provide proper notice for *any* new service and *any* new prices is maintained and fully applicable.

## **8 APPLICATION OF THE 2013 SMP OBLIGATIONS TO FIBRE BROADBAND**

31. Under the Remedies General Determination:

*"Broadband" is defined as "the provisioning of the bundled package consisting of fixed broadband access and ISP services"; and*

*"Broadband Access" is defined as a reference "to the legacy service provided by a Class B provider such as BTC which linked an end-user to a provider of internet service provider (ISP) services. The link in question comprised local access, backhaul, and data stream aggregation, terminating at an ISP provider's premises; "*

32. The Authority confirms its view that this means that **any of the 2013 SMP Obligations which apply to "fixed broadband" will apply to fibreoptic broadband of any form and speed.**
33. This means that, for example, and for clarification, operators with SMP in the wholesale broadband markets (12 and 13) have an obligation to offer wholesale access at retail minus 15%.

**ICOLs should send all representations to Monique Lister at [mlister@rab.bm](mailto:mlister@rab.bm).**