



Digicel

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BY HAND / BY EMAIL

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Dear Mr Punaha

Market Analysis Guidelines Public Consultation

Thank you for the opportunity to make comments on NICTA's Market Analysis Guidelines Consultation Paper dated 25 July 2016 ("**Draft Guidelines**").

Digicel supports the development of Guidelines documents that assist in providing clarity and consistency in terms of NICTA's approach to regulation of the information and communications technology markets. While Digicel understands that the Draft Guidelines are not legally binding in terms of their application, once finalised they will nevertheless provide important guidance on NICTA's approach to market analysis. Digicel agrees with NICTA's comment at paragraph 3.6 of the Draft Guidelines where it notes that the market analysis process will not "replace or supplant the specific threshold tests that the Act requires to be met before such interventions may be recommended to the Minister" and that "*NICTA will typically use a market analysis as a filtering process to inform its decision as to whether or not it would be appropriate to contemplate making a regulatory intervention of the types provided for under Parts VI and VII of the Act*".

Nevertheless, it is appropriate that any Guidelines follow the scheme of the Act and do not result in decisions to pursue regulatory outcomes that would not be supported by the legislation. While Digicel appreciates that the Draft Guidelines are intended to "*explain how NICTA will define ICT service markets and assess competition within those markets*"¹ and we are supportive of that intention, we believe that the Draft Guidelines should go further to explain NICTA's approach and processes to applying an analytical framework to assess whether any market intervention may be required in order to perform its duties under the *National Information and Communication Technology Act 2009* ("**Act**").

Establishing an analytical framework

The application of a consistent analytical framework is consistent with international practice towards enforcing pro-competitive legislation and assists in ensuring that the task is carried out to a rigorous standard. This is because inappropriate regulatory decisions can adversely affect not only firms that are attempting to compete, but also customers that would otherwise benefit from effective competition and low prices. Within a developing country such as Papua New Guinea, particularly in a sector such as information and communications technology, there is a danger that inappropriate regulatory decisions increase the risk faced

¹ Draft Guidelines at paragraph 1.1.

by those investing in the sector and could harm the industry, to the detriment of consumers. For example, section 2 of the Act defines two of the Act's objectives as being to:

"...ensure that the ICT industry contributes to the greatest extent possible to the long-term economic and social development of Papua New Guinea, by means that include —

(a) providing a regulatory framework consistent with the regulatory principles in Section 3 that promotes —

(i) the long-term interests of Papua New Guinea and its people, taking account of the National Goals and Directive Principles and the Basic Social Obligations of the Constitution; and

(ii) the efficiency and competitiveness of the ICT industry in Papua New Guinea; and

(b) ensuring that ICT services of social importance are supplied as efficiently and economically as practicable and supplied at performance standards that reasonably meet the social, industrial and commercial needs of Papua New Guinea and its people; and

(c) promoting the development of an ICT industry in Papua New Guinea that is efficient, competitive and responsive to the needs of Papua New Guinea and its people; and

(d) promoting and maintaining fair and efficient market conduct and effective competition between persons engaged in commercial activities connected with the ICT industry in Papua New Guinea, including by assisting the ICCC to achieve this; and

...

(h) encouraging, facilitating and promoting sustainable investment in, and the establishment, development and expansion of, the ICT industry in Papua New Guinea, including via the exercise of facilities rights."

Section 3 of the Act also establishes important Regulatory Principles that are relevant to the Draft Guidelines whereby it is made clear that:

"... the ICT industry in Papua New Guinea be regulated in a manner that recognises —

(a) the effectiveness of market forces in promoting consumer welfare, specifically that —

(i) to the extent that markets are competitive, primary reliance should be placed on commercial negotiations and the greatest practicable use of industry self regulation,

subject to minimum regulatory requirements consistent with the objective of this Act; and

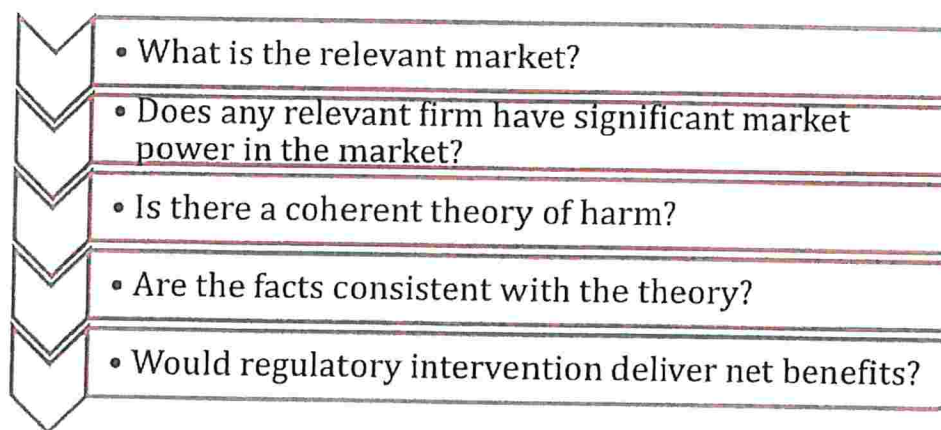
- (ii) to the extent that markets are not competitive, appropriate ex ante regulatory measures may be required to promote and maintain effective and sustainable competition; and*

(b) that regulatory measures should be —

- (i) proportionate and crafted to achieve results that are no more burdensome than necessary to achieve their stated regulatory objectives; and*
- (ii) based on sound economic principles and, to the extent feasible, should be technology-neutral to reflect the potential for convergence of technologies; and*
- (iii) administered in a transparent manner and, to the extent appropriate, should be the subject of prior public consultation (in accordance with Section 229 of this Act), published explanations and public clarifying guidelines; and*
- (iv) implemented within reasonable timeframes that recognise the need for ICT licensees to respond to dynamically changing market forces and the potential consumer detriment from protracted delay; and*
- (v) non-discriminatory in application such that, to the extent appropriate, similarly situated ICT licensees are treated on an equivalent basis subject to the recognition of legitimate differences; and*
- (vi) the subject of consultation with other relevant regulatory authorities in Papua New Guinea, where appropriate, to facilitate the development of a consistent regulatory policy in the public interest.*

It would be inappropriate for the Regulator to act in ways that undermined these objectives and principles.

Accordingly, Digicel suggests that NICTA include, as part of the Draft Guidelines, a clear process similar to that described below and which will be adopted by it when undertaking any market analysis for the purposes of assessing whether or not any intervention may be required.



Digicel submits that each of the steps in the process must be considered and satisfied before any recommendation for regulatory intervention is contemplated by NICTA.

In the following paragraphs, Digicel considers each of these steps in turn.

What is the relevant market?

Digicel broadly supports NICTA's approach to market definition. However, we are concerned that NICTA has not focussed sufficiently on the dynamic nature of ICT markets, especially with the rapid changes in technology, services and consumer habits that are currently occurring. For example, communication via social media is now often preferred over traditional voice communications. Internet based applications are also increasingly being used. This is having a profound impact in communications networks and is driving new ways to think about investment, infrastructure and service deployment.

As a result, traditional views about what might constitute a particular market and time horizons for analysis of those markets necessarily must also change. Digicel submits that it would be appropriate for the Draft Guidelines to reflect this.

Does any relevant firm have Significant Market Power in the market?

Similarly, Digicel is also broadly supportive of NICTA's approach to assessing whether or not any relevant firm has Significant Market Power ("SMP") in a market that has been defined.

The application of rigorous and fact-based tests is essential to ensure that unnecessary regulation is avoided. That is because intrusive regulatory actions can have more severe and damaging effects on investment incentives, efficient and sustainable competition and ultimately on consumer welfare. It could undermine NICTA's duty to ensure any interventions are "*proportionate and crafted to achieve results that are no more burdensome than necessary to achieve their stated regulatory objectives*".

Digicel is therefore concerned that NICTA proposes to regulate on the basis of "*thought experiments*" rather than empirical analysis². NICTA argues that this is necessary because it "*does not have key quantitative data*". Digicel submits that this is unsatisfactory and, if it were to be adopted in practice, would be likely to lead to outcomes that themselves are unlawful and are susceptible to challenge. NICTA has a duty to act on the basis of actual

² Draft Guidelines at paragraph 4.12.

data and not guesswork and, to the extent that it does not have actual data to support its hypothesis should refrain from seeking to impose regulated outcomes.

Is there a coherent theory of harm?

Digicel welcomes NICTA's acknowledgement that the fact that a firm has SMP in a market does not mean that the process of competition, and consumers, are necessarily being harmed as it is the very nature of competition in some markets that a firm that provides better quality products at lower prices may cause its rivals to make lower profits. NICTA would be right not to be concerned about this situation because it benefits consumers. Rather, it is abuses of a dominant position which lessen the competitive process that are of concern to regulators and competition authorities.

It is this theory of harm that is used to justify the introduction of legislation to protect the competitive process from abuse by firms that possess SMP. In this case, the Act provides powers that enable NICTA to make proactive recommendations to the Minister to introduce certain regulations to pre-empt anti-competitive outcomes where there are good and substantiated reasons to expect that they will occur.

Similar provisions are also reflected generally in international competition law. However, these provisions are usually designed to be give effect when anti-competitive abuses are considered to have occurred. Such provisions can be seen in Part 6 of the PNG *Independent Consumer and Competition Commission Act 2002* ("ICCC Act") which also applies to the ICT industry.

However, without proper evidence theories of harm are just abstract theories. If any such actual behaviour is alleged or expected to occur, the case for it must be established and proven by reference to the actual facts of the case, based on credible and cogent evidence that the claimed harm has occurred or can reasonably be expected to occur within a relevant time period.

Are the facts consistent with the theory?

Once NICTA has defined the relevant market, established that a firm has SMP within that market, and put forward a specific theory of harm, NICTA then needs to demonstrate how the theory applies to the specific facts in that particular case. That is, it is NICTA's obligation to specify exactly how the facts are consistent with a given theory of harm. Within the UK, the Office of Fair Trading and Competition Commission have stated that:

"... the SLC [substantial lessening of competition] assessment is inevitably fact specific".³

Importantly, it would be insufficient and inappropriate for NICTA to proceed on the basis of thought experiments that are not backed up by clear and compelling empirical evidence. Digicel further submits that any such evidence must be taken directly from the PNG market which, due to its unique characteristics, mark at as being substantially different from both developed markets and many other developing markets.

Would regulatory intervention deliver net benefits?

³ Review of Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, Draft of 14 April 2010 ("Joint Merger Assessment Guidelines"), paragraph 4.16.

Once a coherent theory of harm has been established, NICTA must then undertake analysis to determine whether any proposed regulatory intervention can reasonably be expected to deliver material net benefits to PNG. Any such analysis should be based on empirical evidence with the costs and benefits quantified. It is also important that such analysis includes a consideration of sensitivities to any assumptions that have been made.

Where there is any doubt or the expected net benefits of a proposed intervention are small, Digicel submits that NICTA should refrain from taking regulatory action. That is because the risks from unnecessary regulatory intrusion are great in terms of dampening incentives for further investment. This is something of critical importance to PNG where ICT infrastructure and services are still being rolled out in what are some of the most challenging economic and environmental conditions in the world.

NICTA makes an indirect reference at paragraph 5.8 of the Draft Guidelines where it states:

"When deciding whether to intervene NICTA must weigh the efficiency costs of potentially incorrectly identifying a market failure (commonly described as a Type I error) against the costs of correcting a market failure (commonly described as a Type II error) ... NICTA considers this highly appropriate given the potential costs of regulatory error."

However, while Digicel agrees strongly, this statement is only made in relation to the application of the "three criteria test" rather than the conduct of a specific cost benefit analysis. Digicel submits that this is insufficient and that a detailed cost benefit analysis should be fundamental to any regulatory decision making arising out of a market analysis and, as such, it should be reflected in the guidelines.

Consistency with analysis under the ICCC Act

Finally, Digicel notes that the Draft Guidelines appear to have been drafted in isolation from the Independent Consumer and Competition Commission ("ICCC") and the ICCC Act under which it operates. Digicel further notes that PNG's competition law is currently under review as part of a broader Government's Consumer and Competition Framework Review ("CCF Review") that was initiated by the Department of Treasury to examine the laws and institutions that protect consumers and promote competition in PNG.

Digicel submits that it would be appropriate for any Guidelines to be prepared in a coordinated way so as to ensure that competition law is applied consistently across all industries. Accordingly, Digicel suggests that NICTA work with the ICCC and the Government's CCF Review team to ensure that a consistent set of analytical practices and processes are adopted by both NICTA and the ICCC.

Digicel looks forward to an opportunity to review any further drafts of the Guidelines and would welcome an opportunity to discuss these issues with you at your convenience.

~~Yours sincerely~~



Andrew Kidu

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