



**REGULATORY
AUTHORITY
OF BERMUDA**

**Section 87 Concentration
Application**

Decision

Matter: Transactions Concerning: KeyTech Limited,
Bermuda Telephone Company Limited, Bermuda
Cable Vision Limited and Barrie OpCo. Limited

Date: 18 August 2014

Section 87 of the Regulatory Authority Act 2011 (the RAA) empowers the Regulatory Authority (the 'Authority') to consider and review applications that involve agreements and/or transactions that could result in the change of ownership and/or control of companies licensed by the Authority to offer Electronic Communications Services in Bermuda. This responsibility places the Authority in the role of a merger control authority strictly related to the sectors it regulates. In this case, the application for change of control relates to two entities in the electronic communications sector: The Bermuda Telephone Company (BTC) and Bermuda Cable Vision Limited (BCV).

After careful consideration of the terms and conditions of the transactions described below, a review of detailed business plans, extensive examination of the various funding and interconnected arrangements surrounding both of the proposed transactions and taking into account its duties under section 87(10) of the RAA, and comments received from interested parties, the Authority in the exercise of its powers under section 87(8)(b) and, subject to the Minister's approval under section 87(11)(c) of the RAA, approves the proposed transactions subject to the conditions listed below at Annexes A and B of this Decision.

This Decision is made on the basis of the information provided to the Authority by the transacting parties to date. The Authority's Decision in respect of the proposed transactions is subject to change (without limitation) in the event there is, in the sole discretion of the Authority, a material change to any of the information provided to the Authority in any respect. In particular, the Authority reserves the right to withdraw its approval or modify the conditions of its approval of either of the proposed transactions in the event the final terms and conditions of the agreements detailing transactions are materially different to those presented to the Authority by the parties.

1. Introduction

1.1 In July 2014 the Authority received notification of the following two proposed concentrations within the meaning of section 87 of the RAA:

- a. 16 July 2014: KeyTech Limited (KeyTech), the parent company of several electronic communications companies in Bermuda, proposes to acquire a controlling interest in Bermuda Cable Vision Limited (BCV) (the 'BCV Investment');
- b. 17 July 2014: Barrie OpCo Limited (Barrie), a recently incorporated Bermuda Company and having Barrie Holdings Limited as its direct parent company, ultimately owned and operated by an independent investor group with experience in telecommunications proposes to merge with BTC and the surviving company upon the completion of the merger would be BTC, which would be wholly owned by Barrie Holdings Limited (the 'BTC Purchase').

1.2 The BCV Investment and the BTC Purchase will be referred to in this Decision together as ('the Proposed Transactions'). The Proposed Transactions were described as, and agreed to on condition that they were contingent upon one and other. It is a condition of the BCV Investment that the BTC Purchase take place so as to ensure that at no point, KeyTech retains simultaneous ownership of BTC and the increased interest pursuant to the BCV Investment.

1.3 In keeping with its duties under section 87(10) of the RAA, in the exercise of its powers

under section 87(8), on 28 July 2014 the Authority issued an Invitation to Comment to the public (Invitation to Comment). This invitation sought comments from interested parties on the Proposed Transactions and their likely effect on innovation on Bermuda's Electronic Communications markets, the effect on competition in that market and/or the effect the transactions could have on the provision of services to the Bermuda public.

2. KeyTech's Divestiture of BTC

The Authority is cognizant of the fact that the BTC Purchase transaction, as proposed, will mitigate the cross ownership concerns it had in the electronic communications sector. Presently, KeyTech has significant holdings in both BTC (100%) and BCV. The Authority has previously determined that both of these entities have significant market power (SMP) in the two main Bermuda wire line infrastructure based services. The Authority's intention has been, and continues to be; to review the KeyTech group with a view to determining the effects KeyTech's cross ownership has on the many markets its subsidiaries operate in. In the interim, KeyTech affiliated companies, those with and without SMP status are under strict reporting obligations relating to inter group transactions. With the BTC Purchase by an independent third party, part of the Authority's concerns becomes significantly reduced. The wire line infrastructure market will now be held entirely by two separate, independent entities. This is a key consideration for the Authority.

3. Concerns

3.1 The Authority still remains concerned about other matters arising (or potentially arising) as a result of the Proposed Transactions. To address these issues the Authority has given its approval subject to conditions designed to reduce, what it finds are the potential for adverse effects on competition in the case of the BCV Investment transaction, and to ensure that BTC remains a viable and vibrant contributor in the Bermuda market in the case of the BTC Purchase transaction. To this end, the Authority is seeking commitments from both KeyTech and Barrie to ensure that the market remains robust, that new investment by competitors will not be stifled, and high entry barriers for new entrants are not created.

3.2 Internet Access /ISP Concerns

Both BCV and Logic Communications Limited (**Logic**) operate in the Internet Service (**ISP**) market. Logic has the largest share of the ISP market at present. BCV has been designated as having SMP in the Internet Access Service (**Access**) market and has recently begun an aggressive campaign to win customers onto its ISP platform (starting with its current Access Customers). The Authority is keen to ensure that BCV remains an aggressive competitor in the ISP market. By taking indirect control of BCV, KeyTech may be inclined to direct BCV's actions in the ISP market in order to protect Logic business or vice versa or in a manner which coordinates the business of both parties in an anticompetitive manner. The Authority has imposed conditions that are aimed at ensuring that BCV and Logic continue to operate as separate entities (and competitors) so long as the companies are in possession of two separate ICOLs.

3.3 Another of the Authority's main concerns is to ensure that the new owners of BTC fully understand the dynamics of Bermuda's electronic communications sector and are committed to making BTC a strong player in the market as a whole. To this end, the Authority is seeking to measure, on a regular basis, BTC's progress in the market against

Its market plans for increased innovation and investment and to create a dialogue with the new BTC ownership centered on roll out targets, which promote innovative product and service offerings to the Bermuda public. The Authority understands, and fully expects, BTC to quickly develop and bring to market new products and services in an effort to vigorously compete with as many services as possible.

3.4 BTC is one of only two broadband access providers in the market and is the incumbent wire line telephone service in Bermuda. Further, BTC's continual rollout of high-speed broadband service throughout the island will provide improved broadband coverage to consumers, increasing services available to the Bermuda public. The Authority is dedicated to the improvement of electronic communications services to Bermuda's residents, it is important; therefore, that BTC remains competitive.

4. Section 87 Public Comments

4.1 The purpose of the Invitation to Comment was to gain insight into whether the ICOL holders or members of the public had any concerns about the proposed transactions. The Authority considered comments relating to whether the Proposed Transactions are likely to have an effect on competition within Bermuda's electronic communication sector, have an effect on the residents of Bermuda with particular interest in the provision of electronic communication services, or have an effect on innovation within Bermuda's electronic communications sector.

4.2 The Authority received a total of three responses to its 28 July 2014 Invitation to Comment, one from a member of the public, and two from ICOL holders: Telebermuda International Limited (TBI) and Digicel Bermuda Limited (Digicel). The concerns of these parties are outlined below. For the most part, those providing comments were supportive of the BTC Purchase, there were, however, many concerns raised regarding the BCV Investment.

Member of the Public

4.3 The concerns of the member of the public highlighted the possibility of an increase in the cost of telecommunications products and services for Bermudian consumers should BTC cease to provide service to the home. The Authority sought clarification, as to why this member of the public made the assertions about price and service to the home. As of the date of this decision, the Authority has not received clarification from the concerned party.

4.4 The Authority's review of the business plans provided to it by Barrie demonstrates that the opposite is true. The business plan revealed no immediate plans to increase pricing of services or any plans to reduce services to the home. Further, the Authority notes that BTC will remain under its SMP obligations in the fixed line telephone and Internet Access Markets that requires BTC to file any price or tariff changes with the Authority for approval before implementation. The Authority has also imposed commitments on BTC's new owner, which are aimed at fostering the offering of new services together with the continuation of current services.

TBI

- 4.5 TBI requested more information about the party acquiring BTC, Barrie. It was not clear what the basis of TBI's request for more information about Barrie was meant to address. The Authority was, in fact, provided with personal and private references of the Barrie investors, specific information concerning their experience in telecoms businesses, detailed business plans and financing terms and conditions and had several meetings with the key investors at the Authority's headquarters to hear directly from them their plans for BTC's future and motivations for the purchase. The Authority has no reason to believe that the investors are not well intentioned and equipped to compete in the Bermuda electronic communications sector.

Digicel

Digicel set out the following concerns it had with the proposed BCV Investment:

- 4.6 Digicel raises its concern that the combination of BCV's dominance in the Internet Access and Subscription Television space together with Logic's ISP market share dominance and its Television product would, as a result of the proposed transaction, increase the ability of BCV and Logic to act in concert limit competition and innovation in the internet and subscription television markets. The Authority has considered this point at length. To mitigate anticompetitive behavior, the Authority has placed restrictions on cross directorships between the two companies and required both entities to be maintained and operated as independent competing companies. There will be a heightened scrutiny on the activities of BCV and Logic in the ISP and subscription television space as a result of their proximity and the Authority is able to impose ex post remedies in the event anticompetitive actions behavior arises.
- 4.7 Digicel recommended that the BCV Investment should be contingent on the application of full cost accounting and accounting separation requirements within the KeyTech group. The Authority is of the view that separate cost accounting is essential as it allows for more transparency. For this reason, in its conditions, the Authority has required that BCV's audited financial statements remain separate, and that Logic provide separate management accounts on an annual basis. In addition, the Authority expects to conduct a review on accounting separation requirements for all ICOL holders. BCV will also be required to provide in its accounting its costs and revenues by service on an annual basis.
- 4.8 In its response, Digicel requests a review of the market definition for the wholesale market for the supply of fixed broadband access services in areas outside of Southside and the City of Hamilton. This request is made on the grounds that currently, BCV has not been designated SMP for broadband access within the city of Hamilton, and Digicel is of the view that BCV does, in fact, have SMP over the entire geography of Bermuda. The Authority is required by section 75 of the ECA 2011 to carry out a market review before the expiration of its first 3 years in operation. Digicel's comments concerning the potential shift in the market warrant review and will be taken into account when the review commences.
- 4.9 Digicel has requested access to the local and sub loop unbundling from BTC and BCV as a precondition to the approval of the Proposed Transactions, i.e. Digicel has requested that the Authority require BTC and BCV to share the cable, copper and fiber optic cable

over which telephone, Internet and cable services are offered with other providers. Digicel's argument in support of this request is that such access would allow for further investment in all aspects of infrastructure, outside of cabling to the premises, allowing for greater competition within the telecommunications sector. Regardless of whether the transaction is approved or rejected, BCV and BTC's respective designations of SMP in the markets of Internet Access, television and telephone will likely remain unaffected. For this reason the Authority is not minded to accede to Digicel's request. The Authority's concern, chiefly, has to be about the anticompetitive effects (or potential anticompetitive effects) of the Proposed Transaction and whether there are any conditions that could prevent or quell such effects. The duopolistic ownership of infrastructure is not a result of the Proposed Transactions, it exists in any event.

- 4.10 It should be noted that the Authority has been reviewing best practices with regards to the use of dark fiber by competitors as well as other infrastructure sharing mechanisms. Some form of consultation, be it formal or informal, will follow in the months to come on this issue.
- 4.11 In addition, the Authority would like to clarify that currently, access to fiber, coaxial cables, and other networking infrastructure is not deemed to be a part of the existing Model Access and Interconnect Agreement (MAIA) for neither BTC or BCV.
- 4.12 Digicel has expressed concern regarding discriminatory practices against Digicel's ISP /Access customers, and believe that the Authority should monitor the situation following, through performing spot checks.
- 4.13 Digicel also notes that any interactions with Digicel ISP customers as a result of installation requests or troubleshooting should not be used as an opportunity to sell any additional services to Digicel customers. The Authority agrees. In fact, the agreements under the MAIA (on a wholesale basis) prevent such behavior from taking place. Digicel's request for a no win back clause would be a practical solution to the problems Digicel fears, however, the action alleged to be carried out by BCV in this regard, could theoretically be carried out without the approval of the Proposed Transaction. For this reason, the Authority is not in agreement with Digicel's request to make a no win back requirement obligatory outside of the MAIA.
- 4.14 In addition, Digicel Expressed concerns that discrimination in pricing from KeyTech for off island conveyance will allow for BCV to gain an unfair competitive advantage through obtaining lower Internet Transit rates for access to the Internet backbone. At present, all KeyTech affiliates that are ICOL holders are required to file any intergroup agreements with the Authority. Such filing obligations will allow the Authority to have visibility of the terms and conditions of services provided by ICOL holders within the KeyTech group to each other which will, in turn, allow the Authority to identify more quickly if there is any anticompetitive behavior in this regard.
- 4.15 The Authority stands ready and able to investigate Digicel's concerns in this regard, but is not prepared to add additional requirements to the KeyTech obligations.

5. Conclusion

The Authority grants approval of Proposed Transactions pursuant to section 18(6) of the ECA and section 87 of the RAA, and authorizes the change of control of the ICOL held by BTC from KeyTech to Barrie Holdings Limited;

- a. Subject to receipt of the Minister's approval under section 87(11) (c) of the RAA to the Conditions set out at Annexes A and B below;
- b. Subject to receipt of written consent of the Minister to the change of control of the ICOL held by BTC from KeyTech to Barrie Holdings Limited, as well as the change of control of BCV by Keytech, under section 18(6) of the ECA; and
- c. Upon condition that both KeyTech Limited and Barrie OpCo Limited provide a written confirmation that it will honour its respective conditions as set out in the annexes below.

Annex A

The Conditions of BTC

In addition to honouring all existing SMP obligations, BTC shall comply with the following conditions:

- 1) File with the Authority a monthly financial report (filed within 30 days of month end), which must include reporting on revenues, expenditures, assets, cash, and debt to equity ratio.
- 2) Promptly disclose to the Authority any Negative Pledge and/or change of ownership control conditions that may be imposed on the Company or that the Company is currently under which are previously unknown to the Authority;
- 3) Submit an Annual Budget to the Authority for the first two years of post acquisition operation (filed within 60 days of year end);
- 4) Submit an annual report of debt repayment within 60 days of yearend and prompt reporting of any new or changes in any financing agreement;
- 5) Submit management accounts to the Authority annually in a timely manner;
- 6) Submit quarterly reporting of total subscriptions for all services provided by BTC.
- 7) Provide the Authority with all the necessary documentation, agreements and undertakings to enable a compliance certificate pursuant to section 73(5)(a) of the Electronic Communications Act 2011 (ECA) to be issued not later than 3 months after the date of the completion of change of control of BTC;
- 8) Within 3 months after the date of acquisition, BTC must enter into a discussion with the Authority concerning its plans for continual rollout of high-speed broadband service as well as the provision of higher broadband access speeds to the Bermuda Market. This discussion will result in the formulation of a timeline within which the company will carry out the provision of widespread high-speed broadband coverage and higher broadband access speeds.

Annex B

The Conditions of BCV, Logic and KeyTech

In addition to honouring all of their existing SMP obligations, BCV and Logic shall comply with, or KeyTech shall procure that BCV or Logic as the case may be, complies with, the following conditions:

- 1) The acquisition of increased equity in BCV is conditional upon the successful divestiture and sale of BTC to an unrelated third party.
- 2) So long as Logic and BCV have two separate ICOLs, KeyTech must ensure that the companies are maintained as two independent entities competing with each other. For clarity, the Authority notes:
 - a. This condition does not prevent either company from changing or reducing its respective service offerings, as it might independently deem appropriate.
 - b. This condition does not prevent Logic from utilizing BCV's regulated wholesale services on a nondiscriminatory basis.
 - c. This condition does not prevent the use of shared corporate services (e.g. Legal, HR, Finance, etc.) where efficiencies can be obtained without violation of this condition.
 - d. No person will be permitted to serve as CEO or as a Director of both Logic and BCV simultaneously;
 - e. KeyTech's shall file with the Authority Directors and Officers Register for itself and each of its subsidiaries on an annual basis, and any updated registers within 14 days of any change in Board membership of such companies.
- 3) BCV must continue to provide audited annual financial statements separate from KeyTech. In addition, BCV must adhere to any and all financial market data collection requirements imposed by the Authority on ICOL holders that is likely to include requests for the filing of statements of revenue and cost information categorized by the ICOL holder's product and service offerings.
- 4) In addition to its current practice of submitting audited financial reporting for Logic as a part of the KeyTech Group, Logic submit segregated annual management accounts to the Authority in a timely manner.

[End]