



## **Notice of Termination of Concentration Review Conditions**

## **Request for Inputs pursuant to section 60 of the Regulatory Authority Act 2011**

Date: 25<sup>th</sup> September 2020

Comments Due: 9<sup>th</sup> October 2020

## TABLE OF CONTENTS

I.	INTRODUCTION .....	3
II.	BACKGROUND .....	4
III.	TRIGGERS FOR THE EXPIRY OF THE CONCENTRATION CONDITIONS CURRENTLY APPLICABLE.....	6
IV.	INFORMAL REQUEST FOR INFORMATION.....	11

## I. INTRODUCTION

1. This Notice of Termination of Concentration Review Conditions (“Notice”) and Request for Inputs pursuant to section 60 of the Regulatory Authority Act 2011 (“RAA”) is intended to provide sectoral participants and the general public with information concerning the anticipated expiry of the Concentration Review Conditions that currently apply to One Communications Ltd. (“OneComm”) and Telecommunications (Bermuda & West Indies) Ltd, Transact Ltd (both trading as Digicel) and the Bermuda Telephone Company Limited (trading as BTC), together (“Digicel”).
2. Pursuant to RAA section 87 and section 18(6) of the Electronic Communications Act 2011 (“ECA”), the RA imposed certain conditions on separate transactions completed in 2015 and 2016 involving:
  - Barrie Holdings Limited, Bermuda Telephone Company Limited, Telecommunications (Bermuda and West Indies) Limited, and Digicel Group Limited (the “Digicel Merger”) (Final Decision conditionally approving the concentration issued on 11 May 2015); and
  - The acquisition of Bermuda Digital Communications Ltd. (BDC) and KeyTech Limited (“KeyTech”), including its subsidiaries Logic Communications Ltd. (Logic) and Cable Co. Ltd. (Cable Co.), by Atlantic Tele-Network, Inc. (ATN) (the “OneComm Merger”) (Final Decision conditionally approving the concentration issued on 27 April 2016).

The purpose of these conditions (the “OneComm Concentration Conditions” and the “Digicel Concentration Conditions,” respectively) was to prevent the respective concentrations from having an anticompetitive effect, harming the public interest or otherwise undermining the basic purposes of the ECA. Among other things, the conditions required the new owners of each merged entity to comply with the applicable obligations adopted by the RA in 2013 that were imposed on sectoral participants with Significant Market Power (“SMP”), as well as specific “hold separate” obligations intended to reinforce these obligations.

3. On 1<sup>st</sup> September 2020, the RA issued its Final Report and Final Decision and Order in the Market Review consultation (“Market Review Decision”). Pursuant to that decision, the RA has adopted a new *ex ante* framework for the regulation of sectoral participants with SMP in Bermuda’s electronic communications markets (the “New SMP Framework”). The New SMP Framework replaces the SMP obligations adopted by the RA in 2013.
4. In accordance with the terms of the RA’s Final Decisions conditionally approving the Digicel and OneComm Mergers in 2015 and 2016, respectively, the conditions imposed on each of the merged entities were set to expire upon the implementation of SMP remedies adopted following a new market review. In the absence of any compelling reasons for retaining the Digicel Concentration Conditions or the OneComm Concentration Conditions, the RA plans to allow these conditions to expire on their own terms once the relevant remedies under the New SMP Framework have been implemented successfully.
5. This Request for Inputs is intended to give sectoral participants and other stakeholders the opportunity to provide evidence of any lingering need to retain one or more of the Digicel Concentration Conditions or the OneComm Concentration Conditions following implementation of the corresponding SMP obligations under the New SMP Framework, as detailed below.

6. In this document, except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them by the ECA, the RAA, Digicel Merger, OneComm Merger and the Interpretation Act 1951.

## II. BACKGROUND

### *The Digicel Concentration*

7. In relation to the Digicel Concentration, on 16 January 2015, Digicel Mobile (“Digicel”) informed the RA that it intended to acquire Bermuda Telephone Company (“BTC”) through a merger with BTC’s immediate parent company, Barrie Holdings. (the “Digicel Proposed Transaction”) (collectively the “Digicel Merged Entities”)
8. Following from this, the RA issued an invitation to the general public to comment on the Digicel Proposed Transaction, on 23 January 2015.
9. The RA considered Digicel’s notification application complete within the meaning of section 87(9) of the RAA, and ultimately approved the decision, subject to various Merger Conditions.
10. Next, on 13 October 2015, Atlantic Tele Network Inc. (“ATN”) and KeyTech Limited (“KeyTech”) jointly submitted a confidential notification to the RA advising that they had entered into an agreement pursuant to which ATN would acquire a controlling interest in KeyTech as part of a proposed business combination of KeyTech with Bermuda Digital Communications Limited (“BDC”) (collectively the “OneComm Merged Entities”)
11. Through a series of related transactions, ATN would become the ultimate majority shareholder (51%) of KeyTech and its subsidiaries and affiliates, including Cable Co., Logic Communications Ltd (“Logic”), BDB Ltd. (“BDB”) and BDC. At the same time, KeyTech would acquire sole ownership of BDC, in which KeyTech and ATN both held significant shareholdings.
12. The parties sought the RA’s approval of the transaction in accordance with the concentration review provisions of section 87 of the RAA and ultimately the RA approved their change of control request, subject to various Concentration Conditions.
13. The Digicel Concentration Conditions included:

#### Hold Separate Condition

This condition required that the Digicel Merged Entities shall maintain certain entities as functionally separate. This included ensuring that the Digicel Merged Entities should ensure and procure that BTC’s core, fixed wireline business shall be carried on by a standalone legal entity separately from the other entities that comprise the post-merger Digicel Group (Bermuda).

14. Cost Accounting and Accounting Separation Obligation

The Digicel Merged Entities were required to retain and continue to apply their existing financial and cost accounting principles and methodologies and not use any portion or aspect of the information accounting systems utilized by their affiliates, unless approved by the RA.

15. No Unreasonable Bundling Condition

This condition stated that where a mixed bundle is offered, the bundle price must cover the wholesale price of the Significant Market Power (“SMP”) product(s), the retail costs of the bundle and the cost of any non-SMP product(s) included in the bundle.

16. Compliance with all SMP obligations under the 2013 Market Review

This condition required compliance with existing SMP remedies under the market review.

17. No Transfer of Assets or Asset Stripping

The Digicel Merged Entities were prohibited from transferring out of the ‘D-BTC Affiliate’ (Barrie Holdings and The Bermuda Telephone Company Limited following the close of the Digicel Merger), any ownership right or interest of whatever nature in any of the Fixed Network Assets or functions that were under the ownership, control or operation of BTC prior to the completion of the Digicel Merger without prior written approval of the RA.

18. Reporting Obligations

The Digicel Merged Entities were required to submit specific information to the Authority on a regular basis that would facilitate the ability of the Authority to monitor developments in regard to representations made by the entities.

19. In paragraph 47 of the Digicel Final Decision, the RA concluded that: “[T]hese conditions shall remain in effect until the conclusion of a relevant Market Review Proceedings.”

***The OneComm Concentration***

20. The OneComm Concentration Conditions included:

21. Hold Separate Condition

This condition required that the OneComm Merged Entities should ensure and procure that the core, fixed network business of each entity that comprises the One Comm Merged Entity shall be carried on by a standalone legal entity separately from the other entities that comprise the OneComm Merged Entity.

22. Cost Accounting and Accounting Separation Obligation

This condition required that all relevant affiliates in the KeyTech Group shall retain and continue to use their respective, existing financial and product accounting principles and methodology pending completion of the upcoming Market Review Consultation.

23. Obligation Not to Unreasonably Bundle

This condition required that the OneComm Merged Entities should obtain the RA's prior review of certain service bundles it proposes to offer.

24. Continued Application of SMP Obligations

This condition required that the ICOL holders controlled by KeyTech should comply with all SMP obligations imposed on them (or their predecessor companies) in the Remedies General Determination.

25. Obligations on Representations

The OneComm Merger Entities had a responsibility to fulfill certain representations set out in the OneComm Final decision.

26. In paragraph 51 of the OneComm Final Decision, the RA stated that: “[I]n assessing the effects of the Proposed Transaction, the Authority has considered the remedial measures that the Parties have agreed to accept as a condition of clearance, which include competitive safeguards that will remain in effect at least until the conclusion of the Market Review Consultation.”

**III. TRIGGERS FOR THE EXPIRY OF THE CONCENTRATION CONDITIONS CURRENTLY APPLICABLE**

27. The tables below set out each Concentration Condition alongside the relevant obligation under the New SMP Framework and the implementation action or event that the RA proposes to identify as the trigger for the expiry of each Concentration Condition (in the absence of evidence that continuation of the Concentration Condition is necessary despite the new SMP obligation taking effect).

Digicel Timeline for Concentration Conditions to fall away

	<i>See Part D: Transitional Provision of the Market Review GD</i>	<i>See Part D, Table 10: Timelines Transitional Provisions of the Market Review GD</i>
<b>Concentration Condition</b>	<b>2020 SMP Obligation</b>	<b>Termination Trigger</b>
Hold Separate Condition	NA	Expires immediately, in order to enable Digicel and OneComm to focus on preparation of separated accounts reflecting integrated service provision as permitted under the ICOL
Cost Accounting and Accounting Separation Condition	Accounting Separation	Expires immediately, in order to enable Digicel and OneComm to focus on preparation of separated accounts reflecting integrated

		service provision as permitted under the ICOL
	Cost Orientation	Expires immediately, except with regard to Transitional SMP Obligations identified in the Market Review FD
No Unreasonable Bundling Condition	Wholesale Access: FRAND and Margin Squeeze	Expires immediately, except with regard to Transitional SMP Obligations identified in the Market Review FD
Compliance with all SMP obligations under the 2013 Market Review	<p>All 2013 remedies fall away except for specified services in Fixed Broadband markets.</p> <p>Retail price cap on a subset of retail fixed broadband access services and ISP services (together defined as the provision of fixed broadband Internet connectivity in this market review).The RA considers it appropriate to continue with a transitional retail price cap remedy for a subset of retail fixed broadband services, along with an advance tariff filing obligation for any proposed increases in the standalone prices for the relevant services and continuing information requirements, including in regard to the pricing of bundles that contain the relevant services.</p> <p>Specifically, the RA will apply the transitional price cap only for services (hereinafter, the “Relevant Services”) provided at:</p> <ul style="list-style-type: none"> <li>• an entry level service of (at least) 15 Mbps download (with at least 5 Mbps upload)—this is the lowest speed currently advertised by OneComm or Digicel; and</li> <li>• a service of (at least) 40 Mbps download (with at least 10 Mbps upload)—this is the lowest advertised broadband speed provided as part of a bundle (noting that SMP operators are required to provide stand-alone broadband alongside bundled offerings as part of the 2020 SMP remedies).</li> </ul> <p>The maximum price for these standalone services will be \$80 and \$105 per month respectively. These are the prevailing prices where the Relevant Services are currently being</p>	Expires immediately, except with regard to Transitional SMP Obligations identified in the Market Review FD

	<p>advertised on a stand alone basis. For the avoidance of doubt this is the maximum price for internet access and ISP combined on a standalone basis. Furthermore, the RA notes that the standalone prices for the Relevant Services may be set below this maximum price cap, and therefore, customers who are currently receiving these services for less than the specified price caps should continue to receive the services at the price currently specified in their contract. This requirement applies equally to OneComm and Digicel.</p>	
Reporting Obligations	Information Provision and wholesale KPIs	Expires immediately

OneComm Timeline for Concentration Conditions to fall away

	<i>See Part D: Transitional Provision of the Market Review GD</i>	<i>See Part D, Table 10: Timelines Transitional Provisions of the Market Review GD</i>
<b>Concentration Condition</b>	<b>2020 SMP Obligation</b>	<b>Termination Trigger</b>
Hold Separate Condition	NA	Expires immediately, in order to enable Digicel and OneComm to focus on preparation of separated accounts reflecting integrated service provision as

		permitted under the ICOL
Cost Accounting and Accounting Separation Condition	Accounting Separation	Expires immediately, in order to enable Digicel and OneComm to focus on preparation of separated accounts reflecting integrated service provision as permitted under the ICOL
	Cost Orientation	Expires immediately, in order to enable Digicel and OneComm to focus on preparation of separated accounts reflecting integrated service provision as permitted under the ICOL
No Unreasonable Bundling Condition	Wholesale Access: FRAND and Margin Squeeze	Expires immediately, except with regard to Transitional SMP Obligations identified in the Market Review FD

<p>Compliance with all SMP obligations under the 2013 Market Review</p>	<p>All 2013 remedies fall away except for Fixed Broadband markets.</p> <p>Retail price cap on a subset of retail fixed broadband access services and ISP services (together defined as the provision of fixed broadband Internet connectivity in this market review).The RA considers it appropriate to continue with a transitional retail price cap remedy for a subset of retail fixed broadband services, along with an advance tariff filing obligation for any proposed increases in the standalone prices for the relevant services and continuing information requirements, including in regard to the pricing of bundles that contain the relevant services.</p> <p>Specifically, the RA will apply the transitional price cap only for services (hereinafter, the “Relevant Services”) provided at:</p> <ul style="list-style-type: none"> <li>• an entry level service of (at least) 15 Mbps download (with at least 5 Mbps upload)—this is the lowest speed currently advertised by OneComm or Digicel; and</li> <li>• a service of (at least) 40 Mbps download (with at least 10 Mbps upload)—this is the lowest advertised broadband speed provided as part of a bundle (noting that SMP operators are required to provide stand-alone broadband alongside bundled offerings as part of the 2020 SMP remedies).</li> </ul> <p>The maximum price for these standalone services will be \$80 and \$105 per month respectively. These are the prevailing prices where the Relevant Services are currently being advertised on a stand alone basis. For the avoidance of doubt this is the maximum price for internet access and ISP combined on a standalone basis. Furthermore, the RA notes that the standalone prices for the Relevant Services may be set below this maximum price cap, and therefore, customers who are currently receiving these services for less than the specified price caps should continue to receive the services at the price currently specified in their contract. This requirement applies equally to OneComm and Digicel.</p>	
<p>Obligations on Representations</p>	<p>Information Provision and wholesale KPIs</p>	<p>Expires immediately</p>

#### **IV. INFORMAL REQUEST FOR INFORMATION**

28. The RA invites interested parties to submit any objections to the proposed process for terminating one or more of the Concentration Conditions referenced above. Any objections should be supported by credible and convincing evidence of the extent to which the termination of specific conditions is likely to have a material impact on competition in the markets that the RA has identified as being characterized by SMP in its 2020 Market Review Final Decision and General Determination.
29. Written comments must reach the RA no later than 11:59 PM on 9<sup>th</sup> October 2020 to be considered. Comments should be sent to the RA via email at [consultation@ra.bm](mailto:consultation@ra.bm) with the subject line "Termination of Concentration Conditions".
30. Should the RA receive credible and compelling evidence of the need to retain one or more of the concentration conditions currently applicable to OneComm or Digicel, the RA will evaluate the need to conduct a public consultation to consider retention of the condition or conditions in question.