

Response to Consultation Paper on Recommendation for market competition assessment methodology

Submitted for and on behalf of the Digicel entities operating under the ECTEL jurisdiction, including but not limited to:

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Question 1 - Are the steps in the process for the market competition framework clear and comprehensive?

Digicel's Response:

Yes, the overall sequential framework is clear, logical, and comprehensive. The staged approach from market definition (which is not an end in itself but a critical step in identifying the competitive constraints affecting a supplier of a given product or service), through the three-criteria test, SMP assessment, and the application of remedies reflects established international regulatory practice. Digicel notes, however, that the revised European Commission Notice¹ on the definition of the relevant market for the purposes of EU competition law, allows for consideration of usage metrics (i.e. partial substitution) and does not require the exclusive use of perfect substitution (access metrics) in defining markets. In this regard, Digicel seeks clarification from the ECTEL on its approach to incorporating both usage and access metrics for its market definitions.

Digicel generally supports the competition assessment framework. Notwithstanding this, it identifies several areas where additional clarity and guidance would strengthen its application in practice:

1. Explicit recognition of regulatory discretion where data limitations exist, particularly in SSNIP (Small but Significant and Non-transitory Increase in Price) testing and quantitative elasticity and critical loss analysis.
2. Clear acknowledgement that not all steps will be appropriate or practicable in every market, particularly in very small or highly concentrated markets.

Greater clarity on the frequency with which the framework will be reviewed or updated to reflect the dynamic evolution of the telecommunications sector. In particular, the ECTEL is encouraged to provide assurance that a process exists for periodic review, taking into account emerging developments such as the growing role of new players, i.e., OTT providers and digital platforms within domestic telecommunications markets, to ensure the framework remains forward-looking and fit for purpose.

Question 2 - Are there any market features not reflected in the framework for defining the relevant market?

Digicel's Response:

The framework is generally robust; however, the following market features merit more explicit consideration:

¹ European Commission, Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C 1645, 2024, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202401645

1. **Demand fragility in small economies** - Even modest regulatory intervention may materially affect operator viability and investment capacity.
2. **Multi-market operational realities** - Operators often operate regionally across OECS markets, with shared infrastructure strategies and group-level financing and investment decisions. Market assessments should consider regional spill-over effects, even where markets are defined nationally.
3. **Non-price competition** - Brand value, network quality, customer care, and coverage differentiation play an outsized role in competition where price competition is limited.

Question 3 - Are there alternative approaches which may be easier to apply in practice?

Digicel's Response:

Yes. Digicel supports the use of simplified, evidence-based approaches, including:

1. Greater reliance on qualitative demand-side evidence, such as historical churn data, customer switching pattern and retention behaviour following past price changes.
2. Benchmarking against comparable small island jurisdictions as a primary analytical tool, where robust cost data is unavailable.
3. Use of regulatory precedents (including prior ECTEL/NTRC decisions, if applicable) as a practical starting point, rather than repeated full market re-analysis.

These approaches improve efficiency while maintaining analytical credibility.

Question 4 - Are the steps involved in the three-criteria test clear or is more detail required?

Digicel's Response:

The steps are clear; however, further clarification is recommended on:

1. What constitutes sufficient evidence to conclude that a market is tending toward effective competition;
2. The time horizon used to assess likely market evolution; and
3. How anticipated investments and technological upgrades by existing operators should be weighted.

Digicel strongly supports the principle that failure of any one criterion should halt further SMP analysis, consistent with EU best practice.

Question 5 - Are all relevant SMP indicators included in the framework?

Digicel's Response:

The listed indicators are comprehensive. However, Digicel recommends:

1. Explicitly recognising that high market share alone is not determinative of SMP in small markets.
2. Greater emphasis on:
 - a) countervailing buyer power, especially from government and large enterprise customers;
 - b) regulatory constraints already imposed on operators (licence obligations, QoS, coverage).
3. Caution in over-reliance on accounting or profitability metrics that are:
 - a) group-level rather than market-specific
 - b) distorted by high fixed and sunk costs.

Question 6 - Should there be a specified market-share threshold for SMP?

Digicel's Response:

Digicel does not support the application of a rigid market-share presumption for SMP. If any indicative threshold is adopted, it should:

- a) Be rebuttable, not determinative;
- b) Trigger further analysis, not automatic designation; and
- c) Be accompanied by mandatory consideration of: actual competitive constraints, barriers to switching and innovation and investment trends.

Question 7- Are there examples of potential joint SMP in the absence of individual SMP?

Digicel's Response:

No, there are no identified examples of potential joint SMP in the absence of individual SMP within the relevant electronic communications markets of the ECTEL Member States. Further, Digicel cautions against expansive use of joint SMP findings in small markets. While theoretical oligopolistic coordination is possible, in practice:

1. Operators face strong competitive incentives to differentiate on price, coverage, and service quality;
2. Market transparency alone should not be equated with tacit collusion.
3. Any joint SMP finding should therefore require clear, compelling evidence satisfying all cumulative conditions.

Question 8 - Is the joint SMP framework workable?

Digicel's Response:

The framework is workable in principle but should be applied exceptionally and cautiously.

Digicel recommends:

1. Strong reliance on counterfactual analysis (modified Greenfield);
2. Clear differentiation between:
 - a) parallel competitive behaviour, and
 - b) coordinated anti-competitive conduct.

Question 9 - How effective would light-handed remedies be?

Digicel's Response:

Light-handed remedies are appropriate and effective in the context of the ECTEL markets.

Transparency, non-discrimination, and information disclosure obligations:

- a) Improve regulatory oversight;
- b) Encourage competitive discipline; and
- c) Avoid imposing unnecessary compliance burdens that deter investment.

More intrusive remedies should remain strictly last-resort measures, supported by strong empirical evidence.

Question 10 - Are there specific remedies that should be explored further?

Digicel's Response:

Yes. Digicel supports deeper consideration of:

- a) Voluntary commitments by operators in lieu of formal remedies;
- b) Sunset clauses on remedies to ensure periodic reassessment;
- c) Geographically differentiated remedies, where competitive conditions vary materially within a State.

Question 11 - Does the framework adequately capture anti-competitive behaviour?

Digicel's Response:

Yes, broadly. The framework aligns with international competition law principles.

However, enforcement should:

- 1. Distinguish clearly between aggressive competition and abuse of dominance; and
- 2. Avoid retrospective recharacterisation of legitimate commercial strategies.

Question 12 - Are there omissions or recommended amendments?

Digicel's Response:

Digicel recommends:

- 1. Clear procedural safeguards, including:
 - a) timelines for investigations
 - b) rights to respond to preliminary findings
 - c) transparency on evidentiary standards
- 2. Explicit recognition of the investment-competition trade-off, particularly in next-generation networks.

Conclusion

Digicel supports the ECTEL's objective of promoting sustainable competition in the electronic communications sector and remains committed to engaging constructively in this Consultation. The methodology should strike an appropriate balance between regulatory certainty, consumer protection, and incentives for continued infrastructure investment in small island economies.