FAIR COMPETITION ACT, CAP. 326C

Commission Report
Digicel-Cingular Merger

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SECTION I THE MERGER TRANSACTION

1.1 OVERVIEW

Section 20 (5) of the Fair Competition Act CAP 326C ("the Act") requires that, the Fair Trading Commission ("Commission") determine whether to grant or refuse permission of any merger falling under its jurisdiction, and notify the applicants in writing of its determination.

The Commission pursuant to this requirement gave consideration to the formal merger application filed on October 25th 2005, by Digicel (Barbados) Limited ("Digicel") and Cellular Communications (Barbados) SRL ("Cingular") (collectively the "Applicants") for consent to transfer control of all the shares of certain holding companies that hold the operating companies providing Cingular's telecommunications services throughout the Caribbean and Bermuda, including the Barbados Holdings to Digicel.

The "Applicants" contemplate that the operations and assets of Cingular would be acquired by Digicel, and that the merged entity would now provide all services under the Digicel brand name. The Commission considered the transaction in regards to the acquisition of Cingular's Barbados Holdings only.

In considering the application, the Commission conducted an investigation into the transaction pursuant to Section 20 of the Fair Competition Act. Section 20 (6) states that:

"the Commission shall conduct an investigation into the proposed merger in order to satisfy itself that the proposed merger would not affect competition adversely or be detrimental to consumers or the economy".

The investigation and market analysis by the Commission took into consideration the views of the Applicants, consumers, competitors, and the wider business community.

Having examined the transaction and its likely impact on the telecommunications market in Barbados, the Commission now sets out in detail its findings on the matter. The report includes:

a) An outline of the legal and administrative jurisdiction of the Commission's investigation into the proposed merger transaction;

b) An analysis of the impact of the transaction on competition in the relevant market, consumers, and the wider economy;

c) A summary of the Commission's findings in regard to the transaction; and

d) The directive of the Commission in regard to the matter.

1.2 MERGER REGULATIONS UNDER THE FAIR COMPETITION ACT, CAP.326C

Under Section 2(1) of the Fair Competition Act, CAP.326C, a merger is defined as:

(a) *"the cessation of two or more enterprises from being distinct, whether by amalgamation, by one or more of the enterprises acquiring control over another or otherwise; or*

(b) *the engagement in a joint merger venture between enterprises which results in two or more enterprises ceasing to be distinct entities"*

There are essentially two ways in which businesses can cease to be distinct:

a) they are brought under common ownership, control or influence; or

b) there is a transaction between the persons carrying on the businesses such that one of the businesses will cease to exist.

These provisions of the Act cover horizontal, vertical and conglomerate mergers. However, the Commission will primarily be concerned to examine mergers between enterprises that produce competing or substitute products. These types of mergers are usually referred to as "horizontal mergers", and may raise competition concerns because they will usually increase concentration levels in the relevant market.

The Commission is not required to investigate all mergers taking place in Barbados, only those which are likely to have a substantial impact on competition. The Act identifies such mergers as those that are likely to control in excess of 40 percent of a market. Section 20 (1) specifies that:

…. "all mergers by an enterprise that

(a) by itself controls, or

(b) together with any other enterprise with which it intends to effect the merger is likely to control

not less that 40 per cent of any market or such other amount of the market as the Minister may by Order prescribe are prohibited unless permitted by the Commission in accordance with this section".

Where the joint market share of the merging firms is at least 40 percent of the market, the Act requires those firms to submit an application to the Commission seeking approval for the merger. Section 20 (3) of the Act states:

…(3) "an application referred to in subsection (2) shall be accompanied by the prescribed information.

….(5) Within 3 months after the receipt of an application under subsection (2), or as soon practicable thereafter the Commission shall determine whether to grant or refuse permission and notify the applicant in writing of its determination".

The Commission therefore is given explicit authority to review mergers that are likely to control in excess of 40 percent of the market, and to grant or refuse permission to the applicants to proceed with the transaction.

Following the review of a merger by the Commission, there are three (3) possible outcomes:

- The Commission may decide to approve the merger because it is of the view that the merger is unlikely to affect competition adversely or be detrimental to consumers or the economy. In such cases, the Commission will notify the applicants of its determination in writing, and will also usually inform the public of its decision and its reasons for allowing the merger.

  Where the Commission has investigated the proposed merger and believes that it is likely to result in a lessening of competition, the transaction may still be permitted if the Commission is of the view that the merger is likely to bring about gains in real as distinct from pecuniary efficiencies that are greater than or offset any limitation on competition.

- The Commission may approve a merger subject to certain specified conditions, which the Commission believes would make the merger less likely to lessen competition or to affect adversely the interests of consumers or the economy. Modifications or agreements that may be acceptable to the Commission will generally fall into two categories:

  a) Structural undertakings, where the merged firm agrees to divest a division, or a business area, through the disposal of assets or shares to an effective competitor; and/or

  b) Behavioural undertakings, such as agreements on future price, output, quality and/or service provided by the merged firm

- The Commission may also decide to prohibit a merger where following its investigation, it is of the view that the merger in its existing form does not qualify on all accounts for permission under section 20 of the Act. In such circumstances, the Commission will ordinarily provide the parties with the reasons for its view prior to making a formal decision.

1.3 THE MERGER TRANSACTION

On July 22nd 2005, at a meeting held at the office of the Commission with representatives of Digicel and Cingular, the Commission was formally made aware of the proposed acquisition of Cingular by Digicel Limited.

Under the proposed transaction, Cingular and Digicel on June 21, 2005, entered into a Stock Purchase Agreement. Pursuant to this Stock Purchase Agreement, Cingular has agreed, subject to obtaining all required regulatory approvals, to sell the shares of certain holding companies that hold the operating companies providing Cingular's telecommunications services throughout the Caribbean and Bermuda, including Barbados Holdings which owns 65 percent of Cellular Communications. Under the proposed transaction, Digicel is expected to acquire control of Cingular's equity interests and the two (2) entities will cease to be distinct as defined at Section 20 of the Fair Competition Act.

Digicel

Digicel Limited is incorporated in Bermuda and was founded by Denis O'Brien, the founder of East Telecom in Ireland. Digicel is majority share holder in a number of operating companies in the Caribbean that provide mobile telecommunication services. Digicel, through various holding companies, owns between 70 percent and 100 percent of operating companies in Barbados, Aruba, the Cayman Islands, Curacao, Grenada, Jamaica, St. Lucia, St. Vincent and the Grenadines that provide analogue and digital wireless voice and data services on the 900, 1800 and 1900 MHz bands in the Caribbean. In Barbados, Digicel Limited has partnered with Warren Telecommunications Limited and together they own respectively 75 percent and 25 percent of Digicel. Digicel Barbados provides mobile telecommunication services in Barbados using GSM *(Global System for Mobile Telecommnication)* technology. Digicel has approximately US$28.1m of assets in Barbados. The network operated by Digicel Barbados consists of 47 base stations and one switch facility which provides approximately 93 percent geographic coverage and 95percent population coverage in Barbados. Digicel Barbados has been granted the following licenses in Barbados:

- Carrier Licence (issued on the 8th of August 2003) – to own and operate a mobile telecommunications network
- Spectrum Licence (issued on the 8th August 2003) – for the use of spectrum in connection with the operation of its mobile telecommunication services
- Service Provider Licence (issued on the 8th August 2003) – to provide mobile telecommunication services; and
- International Licence (issued on the 21st February 2005 – Very Small Aperture Terminal Licence to own and operate a VSAT for the provision of commercial VSAT network operations

The Spectrum Licence issued to Digicel Barbados has a term of 15 years and covers a total of 56 MHZ [REDACTED].

Cingular Wireless

Cingular Wireless is a Delaware limited liability company and has its principal executive offices in Atlanta. It was formed in 2000 by SBC Communication Inc. (SBC) and BellSouth Corporation (BellSouth), whose membership interest in Cingular are held by their respective wholly owned subsidiaries. Cingular is the largest provider of wireless voice and data services in the United States, with more than 50 million subscribers. Cingular reported US$19.4 billion in revenues for the year ended December 31, 2004. Cingular provides a wide range of digital wireless voice and data communication services over TDMA (*Time Division Multiple Access)* and GSM networks. Enhanced voice and high-speed data communications are provided using both GPRS *(General Packet Radio Service)* and EDGE *(Enhanced Data rates for GSM Evolution)* technology.

Cingular acquired AT&T Wireless Services, Inc. ("AWS") in October 2004, including the Bermuda and Caribbean operation of AWS.

As a result of the acquisition of AWS, Cingular now provides wireless voice and data products and services to subscribers in Bermuda and serveral Caribbean markets, including Barbados. Cingular also has licenses to provide telecommunications services in five other Caribbean markets. Cingular primarily provides analog and digital wireless voice and data services in the 900, 1800 and 1900 MHz bands in the Caribbean.

In Barbados, Cingular has partnered with CLICO International Life Insurance Ltd. and BFF Communications Limited, who own 30 percent and five percent respectively, of Cellular Communications (Barbados) SRL ("Cellular Communications"), Cingular's joint venture in Barbados. Cingular's 65 percent majority interest in Cellular Communications is held by Barbados Wireless

Holding Limited ("Barbados Holding"), a wholly owned subsidiary of Caribbean Holdings

Cellular Communications has invested in a GSM network that consists of 26 permanent base stations and 1 switch facility giving its network approximately 96 percent geographic coverage.

Cellular communication has been granted the following licenses in Barbados:

- Carrier Licence (issued on the 8th of August 2003) – to own and operate a mobile telecommunications network
- Spectrum Licence (issued on the 8th August 2003) – for the use of spectrum in connection with the operation of its mobile telecommunication services
- Service Provider Licence (issued on the 8th August 2003) – to provide mobile telecommunication services; and
- International Licence (issued on the 25th February 2005 – Resale of Lease Circuit License (Individual License) to provide resale of lease circuits.

The Spectrum Licence issued to Cellular Communications has a term of fifteen years and covers a total of 56 MHz [REDACTED].

1.4 THE ADMINISTRATIVE PROCESS

The Commission in seeking to ensure that the merging enterprises were accorded a fair opportunity to share their views on the benefits of the transaction to consumers and the economy:

- Held meetings with the Applicants, giving them opportunity to share their views on the transaction. The Commission used these meetings to explain and advise the Applicants on the administrative process involved and legislation to be followed by the Commission in addressing the matter.

- The Commission also served on the Applicants, two sets of interrogatories seeking specific clarification and supporting evidence on important issues. The Applicants were generally cooperative in supplying the requested information.

- In addition to meeting with the Applicants, the Commission in conducting its investigation into the transaction, sought to obtain the views of interested and affected parties. The Commission solicited the views of labour representatives, consumer organizations, business organisations, governmental organisations, competing firms, knowledgeable persons in the field, and consumers. A list of the respondents is provided at Annex C.

- The Commission in seeking to obtain the feedback of consumers conducted a small random survey, visiting a number of public locations and conducting interviews with members of the public (Annex D).

The Commission considered carefully all the comments received from respondents, consumers and all other interested parties in making its decision on the merger.

SECTION II THE MERGER INVESTIGATION

The Act requires at Section 20 (7) that in the conduct of an investigation into a proposed merger the Commission shall take into account:

- *The structure of the markets likely to be affected by the proposed merger;*
- *The degree of control exercised by the enterprises concerned in the proposed merger in the market and particularly the economic and financial power of the enterprises;*
- *The availability of alternatives to the services or goods provided by the enterprises concerned in the merger;*
- *The actual or potential competition from other enterprises and the likelihood of detriment to competition.*
- *The likely effect of the proposed merger on consumers and the economy*

In order to analyse the structure of the market under consideration or the intensity of competition therein, it was necessary to first define the relevant market(s) concerned in the merger.

2.1 THE RELEVANT MARKET

Generally, a market can be described as the smallest area over which a hypothetical monopolist could exercise a significant degree of market power. The Commission will normally define the relevant market according to:

- the products consumed in the market;
- the physical area over which the products are traded; and
- the economic activity being conducted with respect to the products involved.

Relevant Products

The products concerned in the relevant market included those goods and services supplied by the merging firms and their competitors, and the goods and services which could conceivably serve as their substitutes.

In identifying the range of products concerned in the relevant market, the Commission applied the 'Small but Significant Non-transitory Increase in Price' test or the SSNIP test. This test, also known as the hypothetical monopolist test starts with the narrowest definition of the products sold by the merger firms and considers what substitutable products the consumer might turn to if the price of those products were increased by a small but significant amount for the foreseeable future. The products likely to be turned to are included in the market.

The products sold by the merging firms include primarily mobile voice and data telephony services (jointly "mobile telecommunication services"). Mobile voice and data telephony services can be defined as the direct transport and switching of speech and data in real-time between public switched network termination points, enabling any subscriber to use the mobile handset connected to such a network termination point in order to communicate with another termination point[1].

It must be noted that within the 'telephony' market, there is fixed line service, and mobile service. The mobile service provides a form of communication where spontaneity, accessibility and convenience are more important. Mobile communication is distinguished from the fixed line communication because it

[1]Directive 90/388/EEC, the Commission of the European Communities

allows for mobility and accessibility irrespective of location[2]. The fixed line service cannot do this. Data compiled from the consumers surveyed showed that if mobile calls became more expensive (an increase of 15 percent) relative to fixed line calls, the uniqueness of the mobile telephony product renders its substitution by fixed line in the face of such small yet significant increases in price, unlikely.

In regard to substitution by the internet, it was noted that the voice telephony product can be substituted in some regards by data messaging via the Internet and other forms of communication. However, the mobile handsets sold by the merging firms, allow for both forms of messaging simultaneously. Customers typically choose a mobile operator based on the combination of a whole bundle of voice and data services offered. When one party is able to reshape its package without its competitors being able to respond effectively, this can mean a loss of market share for those competitors.

The consumer purchasing the product has access to both data and voice services immediately, and competition takes place across the range of both voice and services, therefore there was no merit in a further subdivision of the market along these lines.

The relevant product ranges considered in this matter therefore were mobile telecommunications services, including jointly voice and data messaging services.

[2] Document No. 04/94, Market *Analysis – Retail Fixed Narrowband Access Markets*, 01 September 2004

Relevant Geographic Area

The Commission generally defines the relevant geographic market by identifying the area over which the merged firm and its rivals currently supply, or could supply the product. The Commission also will consider the area to which buyers can or would practically turn to find alternative sources of supply.

The Commission identified the area over which the merging firms supplied their products and again applied the SSNIP test to determine the areas to which buyers can or would turn to find alternative sources of supply given the relevant increase in price.

It was noted that the legal and regulatory system in Barbados is such that customers can only obtain mobile telecommunications services from licensed network operators. In addition, mobile service providers because of regulatory restrictions cannot move automatically to another country and supply an alternative product to local customers.

In regards to the geographic market, one can identify no real distinction in the type of products or ranges of prices offered with regards to any specific smaller geographic areas within Barbados. Coverage by the merging firms and their competitors tends to be national, reaching over 90 percent geographically and in terms of population.

The Commission therefore agreed that the relevant geographic area in this matter would be limited to Barbados.

Relevant Functional Activity

The Commission generally defines the relevant functional activity through a demarcation of the vertical stages of production and distribution of the concerned products.

The retail sale of telecommunication services describes the economic activity taking place between the providers and the consumers in the domestic market. Consumers in this case include corporate entities, which will purchase the services in sizeable volumes, but the transaction does not include the wholesale of mobile services for further on-selling.

In regard to wholesale telecommunication services, information suggested that there is a case for the separation between a retail market catering to the domestic consumers and a wholesale roaming market catering to the international roaming partner. There are no realistic substitutability possibilities for the two (2) sets of customers in terms of the retail and wholesale services offered.

In the international wholesale roaming market, mobile service providers seek to establish international roaming agreements with other international providers to allow each others' domestic customers to be able to make calls when they travel to international destinations from where those international providers offer a service. Hence, tourists travelling in the region will utilise the services of the local provider with whom their national provider has been able to enter into a roaming agreement.

Firms compete in this market by offering more attractive roaming opportunities to the international providers who will have their customers travelling within the region. Competition in this market is therefore not necessarily direct where one company's loss is another's gain but depend on the firm's individual ability to attract and sustain international agreements. This market therefore though noted is not assessed with respect to a lessening of competition in Barbados.

The functional activity given consideration in this matter therefore will be primarily that for the retailing of the relevant services.

<u>Defined Market</u>

The Commission in giving regard to the basic criteria generally considered in defining the 'relevant' market is of the view that the primary market concerned in this matter is that for the retail supply of mobile telecommunications services in Barbados (the Mobile market). The Commission also however acknowledges the existence of a separate but parallel international wholesale roaming market that is also of interest in this matter.

2.2 THE STRUCTURE OF THE MARKETS AFFECTED BY THE PROPOSED MERGER

In examining the structure of the markets affected by the proposed merger, consideration was given to the number and relative size of the firms in the market, and to the size of the barriers facing new firms seeking to enter the market. Attention was also paid to the level of consumer demand, including the degree of penetration in the market.

2.2.1 MARKET CONCENTRATION

Number of Firms

Prior to the proposed merger, Digicel, Cingular, Cable & Wireless (Barbados) Limited ("C&W") and Sunbeach Communications Inc ("Sunbeach") are the four holders of the requisite Spectrum, Service Provider, and Carrier licences needed to operate in the mobile telecommunications market in Barbados. Of these operators, Sunbeach is the only one not currently providing mobile telecommunication services.

Immediately, post-merger, the number of companies operating in the mobile telecommunications market would decrease from three (3) to two (2) operators as Digicel would upon clearance of the merger acquire the operations and assets of Cingular, and would in future provide all services under the Digicel brand name.

While this scenario represents the immediate size of the market post-merger, the Ministry of Energy and Public Utilities ("the Ministry"), which has responsibility for the issuance of mobile telecommunications licences, has confirmed that the number of licences have been set at four (4) and though there may be some readjustment of the spectrum allocation in the 900 MHz band, enough will be returned to satisfy the needs of any new provider. The Ministry has stated:

> *"It is the intention of Government to reallocate the spectrum currently in use by Cingular to any other interested party if the merger proceeds thereby restoring effective competition in the market."*

The market will therefore contain two (2) operating firms immediately post-merger with the likelihood of a full complement of four (4) firms operating in the market in the future.

<u>Relative Market Shares of Firms</u>

In order to determine the comparative sizes of the market participants and hence their likely relative economic strengths post-merger, the Commission assessed the market shares of the firms according to their associated percentages of market revenue and subscribers .

In assessing the relative market shares of the competitors in terms of subscribers the Commission determined that; Digicel and Cingular combined would control post-merger approximately [REDACTED] percent of the market whilst C&W would control approximately [REDACTED] percent.

The market shares calculated according to revenue showed that Digicel and Cingular combined would control post-merger approximately [REDACTED] percent of the market whilst C&W would control approximately [REDACTED] percent of the market.

The Commission in its deliberations relied on the estimates of market shares derived by the use of percentage revenues as opposed to the number of subscribers, or volumes of minutes sold because:

- Revenues can be supported by independently audited financial records.
- Revenue measurements are standard and common across the providers unlike definitions for subscribers.

- Number of subscribers is distorted because of the substantial number of subscribers with multiple contracts with different providers, as well as the number of inactive contracts.
- Number of subscribers can also give a false market share because of the large differences in volumes of minutes purchased by different subscribers.
- Volumes of minutes sold is also flawed as a market share determinant because of the number of post-paid accounts which are either hardly utilised in terms of the volume of minutes purchased, or over utilised relative to the agreed contracted minutes.

The Commission notes that regardless of the criteria used to determine market shares, the merging parties combined would control no less than 40 percent of the market. It also recognises that post merger C&W would generally still control a market share in excess of that of the merging parties.

Herfindahl-Hirschman Index

The number of firms in the market and their relative sizes describes the level of concentration in the market. Generally speaking, the greater the number of firms in the market the less concentrated the market, and the greater will be the competitive pressures on these firms.

An objective test often used to assess the level of concentration in the market is the Herfindahl-Hirschman Index (HHI)[3] test. The HHI is a concentration-ratio test widely used by competition agencies to measure concentration ratios in

[3] The Herfindahl-Hirschman Index (HHI) is by summing the squares of the market shares of all the firms engaged in the market.

markets affected by a merger. The higher the HHI the more concentrated the market, and therefore the lower the competitive pressures brought to bear on competing firms.

The Commission calculated the HHI for the mobile telecommunications market, based on the estimated market shares (calculated according to revenue percentages) post-merger, and realised an estimate of 5,524.04 with a delta[4] of 410.36.

These estimates are well above the threshold levels generally applied internationally[5] to determine 'high' market concentration. These estimates therefore confirm that the merger will result in the development of a highly concentrated mobile market locally. If these estimates were expressed on a scale of zero to one, with one being a monopoly situation and zero being perfect competition, the estimate realised of 0.55, would suggest a tendency towards neither perfect competition nor monopoly. The fact is that though there would just be two (2) firms operating in the market post-merger, their relative market shares suggest a nonetheless potentially competitive market.

2.2.2 BARRIERS TO NEW ENTRY

Barriers to entry are features of the market that place an efficient new entrant at a significant disadvantage compared to existing firms. Barriers may include legal or regulatory restrictions; high sunk costs; access to scarce resources controlled

[4] The increase in the HHI (or delta) can be calculated by subtracting the market's pre-transaction HHI from the expected post-transaction HHI.

[5] *See* Horizontal Merger Guidelines at 1.51. U.S Department of Justice and the Federal Trade Commission. *See* Guidelines on the assessment of horizontal mergers under the Council regulation on the control of concentrations between undertakings at C 31/6. Official Journal of the European Union.

by incumbent firms; economies of scale and scope; high levels of product differentiation; brand loyalty; and the probability of retaliatory action. The Commission in assessing the more challenging barriers to entry seeks to determine the degree of contestability likely in the market post-merger, or the extent to which the existing market structure is likely to be protected from or regularly exposed to the competitive threats of new entrants.

- ***Legal/Regulatory Requirements***

  All operators in the Barbados mobile telecommunications market are required to have a Mobile Telecommunications Spectrum Licence. Spectrum is the range of frequencies used for over-the-air transmission, which all mobile network operators require to provide mobile services. The spectrum license is granted to an operator by the Ministry of Energy and Public Utilities. The Licence authorises the licensee to use a specific portion of the spectrum to operate its telecommunications network and to provide telecommunications services.

  Access to a spectrum licence therefore is a critical factor in determining the likelihood of entry into the mobile market. The Commission therefore notes the policy of the Ministry to reallocate the spectrum currently in use by Cingular to any other interested party if the merger proceeds.

  The Commission therefore expects that irrespective of a decision to approve or prohibit the merger there will be sufficient spectrum to allow four (4) firms to operate in the mobile market. Following a merger therefore the possibility of one new firm entering the market exists.

- ***<u>High Sunk Costs</u>***

  Sunk costs include the start-up costs required for investment by a firm seeking to enter the mobile industry. The higher these costs the greater the barrier to entry for the new firms.

  The telecommunications industry including the operation of mobile networks is a relatively capital intensive undertaking. Digicel and Cingular each respectively control 47 and 26 permanent base stations and switching facilities needed to provide the appropriate coverage across the island. Digicel has approximately US$[REDACTED] of assets in Barbados. The mobile operator's cost structure is characterized by high fixed plant and equipment costs. The size of these costs suggests that entry to the mobile telecommunications markets would be relatively cautious.

2.2.3 MARKET PENETRATION

Mobile telephony has been the great success story in the telecommunications industry in Barbados. Mobile telecommunications services were introduced into Barbados around 1990. Since that time the number of mobile subscribers has grown significantly, from a total of approximately 900 in 1996, to approximately 181,108 subscribers as of March 2005.

This represents a penetration rate[6] of approximately 73.85 percent[7]. The Barbados market however is deemed not yet 'mature', in regard to the world

[6] The estimated total number of subscribers divided by the total population number in the designated area

[7] http://www.itu.int/ITU-D/ict/statistics/ - International Telecommunications Union website

standard for number of handsets owned. The domestic market is also regarded as under developed in relation to the data products sold.

In a 'mature' mobile market most people will have a mobile telephone. Penetration rates will be over 90 percent. Penetration rates have already exceeded 100 percent in several countries, including Italy, Sweden and the United Kingdom[8], with no signs of abating. This increase is explained by customers buying multiple phones and/or SIM cards. The Netherlands Antilles, with a similar population density to Barbados, had achieved a penetration rate of approximately 90 percent in 2004.

The Barbados mobile telecommunications market therefore in terms of penetration, appears to have significant potential for further growth before it could be deemed 'mature'.

It is noted however, that even when a market is considered 'mature,' competition is still likely to be intense. Marketing objectives change from attracting new customers to the mobile market to attracting existing customers from other networks and to increasing average profit per user.

Summary

The structure of the domestic mobile market post-merger therefore, though concentrated, would have two (2) relatively well matched operators with comparable market shares. The barriers to entry are such as to ensure that the market will be concentrated over the long term, but there is the possibility of additional competition once the spectrum now used by Cingular is reallocated to

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[8] http://www.3g.co.uk/PR/May2005/1412.htm , http://www.enn.ie/news.html "Penetration rates in Europe for instance have been forecasted to grow from 90 percent in 2004 to 98 percent by 2006, eventually reaching the 100 percent by the following year"

a new provider. The market also is not yet fully mature and therefore has significant potential for further growth.

2.3 DEGREE OF CONTROL LIKELY TO BE EXERCISED BY THE MERGED FIRM

The degree of control likely to be exercised by the merged firm is dependent on whether the firm created through the transaction now possesses significant market power or market dominance. The Act states that a dominant firm is one which occupies a position of such economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors.

As a general guide, the Commission considers a firm that has had a sustained market share of 50 percent or more is likely to be in a position of dominance, whereas a firm with a market share less than 40 percent is less likely to hold a position of dominance. If a firm has a large market share, then it may not be effectively constrained by its existing competitors. The Commission will be concerned if a merged firm is likely to have sufficient power to allow it to unilaterally exercise that power.

The Commission's estimates of market share based on percentage revenues reveals that post merger the merged entity would have a control of approximately 40 percent of the mobile market.

Normally a market share of this magnitude would indicate that the particular firm possesses the economic strength to operate in the market without effective competition. In the context of this particular market however, where there would be only two (2) competing firms post-merger, the remaining firm (C&W) actually possesses the superior market share. In this regard, Digicel will still not post-merger, be able to operate in the market without the effective competition of its main rival. It is therefore, in terms of market share unlikely to wield sufficient market power to undertake unilateral anti-competitive practices.

While market share is an important factor, it is not, by itself determinative of dominance. When considering whether or not a merged firm is likely to be able to exercise unilateral market power, the Commission will also give regard to matters such as market concentration, barriers to entry and the economic and financial strength of the merger parties in relation to other existing or potential competitors.

In regard to the other factors that would determine whether the merged entity is likely to possess the power to act unilaterally, one has to consider the barriers to entry in the market. It is evident that the barriers to entry within the mobile market are substantial, suggesting that any firm that could post-merger, garner a position of real strength would be insulated against new entrants, and be able to sustain its power over a long term.

It must be noted that Sunbeach already possess a spectrum license, and therefore could become a competitor in the short to medium term. In addition, there should be available post-merger, the opportunity for a new entrant to take possession of the licence that would be surrendered by Cingular. In this regard, it remains unlikely that Digicel post-merger could compile the degree of market power to indefinitely engage in any unilateral conduct within the mobile market.

In relation to the financial strength of the merger parties to other existing or potential competitors, one has to consider that Digicel's main rival in the mobile market (C&W), is a sizeable undertaking, in possession of superior financial assets locally and internationally; superior branding internationally; and generally greater market experience locally. Digicel and Cingular are themselves sizeable undertakings, but within the local market they are relatively new entrants. They cannot be said to possess the branding likely to dominate the present market in the short term.

Generally, given these present circumstances, the Commission does not expect that the merging parties will be able to exert, in the short term, the degree of control to engage in unilateral anti-competitive activities.

2.4 AVAILABILITY OF ALTERNATIVES TO THE GOODS AND SERVICES PROVIDED BY THE ENTERPRISES

The Act requires the Commission in the investigation of a merger to consider the degree to which post-merger there is likely to be an adequate supply of available alternatives to the services or goods provided by the enterprises concerned in the merger. In this context, the Commission in the interest of continuing competitive markets needed to ensure that customers post-merger would not have a substantially diminished choice of telecommunications products available to them.

In addressing this issue, the Commission considered the basic range of products currently offered by the merging parties, and sought to determine whether there would be a sufficient supply of alternatives to these products post-merger.

Within the generic categories of products offered, depending on the packages assembled and the marketing focus of the different providers, it could be said that they each have their particular market strengths. For instance, a contract with the company Research in Motion (RIM), a designer, manufacturer and marketer of wireless solutions, allowed C&W and Cingular to distribute the Blackberry technology in the market. These devices cater to the corporate client more in need of their associated data messaging services. They can be used to browse files on one's corporate intranet, and are useful for staying connected and responding to urgent office or client requests. The Applicants have claimed that well trained and knowledgeable staff, competent marketing, and reliable customer support services have allowed Cingular to excel in this product range.

In spite of these potential market niches and branding strengths, the firms in the market all offered the standard features available within today's mobile handsets. The basic list of services offered by all the mobile providers prior to the proposed merger is set out at Annex E.

At the moment C&W offers a similar array of services within its range of mobile handsets, as the Applicants. Given the viability of the C&W brand supplying mobile technology in the domestic market for over 15 years, and its continued superior market strength immediately post-merger, it is expected that from the perspective of other viable competitors, that there will be alternative supplies of mobile products post-merger.

The Commission will not speculate on the commercial fortunes of the other license holder not yet operating in the market, but expects that in the long term given the continued availability of spectrum, licences for four (4) firms to operate in the market, there should over time be alternative suppliers allowing for a sustained if not increased offerings of products for the consumer.

In addition, the continuing emergence of new broadband technologies in the telecommunications industry sees Voice over Internet Protocol (VoIP) and Instant Messaging via the Internet bypassing mobile communication in some respects as the choice of consumers and businesses. These products are generally cheaper and include more data capabilities.

Given these experiences in the local mobile market, there is reason to expect that post-merger there will be sufficient alternative sources of supplies as well as continuing alternative types of products available to the consumer.

2.5. THE ACTUAL OR POTENTIAL COMPETITION FROM OTHER ENTERPRISES AND THE LIKELIHOOD OF DETRIMENT TO COMPETITION.

To analyse the actual or potential competition from the other market participants post-merger, and the likelihood of detriment to competition, the Commission considered the dynamics of the market structure; the strengths of the competitors and the history of competition in the market. Based on these factors, the positive and negative implications for competition in the mobile market were identified.

2.5.1 DETRIMENT TO COMPETITION

Reduced Market Diversity

Post-merger, the market will be reduced to only two (2) operating mobile telecommunications service providers. This will definitely lead to a reduction in the diversity of the competition currently experienced in the market. All the firms operating in the market pre-merger had their own unique management focus and means of responding to market and industry developments.

Cingular's brand and management objectives will be lost after the transaction. Cingular has communicated to the Commission that pre-merger its marketing strategy was directed primarily at the corporate customer. Its focus on data services and specialised corporate products made it conspicuous in a market dominated by the other competitors.

It is expected that the Cingular brand will to some extent be captured in any revised Digicel strategy, but the uniqueness of the Cingular character will be lost to the customer not only as a choice for a mobile operator but certain brands and services unique to Cingular. Customers indicated that they chose a provider for any number of unique reasons. A few simply did not want to be associated with the other providers. These customers will no longer have their preferred option.

Increased probability of Collusion

The reduction in the number of competitors in the market will increase the opportunity and probability of collusion within the market. Research has shown that the duopoly market structure is more conducive to collusion between market participants than other market forms. Collusive control over price through covert and overt agreements is used quite readily in highly concentrated markets to exploit the market and extract supra-normal profits. Under these types of circumstances collusion will yield price and output results similar to a pure monopoly. Collusive conduct is also used by firms in these markets to reduce uncertainty during periods of inflationary pressure.

It is important to note however that the market with three competitors pre-merger was only slightly less inclined to such behaviour. Comments received from respondents to the Commission's market inquiry expressed concern that the duopoly market created may lead to collusive behaviour among the two competitors. The Applicants have argued that significant factors exist to suggest that there is no likelihood of express or tacit coordination in the market. They have identified:

- The history of intense competition witnessed so far in the market. Digicel, a new entrant in February 2004, now has a market share of approximately [REDACTED] percent. This is similar to its gains in other regional markets where it faces C&W, including Jamaica where its market share of the mobile market is now approximately 65 percent[9], suggesting the presence of an intense rivalry across the region.
- The lack of full penetration in the market and therefore the opportunity for significant independent growth by both firms in the market;
- The threat of a new entrant given the reallocation of spectrum after the exit of Cingular, and the existence of a fourth firm in Sunbeach, which already has the requisite licences to operate.

[9] See: www.digiceljamaica.com

- The lack of firm and product homogeneity between the Applicants and C&W, which is likely to promote greater rivalry rather than coordinated action.
- The innovative and technologically driven nature of the mobile telecommunications industry which has in the past not been conducive to coordinated behaviour.
- The lack of a retaliatory mechanism in place to be used by operators to force a coordinated action.
- The legal deterrents in place, in the form of the Fair Trading Commission and the Fair Competition Act, which gives the regulator the authority to monitor and take action against such conduct.

These factors are likely to reduce the emergence of collusive conduct in the local market. Research studies[10] however, have identified a number of instances where tacit collusion protected by high barriers to entry, in duopoly markets, was used to maintain artificially high prices. It was only with the awarding of licenses to additional service providers that a sharp decline in prices occurred and a divergence in pricing and tariff packages was observed.

The reduction in the number of operating firms in the market therefore, from three (3) to two (2) providers, the experience elsewhere of collusion in duopoly type mobile telecommunications markets, along with the present barriers to new

[10] Busse, M. (2000) "Multimarket contact and price coordination in the cellular telephone industry." *Journal of Economics and Management Strategy*, 9 (3): 287-320.

Parker, P. and L.H. Roller (1997) "Collusive conduct duopolies: Multimarket contact and cross-ownership in the mobile telephone industry." *RAND Journal of Economics*, 28 (2): 304 - 322.

Valetti, T. and M. Cave (1998) "Competition in U.K. mobile telecommunications," *Telecommunications Policy*, 22:109 -131 entrants in the market, suggests that there will be greater opportunities for the emergence of collusive practices following the proposed merger.

Reduced Price Competition

The theory of duopoly type markets also suggests that they often lead to a lessening of price competition. Such markets are defined by the interdependence of the operating firms. If firm A adopts a high-price policy it will generate increased profits only to the extent that firm B adopts a similar strategy. If firm B uses a low-price strategy it will increase its market share and reduce the profits of firm A. Indeed each firm must consider the reactions of its rival when formulating its pricing policy.

Given that price cuts can be quickly and easily met by the other competitor, the opportunity for either firm to advance its market share through price competition is small. Such behaviour could even realise a price war, with little benefit to the companies involved.

2.5.2 BENEFITS FOR COMPETITION

Strengthened Competitor

The merged entity based on the market-share analysis conducted by the Commission will control, post-merger, a smaller market share than the incumbent provider. In this regard, the merged firm will not become the dominant firm in the market, but should because of its claimed increased economies of scale and cost savings, be a more formidable competitor to the incumbent. In this context, it is expected that the rivalry between the two (2) should be enhanced.

The Applicants have pointed to the acquisition of Cingular's data messaging technology, its additional reach in the region, its customer base and highly skilled human resources, as factors likely to result in increased economic strength that it will be able to leverage in the market.

Respondents to the Commission's enquiry, including C&W, have agreed that Digicel will be significantly stronger post-merger and more capable of competing with the incumbent.

Increased Non-Price Competition

The theory of duopoly markets suggests that such markets are characterised by non-price competition. Product variations, improvements in productive techniques, and innovative market strategies are the main forms of competition likely to be experienced, because these initiatives are less easily duplicated by the competitor. In addition, because firms in these types of markets control large market shares they are typically more financially able to engage in this form of non-price competition.

There is evidence of this trend in the domestic mobile telecommunications market. Digicel and C&W have identified such initiatives as:

- new roaming agreements, (Digicel now boasts of 102 roaming agreements);
- increased regional reach or presence in more regional territories;

- more state of the art technological products such as C&W's introduction of the Blackberry enabled data services; and
- greater community oriented initiatives such as sponsorship of sporting and entertainment events and personalities.

In the duopoly type market these non-price initiatives cannot be duplicated as easily as a price reduction and therefore are more effective means of enhancing the image of the firm and garnering a greater share of subscribers.

Summary

The merger will result in some lessening of competition with respect to the exit of Cingular from the market. In addition there would be an increased risk of collusion, and a likely reduction in price competition given the creation of a duopoly market. On the other hand there is potential for increased competition once the available spectrum license is reallocated to a new entrant, and following the proposed merger, the merged entity would be more capable of competing with the incumbent.

The mobile market should not therefore experience post-merger a major lessening of competition.

2.6 THE EFFECT OF THE PROPOSED MERGER ON CONSUMERS AND THE ECONOMY

In taking into account the likely effect of the proposed merger on consumers and the economy; the Commission examined the degree to which there would be improvements or otherwise in the price, quality and delivery of the goods and services supplied in the market. The Applicants have indicated that:

> *…"the merger will not only incorporate significant productivity gains but will in fact enhance overall competitiveness of the Barbados mobile market and by extension result in greater benefits to not just existing Digicel/Cingular customers but to all customers. Given the prospect that improved service choice and quality as well as guaranteed lower prices will be provided to existing customers by a merged Digicel, this should eventually also lead to improved offerings to competitors customers through the dynamic competitive process".*

In order to determine the extent to which these potential public benefits are likely to be realised by consumers, the Commission analysed the cost-saving efficiencies that the merging parties claimed would allow them to deliver these public benefits.

2.6.1 EFFICIENCIES

The types of efficiencies normally recognised by the Commission include;

- Production efficiencies, which arise from cost savings which allow a firm to produce more or a better output from the same level of inputs. These cost savings include but are not limited to achieving increased economies of scale or scope, rationalisation of product mix, savings in distribution or research and development; and

- Dynamic efficiencies, including research and development activities, innovations, and improvements in product or service quality.

The Commission in looking at efficiencies that may arise from a merger transaction places the burden of proof with respect to the verification of these efficiencies on the parties to the merger transaction. The merger parties are required to verify that the efficiencies are:

- Real, and not pecuniary, vague or speculative in nature; and
- "Merger specific", that is, arising as a direct consequence of the merger.

The efficiencies claimed by the Applicants can be categorised largely under economies of scale, rationalisations of operations, and common network savings.

<u>Economies of Scale</u>

The merging parties claim that in addition to the normal static economies of scale, they expect to realise dynamic economies of scale in regard to future increases in market share. They indicated that:

> *"Clearly the value of Cingular to Digicel is not envisaged as one that simply consolidates the combined market shares currently held by the two entities but one that anticipates an increase in market share, particularly in the corporate market.*
>
> *…Then assuming straight line depreciation of the network and a linear increase in market share over the ten years of* [REDACTED]*, capital network unit costs would decrease on average over the period by almost* [REDACTED] *in real terms".*

This claimed dynamic efficiency is one that cannot easily be verified by the Commission. The applicants estimate that over a seven year period it will realise savings from economies of scale of approximately US $[REDACTED] million per annum. The merging parties did not however provide the data to support its assumptions of a linear increase in market share of [REDACTED] over ten years. The market share increase appears reasonable in theory, but rests on a number of factors over which the merging parties have little control, including the performances of its present and future competitors. Any real gain in market share will be at their expense.

In addition, the parties have not specified an increase in their subscriber base in an expanded market, from which dynamic efficiencies are likely to permeate, and which will not necessarily be at the expense of one's competitors' performance. The Commission nevertheless expects that given the current penetration rate and the potential for further growth in the domestic market, the merged firm should realise some subscriber growth leading to efficiency savings.

<u>Rationalisation of Operations</u>

The merging parties have indicated that;

> *"Both Digicel and Cingular's operations in Barbados are supported by a head office or group function out of Jamaica and Puerto Rico, respectively.…The group offices provide support across all aspects of the business from branding and marketing to legal and technical support.*
>
> *….Post acquisition and following the transition period, recharges to cover the costs of group functions will be greatly reduced as only one supporting regional*

centre will be required. This will lead to both OPEX and CAPEX savings. Where there were previously two brands to cultivate and market there will now be just one.

There will also be savings on capital costs where duplicity of furniture and facilities, IT infrastructure and vehicles required to run regional offices will no longer be required – a portion of such costs currently must be recovered from Barbadian operations "

The merging parties have indicated their expectation for substantial costs savings in regard to the closure of Cingular's Puerto Rico Support Centre. The assumed cost savings in regard to the regional office in Puerto Rico were estimated from Cingular's operating recharges from this office, which are currently in excess of US $[REDACTED] million per year. They have provided supporting data along with their financial statements to verify the estimates given. The estimates appear reasonable.

The Commission agrees that the consolidation of corporate offices and stores is likely to produce immediate cost savings from non-duplication of IT infrastructure, office furnishings and equipment, and therefore has little reason to question these particular efficiencies.

The Commission notes however that the savings gererated in relation to the Support Centre tend to be largely fixed costs savings and as such appear to represent a private gain to the firm, not easily lending themselves to the short-term price formation plans. It is hoped that such savings will ultimately play a role in price formation over the long term.

The Applicants have also indicated that additional rationalisation savings will be recognised in respect of the network, including lease lines, office administration and rental, sales and marketing, vehicles, travelling, and entertainment The Applicants estimate that the savings in regard to these rationalisations to be approximately US $[REDACTED] million per annum.

The Commission agrees that a consolidation of the two (2) networks is likely to generate saving from a reduction in salaries and wages, legal and corporate expenses, etc. It finds that such efficiencies are supported by the Applicants financial statements.

<u>Interconnection Cost Savings</u>

The Applicants have indicated that:

> *"Both residential post and pre-paid customers will enjoy immediate benefits from direct interconnection of the two networks.*
>
> *…Savings with respect to interconnect billing, service level maintenance synergies and a reduction in administration are direct efficiency gains associated with directly interconnecting the two networks. However, the key savings come from the virtual interconnection of the networks under a single network identity".*

The Applicants in estimating the cost savings from the virtual interconnection of the two networks and the exclusion of certain interconnection charges, assumed that interconnect charges comprise all network costs and approximately 20 percent of common costs. Excluding retail costs they estimate that approximately

US $[REDACTED] million to US $[REDACTED] million per annum cost savings is attributable to the merging of the two networks.

The Commission agrees that the merged firms should realise cost saving from the creation of a single network for the Applicants' customers. Instead of paying interconnect charges on a competing network, calls made between former Cingular and Digicel customers would now not incur an interconnect transit charge. Calling costs should logically be lower based on the higher number of intra-network calls and a reduction in off-network calls.

In addition call savings will be generated from a single billing system, and they also expect to realise a reduction in service level maintenance costs and lower administrative costs.

Financial data provided for the cost of making a call (inclusive of toll, inter-connect and in-collect revenue) appears to corroborate the Applicants' claim.

2.6.2 BENEFITS TO CONSUMERS AND THE ECONOMY

The merging firms in seeking to demonstrate the potential gains of the proposed transaction to customers and the economy have suggested that the substantial cost-saving efficiencies identified will bring about a number of benefits including:

- Improved customer care as a result of its 24-hour a day customer service centre.

- An improvement to competition generally because of Digicel's strengthened ability to compete against C&W in regard to data messaging products.

- More regional roaming savings to the Digicel customer as a result of being able to make calls within the larger network, given Digicel's planned expansion into the five (5) new territories (Anguilla, Antigua and Barbuda, Bermuda, Dominica, and St. Kitts and Nevis).

- Improved prices for international roaming because of a preferential roaming agreement signed because of the merger.

- Improvements in domestic calling prices, quality and service delivery accruing to its consumers when making intra-network calls. These improvements result from customers making their calls on the same network as opposed to previously making them across separate networks, thereby allowing for the elimination of the transit charge payable to C&W when making an off-network call.

Improved Customer Service Quality and Coverage

The merged entity has indicated that facilities from its 24-hour customer service centre will be available to former Cingular customers. At present customers of Cingular do not have access to a 24-hour customer service. It is therefore clearly to their benefit to be able to access a 24-hour service.

The Applicants have claimed that during the transition period there would be no deterioration in service for Cingular subscribers. They suggest that quality of service benefits will be driven by greater call coverage in Barbados given the increased number of cell towers available to customers of the new entity. This should reduce the number of dropped or blocked calls.

The benefits of improved coverage depend on the cell site locations, proximity to each other and the physical and commercial attributes of the cell sites. In regard to this, it is likely that subscribers from both networks will benefit from the optimization of cell sites.

Improved Technology

The acquisition of Cingular's technology and human resources is expected to enable Digicel to offer a better mix of services than previously possible. The introduction of more value-added services through devices such as the Blackberry is one example.

The Applicants have pointed out that Research in Motion has now offered to license the Blackberry technology to Digicel because of its newly acquired Cingular customer base and the technology and human resources to support their product.

The Applicants have also indicated that the acquisition of the well trained engineering and technical staff with expertise in deploying higher value-added data services e.g. EDGE gives Digicel the opportunity to deliver new products and services to its customers.

Reduced Regional Roaming Rates

The merger transaction is claimed by the Applicants to have created a second mobile operator with a regional footprint that rivals C&W, the incumbent fixed line and mobile operator in the English speaking Caribbean. This additional regional reach should allow for a greater number of calls to be made by the Applicants' customers across the wider regional network.

In addition to the wider regional coverage, the Applicants expect to realise a reduction in regional call termination charges. On the new regional network these call charges will now be lower given that a call is more likely to originate and terminate on the same network in the Caribbean region. The reduced rates are set out at Annex B.

Reduced International Roaming Rates

Digicel has stated that as a consequence of the acquisition, it has been able to negotiate better guaranteed prices on its international roaming agreements to the USA, Canada, UK, Ireland, Europe and the Rest of the World. These rates are set out in Annex B.

The acquisition has created for the Applicants a larger customer base. Foreign carriers may now see greater benefits from the possibility of generating a higher revenue stream from a large roaming partner. Size gives a mobile carrier greater bargaining power to negotiate cheaper wholesale international roaming rates for its customers.

The Applicants state that the benefits of this preferential agreement with Cingular will be passed on to its customers in the form of lower international roaming rates in the USA on the Cingular network.

Reduced Rates for Calls across the Two Networks

The Applicants have stated that as a consequence of reducing the interconnection charges payable to C&W Barbados, they will be reducing calls costs across the Digicel-Cingular network. They claim that:

> *"Although direct interconnection will only be carried out during the transition phase of the merger, Digicel is proposing immediately to offer current Digicel and Cingular customers significantly reduced rates for calls across the two networks immediately upon approval of the deal. This proposal is based on anticipated savings from efficiency gains, in particular with respect to common costs".*

The projected local call savings for customers of the two companies as guaranteed price reductions are set out at Annex A.

Summary

The Applicants have attempted to demonstrate the effect of the proposed merger on consumers and the wider economy, by providing data to support the cost-saving efficiencies that will allow them to deliver these benefits. Except for the projected market share growth estimates, the estimates of cost-savings identified are generally consistent with data provided in the Applicants' financial statements, and they are for the most part merger-specific.

The Commission agrees therefore that the merger should realise some productive efficiencies through economies of scale, given the sizeable acquisition of the Cingular's operation. There should also be savings generated from the rationalisations in operations and from the reduced interconnection charges.

The benefits mentioned; improved customer care, improved technologies, stimulation of competition, reduced roaming rates and reduced domestic intra-network rates can generally be directly linked to the efficiencies described. This therefore increases the chances of the public realising such benefits.

The extent to which these cost-savings are passed on directly or indirectly to the consumer in the form of increased quality of service and reduced prices are to some degree a question of the policy of the merged entities. It is expected however, that there will be sufficient competitive pressure in the market post-merger to persuade the merged entity to reinvest these benefits into the market.

SECTION III SUMMARY OF FINDINGS

The Commission's summarised findings with regard to the criteria set out in Section 20 (7) of the Act are that:

The structure of the markets likely to be affected by the proposed merger;

- The Mobile Telecommunications market immediately post merger can be described as highly concentrated. After the proposed merger the market will have only two (2) operating mobile telecommunications firms – Digicel and C&W. In addition, the barriers to new market entrants are high. The new entrant must acquire one of the requisite licenses, identify funds to meet the sizeable inherent sunk costs needed to start operations, and generate substantial economies of scale in order to be competitive against the entrenched operators.

  However the two operating providers will be more evenly matched post-merger. In addition, given the latent possibility of the Sunbeach interests and the spectrum reallocation stipulation of the Ministry of Energy and Public Utilities, the market is likely to realise increased competitiveness in the near future.

The degree of control exercised by the enterprises concerned in the proposed merger in the market and particularly the economic and financial power of the enterprises;

- The merged firm will be a sizeable undertaking post-merger, with operations in several regional territories. Within the local market however, they can be described as relatively new entrants, and cannot be said to possess the branding likely to dominate the market in the short term. They will also control a smaller market share post-merger than the incumbent. They are unlikely therefore to be able to exert the degree of control to engage in unilateral anti-competitive practices.

The availability of alternatives to the services or goods provided by the enterprises concerned in the merger;

- The Commission expects that given the continuing emergence of new broadband technologies in the telecommunications industry, the viability of the C&W brand, along with C&W's relatively superior market strength, there will be alternative available supplies of mobile telecommunications products post-merger. The likely increase in the number of competitors in the future should further increase the probability of adequate alternatives in the market.

The actual or potential competition from other enterprises and the likelihood of detriment to competition.

- On balance the merger is unlikely to be substantially harmful to competition. It will lessen competition somewhat by eliminating a capable and unique competitor in Cingular, and will in doing so heighten the risk of exploitative collusion in the market.

Given however the potential for the market to achieve its full complement in terms of number of competitors, the mobile market should not experience a significant lessening of competition.

The likely effect of the proposed merger on consumers and the economy

- The Applicants have demonstrated that apart from any particular harm to competition in the short term, the proposed merger will bring about sufficient efficiencies that will offset any harm to competition.

  The parties have provided data to support their claimed cost-saving efficiencies in regard to rationalisations of their operations, economies of scale, and reduced interconnection charges.

  In addition the Applicants have identified a number of benefits which they expect to be generated from the identified cost savings. The parties have indicated that the merger will lead to; improved customer service, improved technology, stronger competition, reduced regional and international roaming rates and reduced domestic intra-network rates.

  The Commission agrees that these benefits are reasonable and within the power of the merged enterprises to deliver.

In general, the merger appears unlikely to cause a major decline in competition in the mobile telecommunications market in Barbados. There will be some loss of choice with the exit of Cingular, but given the potential for a new market entrant, and the positive efficiencies demonstrated by the parties, which the Commission expects will be passed on to the consumer, the Commission has no cause to prohibit the merger. The Commission therefore consents to the merger subject to the delivery of the benefits proclaimed by the Applicants.

SECTION IV COMMISSION'S DIRECTIVE

The Fair Trading Commission (hereinafter referred to as the "Commission") pursuant to Section (20) of the Fair Competition Act CAP 326C gave consideration to the formal merger application filed on October 25th 2005, by Digicel (Barbados) Limited (hereinafter referred to as "Digicel") and Cellular Communications (Barbados) SRL (hereinafter referred to as "Cingular Wireless") (collectively the "Applicants") for the Commission's consent to Digicel acquiring all the shares of Barbados Wireless Holdings Limited, an intermediary holding company that owns a majority interest in Cingular Wireless which provides telecommunications services in Barbados.

The Commission having conducted an investigation into the proposed merger in accordance with Section 20 (7) of the Fair Competition Act, has satisfied itself that the merger will not affect competition adversely or be detrimental to consumers or the economy, provided that and insofar as the benefits that the Applicants claimed will result from the merger are delivered.

The Commission therefore grants its consent to the application subject to the following:

1. As soon as is practicable and in accordance with any directives given by the Ministry of Energy and Public Utilities, the Applicants relinquish such spectrum allocation, as is required by the said Ministry.

2. Digicel undertakes to maintain the same level of service quality as is currently received by the customers of Cingular Wireless, such that in the

event that any post-paid Cingular Wireless customer during the initial term of their existing post-paid contract, receives a materially inferior or reduced quality of service, compared to that provided prior to the acquisition of Cingular Wireless, Digicel will waive any penalty, any claim of liquidated damages and any early termination fees payable by the affected post-paid contract customer. In the event that a dispute arises between the customer and Digicel, the Commission reserves the right to intervene and make a decision on the dispute, pursuant to the Fair Trading Commission Act, CAP 326B or any other legislation which the Commission enforces.

3. Within seven (7) business days of completion of the acquisition, Digicel undertakes to notify in writing all current Cingular Wireless' post-paid contract customers of the new ownership of Cingular Wireless indicating the undertaking given with regard to service quality.

4. Digicel undertakes to implement its proposed reduction in local call rates for charges to make a call between the Digicel and Cingular networks as set out confidentially in Annex A within six (6) weeks of the completion of direct inter-connection of the Digicel and Cingular Networks. The said local call rates will not be increased for a period [REDACTED] from the date of reduction.

5. Digicel undertakes to maintain for its Barbados subscribers:
    I. its regional DigiRoaming rates for countries in which Digicel currently has network operations; and
    II. its international roaming rate within the USA on the Cingular network at rates not higher than the existing levels for a period of

at least [REDACTED]. The rates and countries referred to herein are set out confidentially in Annex B.

6. Digicel undertakes to submit to the Commission documentation demonstrating its compliance with the above conditions on a half-yearly basis.

7. Where in the opinion of the Commission, Digicel has demonstrated that compliance with the foregoing:

   (i) is prevented by the laws of any jurisdiction;
   (ii) is technically impossible having regard to the existing state of Digicel's network; or
   (iii) a material change in circumstance that was not within the knowledge of Digicel at the time of the application for the merger.

The Commission may permit Digicel to deviate from the above.

Dated this 19th day of December 2005

Original signed by

Neville V. Nicholls
Chairman

ANNEX A

[REDACTED]

ANNEX B

[REDACTED]

ANNEX C

List of Respondents

1. **Barbados Workers Union**
2. **Ministry of Energy & Public Utilities**
3. **TeleBarbados**
4. **Cable & Wireless (Barbados) Limited**
5. **CARITEL**
6. **Barbados Consumer Research Organisation Inc.**
7. **Barbados Private Sector Trade Team**
8. **Sunbeach Communication Inc.**
9. **Barbados Association of Non Governmental Organisations**
10. **Office Of Public Counsel**

ANNEX D

Survey Form

Fair Competition Act, CAP.326C –*Proposed Acquisition of Cingular's Caribbean equity interests by Digicel Limited*

Instructions:

- Please provide answers to as many of the following questions as you are able.
- All information given will remain confidential.

As you may be aware, Digicel (Barbados) Limited is seeking to merge with Cingular Wireless in Barbados and throughout the Caribbean. The Fair Trading Commission as part of its merger investigation is undertaking this survey to get a feel for the views of the general public in relation to the proposed merger. The market is going from 3 operators to 2 operators.

1. Do you own a cell phone? Yes. No.

   a. From which service provider? Digicel . Cingular. C&W
   b. Prepaid or post-paid

2. Do you use a phone from another mobile phone operator? Yes. No.

   a. Please identify the provider(s). Digicel. Cingular. C&W.

3. How did you choose your current cell phone provider(s)?

   a. Price
   b. Service
   c. Other factors (specify)…………………………………………………

4. How do you rate the three mobile phone companies on a scale of 1 to 3 on the following: Price, Service quality and Roaming.

C&W	Good (1)	Fair (2)	Poor (3)
Price			
Service Quality			
Roaming			

Cingular	Good (1)	Fair (2)	Poor (3)
Price			
Service Quality			
Roaming			

Digicel	Good (1)	Fair (2)	Poor (3)
Price			
Service Quality			
Roaming			

5. How interested are you in the proposed merger between Digicel and Cingular?

    a. Very interested
    b. Interested
    c. Not interested

6. If the price of a call from your cell phone went up by more than 15% i.e. from \$0.50to \$0.58 per minute or if you are a post-paid you get 15% less minutes on your current package for the same money. Would you do any of the following:

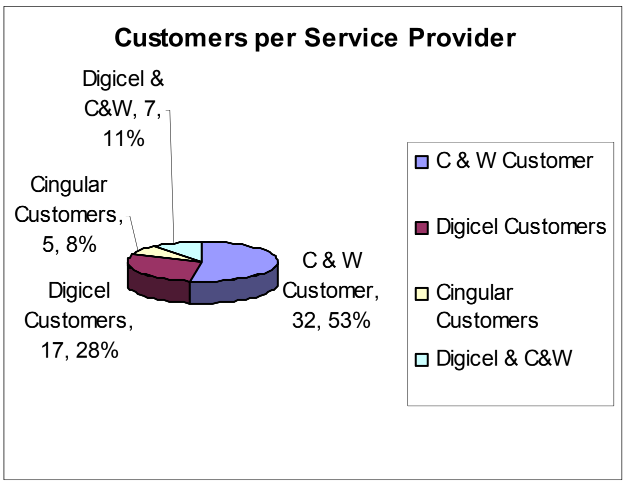
    a. Make more of your calls on a fixed line
    b. Make calls over the Internet
    c. Make less calls on your mobile phone
    d. Make no change.

Selected Results of Survey for Merger

Distribution of Subscribers

Service Provider	Number of Respondents	Percentage	* Number of Respondents	* Percentage
C & W Customer	32	52.5%	39.0	57.4%
Digicel Customers	17	27.9 %	24.0	35.3%
Cingular Customers	5	8.2 %	5.0	7.4%
Digicel & C&W	7	11.5 %		-
Total	**61**	100.0 %	68.0	100.0%

* The number adds those respondents who own two accounts to those who own only one.



Basis for Choice of Provider

Service Provider	Price	Service	Other	Total	Price	Service	Other
C & W Customer	4	5	23	32	12.5%	15.6%	71.9%
Digicel Customers	5	2	10	17	29.4%	11.8%	58.8%
Cingular Customers	0	0	5	5	**0.0%**	**0.0%**	**100.0%**
Digicel & C&W	2	2	3	7	28.6%	28.6%	42.9%
Total	**11**	**9**	**41**	61	18.0%	14.8%	67.2%

Interest in Merger

Service Provider	Very Interested	Interested	Not Interested	Total	Very Interested	Interested	Not Interested
Digicel	5	6	6	17	29.4%	35.3%	35.3%
C & W	9	11	10	30	30.0%	36.7%	33.3%
Cingular	3	2	0	5	**60.0%**	**40.0%**	**0.0%**
Digicel & C&W	1	3	3	7	14.3%	42.9%	42.9%
Total	**18**	**22**	**19**	59	30.5%	37.3%	32.2%

ANNEX E

List of Services Offered by Mobile Providers		
Digicel	**Cable & Wireless**	**Cingular**
Mobile Voice telephony	Mobile Voice telephony	Mobile voice telephony
Voice Services	**Voice Services**	**Voice Services**
Caller ID	Caller ID	Caller ID
Call Waiting	Call Waiting	Call Waiting
3 Way Calling	3 Way Calling	3 Way Calling
Group Conferencing	Group Conferencing	Group Conferencing
Voicemail	Voicemail	Voicemail
Treo technology	**Blackberry with EDGE Technology**	**Blackberry with EDGE Technology**
Data Services	**Data Services**	**Data Services**
Media Messaging (MMS)	Media Messaging (MMS)	Media Messaging (MMS)
Text Messaging (SMS)	Text Messaging (SMS)	Text Messaging (SMS)
E-mail messaging	E-mail messaging	E-mail messaging
Information Messaging	Information Messaging	Information Messaging
Entertainment Messaging	Entertainment Messaging	Entertainment Messaging
Wireless Internet	Wireless Internet	Wireless Internet
Added Value Services	**Added Value Services**	**Added Value Services**
Roaming regionally & internationally	Roaming regionally & internationally	Roaming regionally & internationally
Games	Games	Games
Unique & Fun Ringtones	Unique & Fun Ringtones	Unique & Fun Ringtones
Stylish logos	Stylish logos	Stylish logos
Weather Update	Weather Update	Weather Update
News Update	News Update	News Update