



BERMUDA

REGULATORY AUTHORITY (OBLIGATIONS FOR OPERATORS WITH  
SIGNIFICANT MARKET POWER) GENERAL DETERMINATION 2013

BR 79 / 2013

The Regulatory Authority, in exercise of the power conferred by section 62 of the Regulatory Authority Act 2011 read with section 74 of the Electronic Communications Act 2011, makes the following General Determination:

Citation

1 This General Determination may be cited as the Regulatory Authority (Obligations for Operators with Significant Market Power) General Determination 2013.

Interpretation

2 In this General Determination unless the context otherwise requires all relevant terms shall have the meaning given in the Regulatory Authority Act 2011 and the Electronic Communications Act 2011.

General Purpose

3 This General Determination, in furtherance of the Regulatory Authority (Market Definition and Significant Market Power) General Determination 2013 (BR 47 / 2013), prescribes the ex ante remedies to be imposed on Operators designated as having Significant Market Power.

Terms and conditions of the General Determination

4 The Schedule has effect.

SCHEDULE



BERMUDA  
**REGULATORY  
AUTHORITY**

**General Determination:  
Obligations for Operators with  
Significant Market Power**

General Determination  
Matter: RM01/13-1040  
Date: 7 August 2013

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This General Determination is made by the Authority pursuant to Section 62(1) of the Regulatory Authority Act 2011, and in accordance with Section 74(b) of the Electronic Communications Act 2011, and prescribes the remedies to be imposed on Operators designated as having Significant Market Power in the “Consultation Summary, Final Decision, Order and General Determination: Market Review Process (Part A) – Market Definitions; Market Review Process (Part B) – Significant Market Power”, Matter: MR01/13, issued on 29 April 2013. The *Ex Ante* Remedies prescribed herein were developed, and are imposed, in accordance with Sections 24 and 74(b)(ii) of the Electronic Communications Act 2011 using the general powers granted to the Authority under Section 13 of the Regulatory Authority Act 2011 and in accordance with the procedures established for this purpose in Section 59 of that Act.

### 1 DEFINITIONS

1. In this General Determination, unless the context otherwise requires:

“**Access**” means the making available of facilities or services to another undertaking, under defined conditions, on either an exclusive or a non-exclusive basis, for the purpose of providing electronic communications services;

“**Access and Interconnection (A&I)**” refers to the physical and logical linking of public electronic communications networks (and any other networks specified by the Authority) by the same or a different communications provider in order that facilities or services offered by one provider may be made available to another provider, under defined conditions, for the purpose of providing electronic communications services;

“**Access Seeker**” means any ICOL holder, or any other Individual Licence holder authorized by the Authority in conformity with ECA Section 75, that has made a reasonably detailed written request to another Operator seeking the provision of wholesale interconnection or access services or facilities;

“**Avoidable Cost**” when used in conjunction with Retail Minus, refers to those costs that an Operator would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. In other words, it refers to all of the costs that an Operator incurs in maintaining a Retail, as opposed to a Wholesale, business. This, necessarily, includes a portion of indirect costs as well, which portion must be considered as “attributable to costs that will be avoided”;

“**Broadband**” or “**Broadband Services**” refer to the provisioning of the bundled package consisting of fixed Broadband Access and ISP Services;

“**Broadband Access Services**” refer to the legacy service provided by a Class B provider such as The Bermuda Telephone Company Limited which linked an End-User to a provider of ISP Services. The link in question comprised local access, backhaul, and data stream aggregation, terminating at an ISP’s premises;

“**ECA**” means the Electronic Communications Act 2011;

“**Fibre to the x (FTTx)**” refers to any broadband network architecture that uses optical fibre to replace some or all of the copper used in the customer access network. This term is a generalization for a number of different types of fibre deployment, such as fibre to the node (“FTTN”) and fibre to the home (“FTTH”).

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Voice service delivered over FTTx is in the same market as standard telephony service;

**“International Benchmarking”** refers to the process of establishing the price of a service based on prices in other jurisdictions;

**“Internet Protocol TV (IPTV)”** refers to the provision of multimedia services such as television/video/audio/text/graphics/data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability. Thus IPTV is a carefully managed service delivered using an operator’s proprietary end-to-end platform and possessing quality of service (“QoS”) standards that guarantee picture quality that is as good as, or better than, traditional TV;

**“ISP Services”** refer to the provisioning of access to local and international Internet networks along with the provisioning of Internet services such as web hosting and email accounts;

**“KeyTech Group”** shall refer to:

- (a) any of the following companies: Bermuda Cablevision Limited, Bermuda Digital Communications Ltd., BDB Ltd., The Bermuda Telephone Company Limited, Cable Co. Ltd., Logic Communications Ltd., and North Rock Communications Ltd.; and
- (b) any entity that directly or indirectly owns, is directly or indirectly owned by, or is under common ownership with, any of the ICOL holders identified in subsection (a) above, as evidenced by the ownership of five per cent or more of the shares, stock or other securities or voting rights of the owned entity, through an agreement or arrangement of any type;

**“Leased Lines”** refer to services and products that provide fixed, permanent point-to-point symmetric termination services between two points within Bermuda. A leased line is permanent, in that capacity is available between the two fixed points. However, capacity could be reserved or shared through the associated network depending on the nature of the leased line. Leased lines can be used for providing voice services, other analogue services, and/or data services either directly to End-Users (e.g., private networks for large companies) or to other Electronic Communications Service providers who would then use the Leased Lines in question as an input for the provision of services to their own customers. Leased Lines may be categorized as follows:

- (a) High-speed Leased Lines—1 Mb/s or faster;
- (b) Low-speed Leased Lines—less than 1 Mb/s;

**“Mobile Virtual Network Operator (MVNO)”** refers to a wireless Electronic Communications Services provider that does not hold rights to the radio spectrum or own wireless network infrastructure over which the MVNO provides services to its customers;

**“New Retail Service”** refers to any stand-alone, or bundled, service that customers would perceive as a new or materially different offering as compared with services already available on the market, such as a new broadband speed or a service offering a new functionality, as determined by the Authority in the case of any doubt;

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**“Non-Discriminatory”** means not unreasonably discriminatory. Cognate expressions shall be construed accordingly. When used in reference to the provision of Retail services to End-Users and Wholesale services to other Communications Providers, it includes the requirements to:

- (a) apply equivalent terms and conditions in equivalent circumstances to End-Users or to other Communications Providers; and
- (b) in the case of Wholesale services, to provide facilities, services and information to others under the same conditions and of the same quality as it provides for its own internal purposes or to those of its own divisions, subsidiaries, partners and Affiliates;

**“Operator”** means a Communications Provider as defined under Section 2 of the ECA;

**“Predatory Pricing”** may occur when services are provided by an Operator with SMP at prices below cost so as to foreclose, or be likely to foreclose, actual or potential competitors;

**“Price Squeeze”** also sometimes referred to as a “margin squeeze”, may occur when a vertically integrated Operator with SMP in an upstream market charges a price for the product from the upstream market which, compared with the price it charges in the downstream market, would prevent an equally efficient competitor from trading profitably in that downstream market on a lasting basis;

**“Public Switched Telephone Network (PSTN)”** refers to a public circuit-switched telephone network;

**“RAA”** means the Regulatory Authority Act 2011;

**“Reference Access and Interconnection Offer (RAIO)”** refers to an offer to provide Access and Interconnection services and facilities that includes a description of the Access and Interconnection services and facilities being offered, setting out the particular components according to market needs and all of the terms and conditions for Access and Interconnection to be satisfied by an entity wishing to enter into an Access and Interconnection agreement.

**“Replicability”** means the ability of a reasonably efficient competitor to replicate a Retail offering using a Wholesale service. Testing for Replicability involves:

- (a) assessing whether the relevant Wholesale service allows for replication of the Retail service from a technical point of view; and
- (b) whether the margin between the Wholesale and Retail product is sufficient so that there is no Price Squeeze;

**“Retail Minus”** involves establishing a Wholesale price for a product or service by deducting the Avoidable Cost of a retail service from the Retail Price. This methodology ensures that the Wholesale price, relative to that product or service’s Retail price is such that there is a sufficient margin for a Wholesale customer using that product or service as an input to recover Retail costs and still make a profit on the provision of Retail service;

**“SMP”** means Significant Market Power as defined under Section 2 of the ECA;

**“SMP Product”** refers to a product, or service, offered by an Operator that possesses SMP in the relevant market to which the product or service belongs;

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“**Tying**” or “**Tie**” refers to the practice of linking one good or service to another, such that customers seeking to purchase one must also purchase the other; and

“**Wholesale Line Rental and Local Calling Service (WLRLC)**” refers to a service bundle consisting of local access and calling services made available to other Operators on a Wholesale basis. Essentially it is a total service resale product.

### 2 INTERPRETATION

2. For the purpose of interpreting this General Determination:
  - (a) unless the context otherwise requires, words or expressions shall have the meaning assigned to them herein, the ECA, RAA and Interpretation Act 1951;
  - (b) where there is any conflict between the provisions of this General Determination and the ECA or RAA, the provisions of the ECA or RAA, as the case may be, shall prevail;
  - (c) terms defined herein and in the ECA and RAA have been capitalised;
  - (d) headings and titles used herein are for reference only and shall not affect the interpretation or construction of this General Determination;
  - (e) references to any law or statutory instrument include any modification, re-enactment or legislative provisions substituted for the same;
  - (f) a document referred to herein shall be incorporated into and form part of this General Determination and a reference to a document is to a document as modified from time to time;
  - (g) expressions cognate with those used herein shall be construed accordingly;
  - (h) use of the word “include” or “including” is to be construed as being without limitation; and
  - (i) words importing the singular shall include the plural and vice versa, and words importing the whole shall be treated as including a reference to any part unless explicitly limited.
3. This General Determination shall be construed by reference to the Consultation Documents and Final Decision issued in the Public Consultation entitled “Obligations for Operators with Significant Market Power,” Matter RM01/13. Where there is any conflict between the Consultation Documents, the provisions of the most recent Consultation Document shall prevail. Where there is any conflict between the Consultation Documents and the Final Decision, the provisions of the Final Decision shall prevail. Where there is any conflict between the Final Decision and this General Determination, the provisions of this General Determination shall prevail.

### 3 LEGISLATIVE BACKGROUND AND PURPOSE

4. Pursuant to, and in accordance with, ECA Sections 22(1), 23(4) and 74(b)(i) and RAA Sections 59(2), 62(1), 70(1), and 72(4), the Authority conducted and concluded its Public Consultation concerning market definition and Significant Market Power Determination with the issuance of its “Market Review Process — Market Definition and Significant Market Power General Determination”, Matter: MR01/13, issued on 29 April 2013.



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5. Having concluded that Public Consultation, the Regulatory Authority is required by ECA Section 23(4)(c) to conduct a public consultation for the purposes of “deciding which obligations, if any, should be imposed in respect of each relevant market characterised by SMP in order to promote or preserve effective competition, in accordance with section 24.”
6. ECA Section 21 sets out the principles and objectives that the Authority must seek to satisfy when determining whether to impose remedies on one or more SMP Operators in a market, which are:
  - (a) develop or maintain effective and sustainable competition for the benefit of consumers with regard to price, innovation and choice;
  - (b) promote investment in the electronic communications sector;
  - (c) establish *ex ante* remedies that are effective but proportionate, taking into account the costs of compliance and the ultimate benefits to consumers;
  - (d) establish *ex ante* remedies that apply on a technology-neutral and service neutral basis whenever feasible; and
  - (e) rely on market forces and withdraw, reduce or limit *ex ante* remedies in circumstances where the Authority concludes that markets are effectively competitive or likely to become so within a reasonable period of time, taking into account actual and expected market circumstances.
7. ECA Section 24(4) instructs the Authority that any obligations imposed in accordance with Section 24 shall be Proportionate and justified in light of the relevant circumstances and the purposes and objectives set out in Sections 5 and 21 and shall, in the case of any access obligations, take account of:
  - (a) the technical and economic feasibility of using or installing competing facilities, taking into account the type of Interconnection or access involved;
  - (b) the feasibility of providing access in relation to available capacity;
  - (c) relevant investment risks incurred by an operator designated as having SMP; and
  - (d) the ability of the Communications Provider with SMP to impede the development of effective competition through its subsidiaries, partners and Affiliates.
8. ECA Section 24(1)(a)-(n) provides a list of *Ex Ante* Remedies that the Authority may choose to apply to designated SMP Operators. ECA Section 24(1)(o) gives the Authority the ability to select other remedies as necessary to promote or preserve effective competition in a relevant market or markets.
9. ECA Section 24(6) states that the burden of proof for demonstrating that a remedy should not be imposed, or should be modified or withdrawn, shall rest with the Communications Provider that is designated as having SMP in the relevant market.
10. ECA Section 24 provides the ECA’s comprehensive guidance concerning the imposition of *Ex Ante* Remedies on Operators found to possess SMP.
11. ECA Section 74(b)(ii) directs the Authority to, following a public consultation, issue decisions and orders specifying any applicable *Ex Ante* Remedies in accordance with Section 24 no later than 240 calendar days following the date of commencement of Part 12 of the ECA. Section 74(b) further provides that the

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Authority shall undertake this task notwithstanding the process as set out in RAA Section 72.

12. RAA Section 13(r) grants the Authority the power to adopt remedies to deter anti-competitive conduct by Sectoral Providers in any relevant market.
13. RAA Section 59(1) provides that the Authority, without prejudice to its authority to impose obligations on Sectoral Providers pursuant to Section 85, may impose *Ex Ante* Remedies on a Sectoral Provider with SMP, when authorized to do so by sectoral legislation.
14. In accordance with RAA Section 70(1), the Authority published a Consultation Document on 17 May 2013, entitled "Obligations for Operators with Significant Market Power". This consultation document set out the proposed remedies to be imposed on Communications Provider(s) designated as having Significant Market Power in our Consultation Summary, Final Decision, Order and General Determination: Market Review Process (Part A) – Market Definitions and Market Review Process (Part B) – Significant Market Power, Matter: MR01/13, issued on 29 April 2013.
15. A second consultation document, the "Further Consultation: Obligations for Operators with Significant Market Power – Final Draft General Determination", was issued on 15 July 2013, and additional comments on the modified set of proposed remedies contained therein were invited by the Authority.
16. This Public Consultation was closed on 25 July 2013. In accordance with RAA Section 72(4), the Authority published a Consultation Summary, Final Decision, Order and General Determination in the Public Consultation on 7 Aug 2013, setting out its conclusions regarding the issues raised during the Public Consultation process.
17. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
  - (a) the *Ex Ante* Remedies provided in Section 4, below, shall be imposed upon those Operators designated by the Authority as having SMP in one or more of the relevant markets previously identified by the Authority;
  - (b) the *Ex Ante* Remedies provided in Section 5 below, shall be imposed upon those SMP Operators upon whom the Authority has imposed an obligation to provide Wholesale Access services as determined in Section 4.2.1, below; and
  - (c) the *Ex Ante* Remedies provided in Section 6 shall be imposed on members of the KeyTech Group on a provisional basis pending completion of the Authority's separate review of the potential competitive impact of horizontal and/or vertical leveraging by KeyTech Group members with SMP into adjacent markets, which shall consider the continued need, if any, for the imposition of these and any additional or enhanced remedies on some or all Members of the KeyTech Group ("KeyTech Review").

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**4 MAIN PROVISIONS**

**4.1 Determinations concerning Retail market remedies**

18. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:

**4.1.1 Remedies applicable to all Retail markets**

19. SMP Operators shall be required to continue to offer existing Retail products in relevant markets on a component basis, as well as existing bundles (e.g., the voice plus ADSL bundles marketed by BTC) at prices that do not increase at a rate greater than the price capped rates established in Section 4.1.2, below.

**4.1.2 Remedies concerning the imposition of Retail price caps**

20. Retail price caps shall be imposed on those relevant markets, services, and SMP Operators depicted in Table 1.

**Table 1: Relevant markets and SMP Operators subject to Retail price cap remedies<sup>1</sup>**

<b>Market No.</b>	<b>Relevant Markets</b>	<b>SMP Operator(s)</b>
1	A national market (excluding Southside) for the supply of Retail fixed narrowband access lines and local calls to residential customers	BTC
2	A market for the supply of Retail fixed narrowband access lines and local calls to business customers outside of Southside and the City of Hamilton and contiguous suburbs	BTC
3	A national market (excluding Southside) for the supply of Retail fixed Broadband Access Services and ISP Services to residential customers	BTC, BCV
4	A market for the supply of Retail fixed Broadband Access Services and ISP Services to business customers outside of Southside and the City of Hamilton and contiguous suburbs	BTC
6	A market for the Retail supply of low-speed Retail Leased Lines in the City of Hamilton and contiguous suburbs	BTC

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<sup>1</sup> The markets depicted in this table do not constitute the entire list of relevant Retail markets appearing in the table at Appendix—B of the Further Consultation Document. The markets depicted here are only those relevant Retail markets that have had Retail price caps imposed upon them.

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<b>Market No.</b>	<b>Relevant Markets</b>	<b>SMP Operator(s)</b>
7	A market for the Retail supply of low-speed Retail Leased Lines outside of the City of Hamilton and contiguous suburbs (excluding Southside)	BTC
8	A market for the Retail supply of high-speed Retail Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	BTC
9	A national market for the supply of Retail Subscription Television Services (excluding Southside)	BCV

21. Excepting the price caps imposed on Market Nos. 3 and 4—Retail fixed Broadband Access and ISP Services, and Market No. 9—Retail Subscription Television Services, in all other instances where a price cap is imposed on an Operator, the following price cap formula shall be utilized:

$$PCIt = PCIt-1 * (1 + CPI + Y), \text{ where;}$$

CPI = Consumer Price Index (rate of inflation);<sup>2</sup>

Y = 2%;

PCIt is the price cap index for the current year; and

PCIt-1 is the price cap index for the prior year.

22. An SMP Operator upon whom a price cap has been imposed shall:
- (a) make an annual filing demonstrating that it has abided by the terms of the price cap for that year. In making this filing, the Operator must show that the weighted average of the prices for price capped goods and/or services comports with the price cap terms;<sup>3</sup>
  - (b) show that the quantities used in the weighting are those from a fixed base year.<sup>4</sup> The base year is set at 2012 and the weights to be used in the price cap calculation are the quantities of goods purchased from the SMP Operator in 2012. The Authority may at some point in the future alter the base year to a year other than 2012 if it considers this necessary; and

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<sup>2</sup> As measured by the Consumer Price Index (“CPI”) published by the Bermuda Department of Statistics based on the most recent full calendar year (January-December).

<sup>3</sup> The percentage change in prices would be calculated using logarithms. For example, if the price for a service changed from \$26 to \$28, this would be reported as a 7.4108% =  $\ln(28 / 26)$  change in price (where  $\ln$  refers to the natural logarithm function).

<sup>4</sup> Using a fixed base year weights means that changes in the weighted average price over time reflect only changes in prices rather than changes in weights.

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(c) show that carry over effects are not included. Regardless of prior years' adjustments, an Operator shall only be permitted to raise its prices by the annual inflation rate plus 2% adjustment factor in any one year.<sup>5</sup>

23. Where we use the term "annual price increase", we are referring to the price changes that may occur in the calendar year, January to December. In a calendar year, the price of the basket of goods may not increase by more than (CPI + Y). An SMP Operator can file for rate changes, where those are appropriate, only after it has obtained a Satisfactory Compliance Notice as set out in ECA Section 73(5)(a).
24. If an Operator does not implement a price change at the start of the calendar year, its composite rate may go up by more than CPI + Y, as long as the following two conditions are satisfied:
  - (a) the annualized rate increase for the basket must be no greater than CPI + Y; and
  - (b) the price increase for the shorter period of time may be no greater than 25% of the increase permitted on an annual basis.<sup>6</sup>
25. The annual inflation rate plus 2% adjustment factor shall remain in place until the next market review is completed, unless an SMP Operator is able to demonstrate that the price capped price would not enable it to recover the costs of providing the product or service whose price is capped.

### **4.1.2.1 Remedies concerning the application of the Retail price cap to Market Nos. 3 and 4—Retail fixed Broadband Access Services and ISP Services**

26. The application of the price cap to Market Nos. 3 and 4—Retail fixed Broadband Access Services and ISP Services shall be done such that:
  - (a) the price per Mb/s cannot increase (unless there is an affirmative showing that prices are not recovering historical costs); and
  - (b) the price cap shall be applied to the price per Mb/s for each broadband access speed offered.
27. At the end of each 12 month period BTC and BCV must submit a report to the Authority showing any changes in their Retail Broadband prices and how those compare to the price cap.

### **4.1.2.2 Remedies concerning the application of the Retail price cap to Market No. 9—Retail Subscription Television Services**

28. The application of the price cap to Market No. 9—Subscription Television Services shall utilize the same price cap formula set out at paragraph 20 except that the Y

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<sup>5</sup> For example, suppose that a firm with SMP could have raised its prices by inflation plus 2% rate of 4% in 2013, but decided to lower them by 5% instead. Now further suppose that in 2014 market conditions have changed and the firm would like to raise its prices by 9% to make up for 2013. The firm would not be permitted to implement the 9% carry over price increase. The firm would only be permitted to raise their prices in 2014 by the change in annual CPI plus 2% adjustment factor.

<sup>6</sup> For example, if CPI + Y is 4%, and if an increase in prices is not implemented until July 1st, the rate of increase is limited to five percent (4% + .25 \* 4%).

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shall be set to 0% and there shall be no adjustment for inflation. This means that for Subscription Television Services the relevant price cap is:

$$PCI_t = PCI_{t-1}$$

29. BCV can petition the Authority if it considers that a greater price increase is required in order to achieve a reasonable return on investment. The Authority may permit an increase in the price cap for a given year if it is satisfied that BCV would not otherwise be able to earn a reasonable return on investment.
30. At the end of each 12 month period a report must be submitted to the Authority showing any changes in their Retail Subscription Television Services prices and how those compare to the price cap.
31. This Retail price cap obligation shall remain in place until either:
  - (a) BCV has provided Subscription Television Services to a minimum of 100 subscribers for at least six months via a Wholesale resale service offering provided by BCV to another Operator; or
  - (b) market conditions change such that a re-examination of the regulatory oversight of the market is deemed necessary by the Authority and the Authority, in light of that re-examination, determines that the price cap obligation may be removed.

### 4.1.3 Remedies concerning the Retail tariff notification filing requirements

32. Tariff notification filing obligations shall be imposed upon the following Operators:
  - (a) BTC; and
  - (b) BCV.
33. Any SMP Operator upon which a tariff notification filing obligation has been imposed shall:
  - (a) file with the Authority all existing tariffs within 30 calendar days of the date on which this General Determination becomes effective;
  - (b) file a notification with the Authority of all new tariffs, tariff changes and extensions to special promotions at least 10 business days before the proposed effective date of the new tariff, with the exception of bundled offers including an SMP Product, which will require at least 20 business days' notice prior to the effective date of the bundled tariff. The tariff notification shall include:
    - (i) a description of the service or services to which the tariff relates;
    - (ii) a description of whether the tariff is a new tariff or replaces an existing tariff;
    - (iii) information on whether the tariff is a limited availability special promotion, or a permanent tariff change:
      - (1) if it is a special promotion, the period of duration of the special shall be specified;
    - (iv) a description of, and a complete copy of, the terms and conditions of provision of the tariff;

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- (v) the proposed pricing, including discounting arrangements – this includes volume discount schedules (where applicable), bundled discounts and any other type of discount off the tariffed price that will be offered to customers;
  - (vi) the commercial rationale for making the proposed change;
  - (vii) the number of existing customers that would be affected by the change; and
  - (viii) the expected demand for the service;
- (c) submit to the Authority any non-standard pricing<sup>7</sup> arrangement it contemplates offering to customer at least 10 business days before the effective date of said offering. The tariff notification shall include:
- (i) a description of the service or services to be offered;
  - (ii) a description of, and a complete copy of, the terms and conditions under which the service will be offered;
  - (iii) the proposed pricing, including discounting arrangements – this includes volume discount schedules (where applicable), bundled discounts and any other type of discount off the tariffed price that will be offered to customers;
  - (iv) the commercial rationale for offering the non-standard pricing offer;
  - (v) the projected impact of the non-standard pricing offer on existing customers;
  - (vi) in the case of any proposal for geographic de-averaging, detailed cost study justifying the proposed cost/price differentials and demonstrating the existence of separate geographic markets;
  - (vii) any objective justification to demonstrate that the offer complies with Section 24(f)(i) of the ECA; and
  - (viii) the expected demand for the service;
- (d) file a notification with the Authority of any New Retail Service at least 30 calendar days in advance of the commercial offer of the service. The notice shall include:
- (i) a description of the service or services to be offered;
  - (ii) a description of, and a complete copy of, the terms and conditions under which the service will be offered;
  - (iii) the proposed pricing, including discounting arrangements – this includes volume discount schedules (where applicable), bundled discounts and any other type of discount off the tariffed price that will be offered to customers;
  - (iv) the commercial rationale for offering the New Retail Service or services;
  - (v) the projected impact of the New Retail Service(s) offering on existing customers;
  - (vi) the expected demand for the service; and

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<sup>7</sup> Non-standard pricing includes any pricing offered to one or more customers that differs from standard tariffs, and includes, among other things, geographically de-averaged tariffs as well as individually targeted tariffs.

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- (vii) confirmation of compliance with the wholesale requirement of Section 4.3.2.1 of this General Determination, or an explanation of why the requirement does not apply.
- (e) in the event of a planned service withdrawal, submit to the Authority the following information no less than 60 calendar days in advance of the termination of that service:
  - (i) the commercial rationale for withdrawing the service;
  - (ii) the number of current customers that will be affected by the service withdrawal;
  - (iii) the process that the operator intends to use to notify affected customers; and
  - (iv) alternative services to which customers can transition.
- 34. The Authority may reject the Retail tariff notice filing for any service(s) where full and complete information required in this section has not been provided with the tariff notification. In such cases the Authority will provide the Operator with written notification that its filing was rejected for failing to meet the requirements of Section 4.1.3 and must be re-filed, subject to the timelines provided above, before service(s) may be initiated
- 35. Any and all tariff notifications referenced in paragraph 33(b) - (e), above, involving Retail products or services that are provided from within a market upon which Wholesale access obligations have been imposed shall be made available to other Operators according to the notification schedule presented in paragraphs 33(b) - (e), above. Tariff notifications involving only Retail products or services that are not from within a market upon which Wholesale access obligations have been imposed need not be made available to other Operators.
- 36. The Authority may, on its own initiative or following a timely objection raised by any interested party, issue a direction to the proponent of any action falling under paragraph 33(b) - (e) above requiring the proponent to suspend the planned effective date of the proposal in question until the Authority has investigated any relevant concerns raised and issued an administrative determination approving, rejecting or modifying the proposal.

**4.1.4 Remedies specific to Market No. 5—the national market for the supply of Retail mobile services, including voice and data**

- 37. The Authority determines that BDC and Digicel shall file, on a quarterly basis, information on traffic flows and customer connections in the following formats:

**Table 2: Quarterly traffic monitoring information required**

Outbound on-net mobile-to-mobile minutes		Outbound off-net mobile-to-mobile minutes	
Prepaid	Postpaid	Prepaid	Postpaid

**Table 3: Quarterly subscriber number information required**



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	Prepaid	Postpaid
Number of subscribers active within the last 30 days of the quarter		

38. The Authority will monitor the data provided and if it becomes apparent that on-net/off-net price discrimination is having a negative impact on market competitiveness, the Authority will either:
- (a) conduct an investigation under RAA Section 89 to determine whether enforcement action is necessary and, if so, what form it should take; or
  - (b) initiate a Public Consultation into the matter under RAA Section 69 to determine what remedies, if any, needed to be imposed to ensure a level playing field.

**4.2 Determinations concerning Wholesale market remedies**

39. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that Wholesale obligations shall be imposed on the relevant markets and SMP Operators depicted in Table 4, below.

**Table 4: Relevant Wholesale Markets and SMP Operators<sup>8</sup>**

Market No.	Relevant Markets	SMP Operator(s)
10	A Wholesale market for the supply of fixed narrowband access and local calls in the City of Hamilton and contiguous suburbs	BTC
11	A Wholesale market for the supply of fixed narrowband access and local calls in areas outside of Southside and the City of Hamilton and contiguous suburbs	BTC
12	A Wholesale market for the supply of fixed Broadband Access Services <sup>9</sup> in the City of Hamilton and contiguous suburbs	BTC
13	A Wholesale market for the supply of fixed Broadband Access Services in areas outside of Southside and the City of Hamilton and contiguous suburbs	BTC, BCV
14	A national market for the supply of Wholesale access and local call origination on mobile networks.	BDC, Digicel

<sup>8</sup> The markets depicted in this table do not constitute the entire list of relevant Wholesale markets appearing in the table at Appendix—B of the Further Consultation Document. The markets depicted here are only those relevant Wholesale markets that have had Wholesale obligations imposed upon them.

<sup>9</sup> Broadband Access Service comprises: local access, backhaul, and data stream aggregation, terminating at a Wholesale Operator's premises.

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<b>Market No.</b>	<b>Relevant Markets</b>	<b>SMP Operator(s)</b>
<b>15</b>	A national market for the supply of Wholesale origination of international calls on mobile networks <sup>10</sup>	BDC, Digicel
<b>16</b>	A Wholesale market for the origination of international calls on fixed networks in the City of Hamilton and contiguous suburbs	BTC
<b>17</b>	A Wholesale market for the origination of international calls on fixed networks in areas outside of Southside and the City of Hamilton and contiguous suburbs	BTC
<b>18</b>	A market for the Wholesale supply of low speed Leased Lines in the City of Hamilton and contiguous suburbs	BTC
<b>19</b>	A market for the Wholesale supply of low speed Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	BTC
<b>20</b>	A market for the Wholesale supply of high speed Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	BTC
<b>21</b>	A market for the Wholesale supply of access to facilities used to construct fixed local access networks	BLDC, BELCO, BCV, and BTC
<b>23</b>	A Wholesale market for the transmission facilities used to deliver Subscription Television Services to End-Users in addition to the Subscription Television Services themselves	BCV

**4.2.1 Determinations concerning the obligation to provide Wholesale access service**

40. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
41. The obligation to provide Wholesale access services is to be imposed on those SMP Operators found to possess SMP in Market Nos. 10 through 21, and Market No. 23 in Table 4, above;
  - (a) the application of this remedy to Market No. 10—the Wholesale market for the supply of fixed narrowband access and local calls in the City of Hamilton and contiguous suburbs—shall be limited to the provision of services into the Retail residential market only;

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<sup>10</sup> Pre-selection of international carriers. ECA Section 73(8)(a) requires Carrier Pre-selection for international calls for all ICOL holders (that participate in the Numbering Plan) until the advent of number portability.

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- (b) the application of this remedy to Market No. 11—the Wholesale market for the supply of fixed narrowband access and local calls outside of Southside and the City of Hamilton and contiguous suburbs—shall apply to the provision of services into the Retail residential and business markets;
  - (c) the application of this remedy to Market No. 12—the Wholesale market for the supply of fixed Broadband Access Services in the City of Hamilton and contiguous suburbs—shall be limited to the provision of services into the Retail residential market only;
  - (d) for the application of this remedy to Market No. 21—the market for the Wholesale supply of Access to facilities used to construct fixed local access networks—the Authority has determined that BLDC, BELCO, BCV, and BTC shall provide Non-Discriminatory Access to those facilities used to construct fixed local access networks that are controlled by them; and
  - (e) the application of this remedy to Market No. 23—the Wholesale market for the transmission facilities used to deliver Subscription Television Services to End-Users, apart from the Subscription Television Services themselves, shall be limited to the provisioning by BCV of a Wholesale resale service (in accordance with the model A&I agreement process and procedures presented in Section 5.1, below) that is fit for the purpose of replicating (in content and quality of service) the Retail Subscription Television Services made available by BCV via its various Retail Subscription Television Service tier offerings.
    - (i) the utilization of this Wholesale resale service shall be limited to the provision of a Retail Subscription Television Service comprising solely those channels, associated content and services available through BCV's various Retail Subscription Television Service tiers;
    - (ii) obtaining the resale, retransmission, and/or access rights (or permissions) for the content available on those channels shall be the sole responsibility of the Access Seeker seeking Access to the Wholesale resale service;
    - (iii) BCV shall not engage in any type of behaviour that has or is likely to have the effect of impeding an Access Seeker's efforts to obtain content resale, retransmission, and/or access rights (or permissions) from a content provider; and
    - (iv) in the event that BCV commences the provision of a Wholesale Subscription Television Service (or a Wholesale Broadband Service capable of providing subscription IPTV services) to another Operator, subsidiary or third party, BCV will be required to make available an equivalent service to all other Operators in accordance with the model A&I and RAIO remedies discussed generally at Section 5.1, below; in particular the remedy imposed at paragraph 73.
42. For Market Nos. 15 through 17, the Wholesale Access obligations are as follows:
- (a) for Market No. 15, Wholesale origination of international calls on mobile networks, Wholesale Access will be governed by the pre-existing policy adopted under the Telecommunications Act 1986 according to which Wholesale origination charges are set at zero, unless an Operator makes an affirmative showing that the current price is not recovering historical costs, or unless directed otherwise by the Authority;

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- (i) Wholesale origination services shall be provided on a Non-Discriminatory basis;
  - (b) for Market Nos. 16 and 17, Wholesale markets for the origination of international calls on fixed networks, Wholesale Access will be governed by the current policy according to which Wholesale origination charges are set in accordance with the current price ceiling established by the LAC (local access charge) decision, unless it is subsequently revised by the Authority;
    - (i) Wholesale origination services shall be provided on a Non-Discriminatory basis.
- 43. For Market Nos. 10 through 13, 18 through 20, and 23, the Wholesale Access services shall be provided in accordance with the terms and conditions established in the modified A&I and RAIO process depicted at Section 5.1 and shall be provided in a timely manner to all Access Seekers.
- 44. For Market No. 14, a national market for the supply of Wholesale access and local call origination on mobile networks, the Authority has determined that no Wholesale Access obligation will be imposed at the present time. However:
  - (a) if either BDC or Digicel (or an Affiliate of either company) does at some point in the future commence provision of a Wholesale mobile service to another Operator, this will trigger the imposition of the model A&I and RAIO remedies discussed generally at Section 5.1, below, with the following modifications:
    - (i) the effective start date for the development of the model A&I agreement process will be the date on which the Authority has been notified by either company that the development of a Wholesale mobile service product has formally begun, as per subpart (b), below, of this paragraph; and
    - (ii) no Wholesale mobile service product offered by either BDC or Digicel to another ICOL holder may be utilized commercially until a model A&I agreement making an equivalent Wholesale mobile service commercially available to all other Access Seekers has been developed and approved by the Authority (as per Section 5.1.1, below).
  - (b) the Authority further determines that BDC and Digicel are obligated to notify the Authority within five business days of the commencement of formal negotiations concerning the development of an MVNO service. This notification will be treated by the Authority as confidential and will not be made a matter of public record. For this purpose, formal negotiations will be considered to have commenced when either BDC or Digicel has received the following information from an Operator requesting MVNO Access:
    - (i) a high-level description of services to be provided by the host MNO (other than Wholesale network Access service, if actually required), including:
      - (1) customer billing and support service;
      - (2) number portability service;
      - (3) service related to international roaming;
      - (4) SIM card provision/sourcing; and
      - (5) acquisition of consumer numbers (e.g., whether from MNO's numbering resources, from the national Numbering Plan or from a third party);

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- (ii) in the event that what is being sought is Wholesale network Access service, confirmation of whether or not the MVNO Access Seeker will provide its own points of Interconnection for traffic exchanged with third party network(s).
- (iii) confirmation of the scope of service that will be provided (*i.e.*, whether the arrangement will involve Access to/resale of GSM, 3G and/or LTE technologies/services);
- (iv) the proposed length of term of the commercial agreement; and
- (v) estimated volumes of traffic over the proposed term.

### 4.2.2 Determinations concerning the pricing of Wholesale products or services

45. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:

#### 4.2.2.1 Application of the Retail Minus Avoidable Cost remedy

46. The obligation to provide Wholesale Access products and services at Retail Minus Avoidable Cost has been imposed by the Authority on BTC and BCV in Market Nos. 10 through 13, 18 through 20, and 23 in Table 4, above;
- (a) Wholesale products and services originating in these markets shall be priced at Retail Minus Avoidable Cost utilizing the Avoidable Cost percentage of 15%;<sup>11</sup> and
  - (b) any changes in the Retail prices of any Retail products or services associated with Market Nos. 10 through 13, 18 through 20, and 23 shall be immediately reflected in the Wholesale Retail Minus Avoidable Cost price of any equivalent Wholesale products or services.
47. The Authority determines that, where volume discounts or loyalty (term) discounts are available, the Retail Minus Avoidable Cost calculation shall apply to the discounted price as long as the Wholesale customer can satisfy the conditions of the discount.<sup>12</sup>
48. The Authority determines that, with regard to the obligation to provide Line Rental and Local Calls ("WLRLC"), in Market Nos. 10 and 11:
- (a) the application of this remedy to Market No. 10—the Wholesale market for the supply of fixed narrowband Access and local calls in the City of Hamilton and contiguous suburbs shall be limited to the provision of services into the Retail residential market only;
  - (b) the application of this remedy to Market No. 11—the Wholesale market for the supply of fixed narrowband Access and local calls outside of Southside and the

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<sup>11</sup> The discount in Market No. 23 may need to be re-evaluated if an Access Seeker directly pays a content provider(s) for any content obtained.

<sup>12</sup> For example, if a Retail customer is required to sign a long-term contract to obtain the discount offered, then the Wholesale service should be available at the discounted Retail rate minus the Avoidable Costs if the Wholesale customer is willing to commit to the same long-term contract.

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City of Hamilton and contiguous suburbs shall apply to the provision of services into the Retail residential and business markets; and

- (c) a separate Wholesale product and price shall be made available for each fixed narrowband Access line and local calling usage package provided to the Retail market by BTC.
49. The Authority determines that, with regard to the obligation to provide Wholesale Leased Line Services, Market Nos. 18, 19 and 20:
- (a) a separate Wholesale product and price shall be made available for each leased line service offering provided by BTC in the Retail market.
50. The Authority determines that, with regard to the obligation to provide Wholesale Broadband Access Services, Market Nos. 12 and 13:
- (a) the application of this remedy to Market No. 12—the Wholesale market for the supply of fixed Broadband Access Services in the City of Hamilton and contiguous suburbs shall be limited to the provision of services into the Retail residential market only;
  - (b) the relevant Retail price upon which the Retail Minus Avoidable Cost price shall be established is the Retail price for Broadband Access Services alone, as opposed to the Retail price for the bundle of Broadband Access and ISP Services; and
  - (c) a separate Wholesale product and price shall be made available for each Broadband Access Service speed offering provided to the Retail market by an SMP Operator.

### **4.2.2.2 The Wholesale pricing remedy applicable to Market No. 21—The market for the Wholesale supply of Access to facilities used to construct fixed local access networks**

51. For this market, the Authority has determined that prices for Wholesale Access services to the facilities used to construct fixed local access networks controlled by BLDC, BELCO, BCV, and BTC shall be established as follows:
- (a) for pole Access prices shall be capped at the current rate charged to each customer, with the ability for Access Seekers to petition and request a rate investigation;
  - (b) for duct Access prices shall be capped at the current rates charged to each customer, unless it can be established to the Authority's satisfaction through a cost study that this does not reflect cost; and
  - (c) for Access to other Access services supplied the price ceiling shall be capped at the current rate charged to each customer.
52. Parties on whom these obligations have been imposed (BLDC, BELCO, BCV, and BTC) shall;
- (a) file annual reports with the Authority demonstrating that the terms of the price caps imposed at the preceding paragraph 51 have been complied with; and
  - (b) within 30 calendar days of the effective date of this General Determination file with the Authority copies of all existing price sheets for services provided to current customers.

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**4.2.3 Determination concerning call termination on fixed and mobile networks**

53. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
- (a) in accordance with ICOL Transitional Condition A2.3(a), parties are required to not increase the rates for Wholesale termination of domestic and international calls on their Electronic Communications Networks.<sup>13</sup>

**4.3 Determinations on miscellaneous items**

**4.3.1 Determination concerning the provisions of Condition 11 of the Integrated Communications Operating Licence**

54. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that an SMP Operator shall at all times comply with the applicable provisions of Condition 11 of its ICOL.

**4.3.2 Determination concerning the provisioning of Retail and Wholesale bundles**

55. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
56. With respect to any new bundled Retail service offerings, any SMP Operator upon which an obligation to provide services in a relevant Wholesale market has been imposed shall:
- (a) for any bundle containing an SMP Product, make the SMP Product contained in that bundle available on a standalone basis to both Retail and Wholesale customers, and:
- (i) the standalone SMP Product provided to Retail customers shall be equivalent in terms of service quality to its bundled counterpart and shall be provided according to terms and conditions that are just, reasonable, and Non-Discriminatory;
- (ii) the standalone SMP Product provided to Wholesale customers shall:
- (1) be made available according to the terms and conditions established in the modified A&I process depicted at Section 5.1; and
- (2) be made available no later than the date on which the new bundled Retail service of which it is a part is made available to Retail customers; and
- (b) for any bundle or sub-bundle composed solely of SMP Products, make available a corresponding Wholesale bundle that shall:
- (i) be priced at the Retail price of the bundle minus the Avoidable Cost percentage of 15%;<sup>14</sup> and

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<sup>13</sup> This provision states that, until such time as the Authority makes a General Determination to the contrary, rates for Wholesale termination of domestic and international calls shall not increase.

<sup>14</sup> Bundled offerings comprising SMP Products and non-SMP Products do not have to be made available on a Wholesale basis.

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- (ii) be made available no later than the date on which the new bundled Retail service is made available to Retail customers.
- (c) provide information demonstrating that the bundled service offering will not impose a Price Squeeze if requested to do so by the Authority. An Operator must provide this information within two business days of receiving a request to do so from the Authority.<sup>15</sup> The information provided must demonstrate that:
  - (i) for any bundle comprised solely of SMP Products, the difference between the Retail and Wholesale price of the bundle is not less than the Retail price multiplied by the Avoidable Cost discount factor of 15%.
  - (ii) for any bundle containing SMP and non-SMP Products in the bundle:
    - (1) the Retail price of the bundle is not less than the sum of the Wholesale prices of any SMP Products contained in the bundle;
    - (2) the difference between the Retail price of the bundle and the sum of the Wholesale prices of any SMP Products contained in the bundle is such that it recovers the cost of providing the non-SMP Products contained in the bundle, as well as the associated Retail costs of the bundle;
      - a. the information provided shall be provided in an auditable format and contain an explanation of the methodology and assumptions utilized in developing the associated Retail costs of the bundle as well as the non-SMP Product related costs; and
- (d) not Tie an SMP Product to a product outside the SMP market.

### 4.3.2.1 Determination concerning the provisioning of new services

57. An SMP Operator, excluding BDC and Digicel (absent the provision of a wholesale mobile service), with SMP in Markets 10 through 13 and 18 through 20 may not market or commercially launch a New Retail Service unless and until, in the opinion of the Authority, a fit for purpose equivalent Wholesale service has been fully tested and is commercially available to Access Seekers throughout Bermuda, in any case in which said Wholesale service falls within a relevant Wholesale market in which the Operator has been found to have SMP and upon which Wholesale Access obligations have been imposed. Before the proposed New Retail Service may be marketed or sold, the SMP Operator shall:
- (a) no less than 60 calendar days prior to the planned launch date of the Retail services provide to all ICOL holders a detailed description of the proposed terms and conditions of the A&I agreement or relevant RAIO provisions<sup>16</sup> that would govern the Wholesale service to be provided, by publishing notice of same and making the details available on its website;
    - (i) ICOL holders will have 10 calendar days within which to respond to the proposed terms and conditions of the A&I agreement or relevant RAIO provisions, starting from the date on which those are published;

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<sup>15</sup> We note that RAA Section 85(5) prohibits Price Squeezes and predation.

<sup>16</sup> These provisions will apply to any RAIOs that are successfully negotiated voluntarily and approved by the Authority during the period prior to the RAIO process described in Section 5.1.2, below, unless the Authority issues a general determination establishing a different process specifically applicable to the provision of New Retail Services and Wholesale equivalents.



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- (b) within seven calendar days of the receipt of any comments concerning the proposed terms and conditions of the A&I agreement or RAIO provisions make available to interested ICOL holders copies of:
    - (i) any proposed amendments to any existing and approved A&I agreement(s) or RAIO provisions which may be required to accommodate the new Wholesale service to be developed;
    - (ii) a new A&I agreement or RAIO provisions incorporating the Wholesale service to be provided and that is substantially similar in form and substance to the SMP Operator's approved model A&I agreement(s) or RAIO developed in accordance with the procedures established at Section 5.1.1 or in the RAIO process; and
    - (iii) a document that describes, concisely, any points of disagreement (if any exist) between the proposed amended and new A&I agreement(s) or RAIOs, and any comments or concerns submitted by ICOL holders regarding those agreement(s), along with a description of the company's response to those disagreements and the basis for that response;
  - (c) within 30 calendar days of the planned launch date submit to the Authority copies of the proposed amended and new A&I agreement(s) or RAIO provisions along with a concise description of any terms and conditions that may still be in dispute, the company's proposed resolution of same, and the basis for the proposed resolution sought by the company.
  - (d) cooperate with the Authority to resolve any material disputes prior to launch date; and
  - (e) if necessary, delay the launch date until a date approved by the Authority, which shall be no earlier than the date on which an equivalent Wholesale service, offered pursuant to an approved A&I agreement or RAIO provisions, has been tested and made commercially available to any interested ICOL provider.
58. The Authority reserves the right to waive any of the referenced requirements or conditions upon request following the relevant procedures set out in the preceding paragraph if it determines that their application in a particular situation would be disproportionate, that the outcome will not harm competition and that a waiver is in the public interest.

**4.3.3 Determination concerning ring-fencing of information flows between an SMP Operator's Wholesale and Retail operations (applicable to all relevant Wholesale markets)**

59. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
- (a) Any ICOL holder that has been found to have SMP in a relevant market, excluding BDC and Digicel (absent their provision of wholesale mobile services), and is subject to an obligation to provide Wholesale services in that market shall take appropriate steps to ensure that:
    - (i) any proprietary information it obtains from or about its Wholesale customers relating to the provision of regulated Wholesale services is kept confidential

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by personnel working within the function or functions responsible for the provision, supply, maintenance and repair of Wholesale services; and

- (ii) such information is not shared with, made accessible to or otherwise disclosed to any individual who is involved in or responsible for the sale, marketing or supply of the SMP Operator's Retail services.
60. Any violation of this rule (see also ICOL Condition 13.7) shall be notified to the Wholesale customer and to the Authority within one business day of the breach.
61. The SMP Operator's Chief Executive Officer and the executives responsible for any function involved in the supply of Wholesale services shall execute and file with the Authority a semi-annual declaration confirming that adequate physical, technical and/or organizational measures are in place and that reasonable training and notice have been provided to relevant Wholesale personnel concerning the steps regarding the treatment of Wholesale information described in paragraph 59(a), above.
- (a) This declaration shall be accompanied by a brief description of the measures taken by the SMP Operator to ensure that no Wholesale customer data is disclosed to any individual that is involved in the sale, marketing or supply of the SMP Operator's Retail services.

### 4.3.3.1 ICOL Compliance Trigger for obligation to ring-fence Wholesale customer data

62. The ICOL Compliance Trigger for the obligation to ring-fence Wholesale customer data will be considered met for the purposes of ECA Section 73(5)(a) with respect to BTC, BCV and BLDC when:
- (a) the first declaration confirming that adequate physical, technical and/or organizational measures, signed by the company's Chief Executive Operator and the executives responsible for any function involved in the supply of Wholesale services, has been submitted to the Authority together with a description of the relevant measures taken; and
  - (b) the Authority concludes that the measures taken are adequate to reasonably ensure that no Wholesale customer data is disclosed to any individual involved in the sale, marketing or supply of the SMP Operator's Retail services.

## 5 DETERMINATION CONCERNING THE PROCESS FOR ESTABLISHING MODEL A&I AGREEMENTS AND RAIOS

63. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
- (a) the *Ex Ante* Remedies provided in Section 5.1, below, shall be imposed upon those SMP Operators upon which the Authority has imposed an obligation to provide Wholesale Access services as determined in Section 4.2.1, above.

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### 5.1 Determination concerning the process for establishing Model A&I Agreements and RAIOS<sup>17</sup>

64. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:

#### 5.1.1 The model A&I approval process

65. Within 10 calendar days of the effective date of this General Determination, each SMP Operator having SMP in Market Nos. 10 through 13, 18 through 20, and 23 (as per Paragraph 43, above) shall publish on its website a model A&I Agreement for each relevant Wholesale service that:
- (a) describes in reasonable detail the specific services to be provided, including where relevant the speed, quality of service, and relevant technical characteristics, which shall be fit for the purpose of enabling the provision of the relevant Retail services downstream by Access Seekers upon reasonable request;
  - (b) includes appropriate service level guarantees and escalation procedures supported by penalties that will be paid to the aggrieved party for failure to meet the established guarantees.
    - (i) The penalties shall be proportionate but effective, taking into account both compensatory and deterrence factors in order to minimise the potential for “efficient breach”.
    - (ii) The content and form of the guarantees and the size of the applicable penalties shall be a matter of negotiation between the parties (that is, between the Access provider and the community of Access Seekers) in the first instance.
  - (c) incorporates the most favourable terms and conditions to counterparties (including Affiliates of the SMP Operator and members of the KeyTech Group) of the corresponding A&I agreements relevant to each Wholesale service that were entered into prior to the effective date of this General Determination;
  - (d) incorporates the applicable Retail Minus pricing requirements set forth in this General Determination are implemented as at the effective date for each specific service and any related fees;
  - (e) modifies or eliminates any material terms or conditions that are incompatible with the new regulatory framework, including the RAIO Guidelines set out on the Regulatory Authority website; and
  - (f) stipulates that all terms and conditions of the A&I agreement are subject to modification in accordance with the terms of a fair and reasonable RAIO that shall comply with the Guidelines set on the Regulatory Authority website and

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<sup>17</sup> At the present time only BTC and BCV will be subject to this obligation. All references to “SMP Operator” in this Section 5.1 shall be interpreted accordingly. If at some later point Digicel or BDC elect to provide Wholesale mobile services, their SMP status will cause this obligation to be triggered at which point they would then become subject to the remedies imposed herein.

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shall be developed by the SMP Operator in accordance with procedures to be established by the Authority in accordance with paragraph 75 below.

66. The SMP Operator shall notify by email all ICOL holders of its publication of the model A&I agreements and the services covered, and provide an email address to which comments or queries may be sent by Access Seekers. Access Seekers shall have 10 calendar days in which to provide their comments on any material concerns they believe it is critical to resolve within the time frame of the A&I process established by this General Determination, rather than in the subsequent RAIO process to be conducted by the Authority.
67. A copy of all model A&I agreements proposed by the SMP Operator, along with a copy of the notice required in paragraph 66, shall be filed with the Authority on the date of publication.
68. If any material issues arise, the SMP Operator or an Access Seeker may request the Authority to facilitate one-on-one or industry mediations.
69. Within 30 calendar days of the effective date of this General Determination, the SMP Operator shall submit copies of its best and final A&I agreement offers to the Authority and publish copies of the same on its website, along with a position paper setting forth:
  - (a) a list of all material objections to the proposed agreements that have been raised by Access Seekers and not resolved, and
  - (b) a justification for the positions taken by the SMP Operator in response to the unresolved objections, if any, referenced in subpart (a).
70. Access Seekers shall have 10 calendar days to provide the Authority with their written comments in response to the proposed agreements and position paper.
71. The Authority will consider the position paper and comments submitted (including all relevant intra-KeyTech Group contracts submitted pursuant to paragraph 83) and, in due course, issue a final decision accepting or modifying the model A&I agreements.
72. The SMP Operator shall publish the approved model A&I agreement(s) on its website on the first business day following the effective date of the Authority's final decision, and shall promptly modify all existing A&I agreements to conform to the model agreement. The Authority reserves the right to allow minor variations from the model agreement in the case of modifications to pre-existing agreements where these are justified by the circumstances and not unduly discriminatory vis-à-vis other Access Seekers. These approved, model A&I agreements shall be made available to all Access Seekers on a Non-Discriminatory basis.
73. Each Operator that has been found to have SMP in a relevant market and is subject to an unconditional obligation to provide Wholesale services in that market must supply fit for purpose Wholesale services<sup>18</sup> that are equivalent to the services it provides to its own retail operations to another ICOL holder.
74. The Authority reserves the right to waive any of the referenced requirements or conditions upon request following the relevant procedures set out in paragraphs 65-73 of this General Determination relating to the A&I agreements if it determines that

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<sup>18</sup> I.e., any service in the relevant market that is provided to another ICOL holder.

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their application in a particular situation would be disproportionate, that the outcome will not harm competition and that a waiver is in the public interest.

### 5.1.2 RAIO process

75. Following the completion of the model A&I process set out in the preceding Section 5.1.1, a consultation on the establishment of RAIOs will, in due course, be initiated by the Authority. The purpose of this consultation shall be to:
- (a) evaluate the merits of undertaking a RAIO proceeding in light of the results achieved by the model A&I process; and
  - (b) if it is determined that the establishment of a RAIO is necessary:
    - (i) propose a set of comprehensive RAIO Guidelines, using those presented in Annex A as a basic framework; and
    - (ii) develop a RAIO approval process..

## 6 DETERMINATION CONCERNING PROVISIONAL KEYTECH GROUP REMEDIES

76. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:
- (a) the *Ex Ante* Remedies provided in Sections 6.1 and 6.2, below, shall be imposed on members of the KeyTech Group on a provisional basis pending completion of the Authority's separate review of the potential competitive impact of horizontal and/or vertical leveraging by KeyTech Group members with SMP into adjacent markets, which shall consider the need, if any, for the continuation or the imposition of additional or enhanced remedies on some or all Members of the KeyTech Group ("KeyTech Review").

### 6.1 Remedies applicable to KeyTech Group members found to have SMP

77. In any case in which the concentration review process set forth in RAA Section 87 does not apply, a member of the KeyTech Group that has been found to have SMP in a relevant market shall seek prior written approval of the Authority before effectuating:
- (a) any proposed increase, through an agreement or arrangement of any type, in the ownership of its shares, stocks or securities or in the voting rights that it holds in any other member of the KeyTech Group that, directly or indirectly, holds an ICOL; or
  - (b) any transfer of assets, key personnel, significant employee groups, or functions (including by means of outsourcing or service agreements or arrangement) to any other member of the KeyTech Group that, directly or indirectly, holds an ICOL.
78. Notice of the transactions identified above or any similar types of changes or transfers shall be provided to the Authority at least 30 calendar days in advance of the planned closing or effective date, and shall include a full description of the transaction and true and complete copies of all relevant documentation relating thereto.

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79. No member of the KeyTech Group that has been found to have SMP in a relevant market and is subject to an obligation to provide Wholesale services may supply a new or modified Wholesale service to any other member of the KeyTech Group unless and until, in the opinion of the Authority: (1) such new or modified service is provided under a written A&I agreement or RAIO; and (2) the same A&I agreement or RAIO is available to all other Access Seekers; and (3) an equivalent Wholesale service has been fully tested and is commercially available to all Access Seekers throughout Bermuda. This obligation shall apply in any case in which said Wholesale service falls within a relevant Wholesale market in which the Operator has been found to have SMP and upon which Wholesale Access obligations have been imposed. To meet this obligation the SMP Operator shall:
- (a) no less than 60 calendar days prior to the planned launch date for the provision of a Wholesale service to any member of the KeyTech Group, provide to all ICOL holders a detailed description of the proposed terms and conditions of the A&I agreement or RAIO provisions that would govern the new or modified Wholesale service to be provided, by publishing notice of same and making the details available on its website;
    - (i) ICOL holders will have 10 calendar days within which to respond to the proposed terms and conditions of the A&I agreement or RAIO provisions, starting from the date on which those are published;
  - (b) within seven calendar days of the receipt of any comments concerning the proposed terms and conditions of the A&I agreement or RAIO provisions, make available to interested ICOL holders copies of:
    - (i) any proposed amendments based on the comments received (shown in tracked changes against the original proposal); and
    - (ii) a document that describes, concisely, any points of disagreement (if any exist) between the original proposal and the amended proposal, and any comments or concerns submitted by ICOL holders regarding those agreement(s), along with a description of the company's response to those disagreements and the basis for that response;
  - (c) within 30 calendar days of the planned launch date, submit to the Authority copies of the original and revised (if any) proposal along with a concise description of any terms and conditions that may still be in dispute, the company's proposed resolution of same, and the basis for the proposed resolution sought by the company.
  - (d) cooperate with the Authority to resolve any material disputes prior to launch date; and
  - (e) if necessary, delay the launch date until a date approved by the Authority, which shall be no earlier than the date on which an equivalent Wholesale service, offered pursuant to an approved A&I agreement or RAIO provisions, has been tested and made commercially available to all interested ICOL holders.
80. The Authority reserves the right to waive any of the above requirements and conditions listed in the preceding paragraph if it determines that their application in a particular situation would be disproportionate provided that the outcome will not harm competition and is in the public interest.

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81. Each member of the KeyTech Group that has been found to have SMP in a relevant market and is subject to an obligation to provide Wholesale services in that market shall take appropriate steps to ensure that any information it obtains from or about its Wholesale customers relating to the provision of regulated Wholesale services is kept confidential within the company and is not shared with, made accessible to or otherwise disclosed to any individual who holds a position with another member of the KeyTech Group, unless the informed written consent of the Wholesale customer has been obtained in advance.
- (a) Any violation of this rule (see also ICOL Condition 13.7) shall be notified to the Wholesale customer and to the Authority within one business day of the breach.
  - (b) The CEO and executive responsible for Wholesale services of each SMP Operator shall execute and file with the Authority a semi-annual declaration confirming that adequate physical, technical and/or organizational measures are in place and that reasonable training and notice have been provided to relevant personnel. The declaration shall be accompanied by a brief description of the measures taken by the SMP Operator to ensure that no Wholesale customer data is disclosed to any individual that works for another member of the KeyTech Group.
82. Each member of the KeyTech Group that holds an ICOL and has been found to have SMP in a relevant market shall, no later than 30 calendar days following the effective date of this General Determination, provide the Authority with a meeting schedule of all regular or specially scheduled non-public meetings or functions that involve personnel employed by, or working for, any other member of the KeyTech Group (regardless of whether the latter has been found to have SMP in a relevant market). For this purpose:
- (a) the presence at an ICOL holder's board meeting of a board member previously identified to the Authority in accordance with paragraph 84 below shall not, in and of itself, be deemed to trigger this obligation;
  - (b) the meeting schedules shall indicate the purpose of each such meeting or function, the names, positions and affiliations of the individuals invited to attend such meetings, the frequency of such meetings if held on a recurring basis, and any other information that the Authority considers to be relevant to potential competition concerns arising from any vertical or horizontal relationships between members of the KeyTech Group; and
  - (c) the meeting schedules initially provided to the Authority in accordance with this paragraph 82 shall be updated by KeyTech Group members when submitting any changes or additions to those schedules. Any such changes or additions shall be notified to the Authority within seven calendar days following their occurrence. The changes and additions must be provided to the Authority even after the 30 day initial period has passed.

**6.2 Remedies applicable to all KeyTech Group members holding ICOLs**

83. Each member of the KeyTech Group that holds an ICOL shall, no later than 30 calendar days following the effective date of this General Determination, provide the Authority with true and complete copies of all intra-Group contracts to which it is party, including but not limited to any form of secondment agreement, supply contract or outsourcing agreement that it has entered into with any other member of



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the KeyTech Group. If any such agreements are not in writing, a written description of the basic terms and conditions between the relevant KeyTech Group members should be provided to the Authority. Any new agreements or modifications to existing agreements already filed shall be notified to the Authority no later than seven calendar days following their execution. In all cases, the relevant documentation shall be accompanied by a comprehensive overview of the relationships between the parties and a reasonable summary of the key terms of the agreements (or amendments) reflected in the documentation submitted.

84. Each member of the KeyTech Group that holds an ICOL shall, no later than 30 calendar days following the effective date of this General Determination, provide the Authority with a list of all executive and non-executive board members and members of the senior management team that hold similar positions, whether or not remunerated, with any other member of the KeyTech Group. The list shall contain a full description of the roles and responsibilities of the listed individuals. Any changes to the list (including the individuals or their positions or responsibilities) shall be notified to the Authority no later than seven calendar days following the effective date of the change. In all cases, the information submitted shall include the full name, title and a full description of the position and responsibilities of each listed individual in every relevant KeyTech Group member company.

### 7 ICOL COMPLIANCE TRIGGERS

85. The Authority will issue a notice of compliance to an SMP Operator pursuant to ECA Section 73(5)(a) authorising full use of that Operator's ICOL when the Authority determines that each and every compliance trigger ("ICOL Compliance Trigger") identified in this section of the General Determination that applies to that Operator has been complied with. For the avoidance of doubt, these compliance triggers are in most cases a subset of the full complement of *Ex Ante* Remedies that are imposed by this General Determination on individual SMP Operators. All SMP remedies will be enforced by the Authority on an on-going basis using the tools made available to it under the RAA, the ECA and the respective ICOLs.

#### 7.1 Compliance with Retail market remedies in Markets 1-9

86. The Authority determines that the ICOL Compliance Trigger for the Retail market remedies will be met for purposes of ECA Section 73(5)(a) when:
- (a) the Chief Executive Officer of the SMP Operator upon which Retail price caps have been imposed undertakes to comply with the Authority's relevant determinations concerning the imposition of the price cap per Section 4.1.2; and
  - (b) the SMP Operators upon which Retail tariff notification filing obligations have been imposed have filed with the Authority a copy of all existing tariffs as per paragraph 33(a).
87. An SMP Operator meeting the ICOL Compliance Triggers set out above will be considered to be in compliance for the purposes of ECA Section 73(5)(a) only.



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**7.2 Compliance with the obligation to provide Wholesale line rental and local calls (WLRLC) services in Market Nos. 10 and 11**

88. The Authority determines that the ICOL Compliance Triggers for the obligation to provide WLRLC services will be met for purposes of ECA Section 73(5)(a) when:
- (a) the Authority has issued a final decision either approving or modifying the model A&I agreement;
  - (b) the SMP Operator on which the obligation has been imposed satisfactorily demonstrates that it has modified all of its existing A&I agreements to conform to the approved A&I agreements and that it has offered the approved A&I agreement to any Access Seeker requesting or likely to be interested in this service; and
  - (c) the Chief Executive Officer of the SMP Operator on which the obligation has been imposed signs an undertaking:
    - (i) agreeing to cooperate fully in the development of a fair and reasonable RAIO conforming to the RAIO Guidelines in a further consultation to be carried out by the Authority; and
    - (ii) committing not to exceed the price ceiling established by the LAC (local access charge) decision unless directed otherwise by the Regulatory Authority.
89. An SMP Operator meeting the ICOL Compliance Triggers set out above will be considered to be in compliance for the purposes of ECA Section 73(5)(a) only.

**7.3 Compliance with the requirement to provide fixed Broadband Access Services in Market Nos. 12 and 13**

90. The Authority determines that ICOL Compliance Triggers for the obligation to provide Wholesale fixed Broadband Access Services will be met for purposes of ECA Section 73(5)(a) when:
- (a) the Authority has issued a final decision either approving or modifying the model A&I agreement;
  - (b) the SMP Operator on which the obligation has been imposed satisfactorily demonstrates that it has modified all of its existing A&I agreements to conform to the approved A&I agreements and that it has offered the approved A&I agreement to any Access Seeker requesting or likely to be interested in this service; and
  - (c) the Chief Executive Officer of the SMP Operator on which the obligation has been imposed signs an undertaking agreeing to cooperate fully in the development of a fair and reasonable RAIO conforming to the RAIO Guidelines in a further consultation to be carried out by the Authority;
91. An SMP Operator meeting the ICOL Compliance Triggers set out above will be considered to be in compliance for the purposes of ECA Section 73(5)(a) only.

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**7.4 Compliance with the requirement to provide Wholesale Leased Line (“WLL”) services in Market Nos. 18, 19 and 20**

92. The Authority determines that the ICOL Compliance Triggers for the obligation to provide WLL services will be met for purposes of ECA Section 73(5)(a) when:
- (a) the Authority has issued a final decision either approving or modifying the model A&I agreement;
  - (b) the SMP Operator on which the obligation has been imposed satisfactorily demonstrates that it has modified all of its existing A&I agreements to conform to the approved A&I agreements and that it has offered the approved A&I agreement to any Access Seeker requesting or likely to be interested in this service; and
  - (c) the Chief Executive Officer of the SMP Operator on which the obligation has been imposed signs an undertaking agreeing to cooperate fully in the development of a fair and reasonable RAIO conforming to the RAIO Guidelines in a further consultation to be carried out by the Authority;
93. An SMP Operator meeting the ICOL Compliance Triggers set out above will be considered to be in compliance for the purposes of ECA Section 73(5)(a) only.

**7.5 Compliance with the requirement to provide a resale service that is fit for the purpose of providing Subscription Television Services in Market No. 23—Wholesale Subscription Television Services**

94. The Authority determines that the ICOL Compliance Triggers for the obligation to provide a resale service that is fit for the purpose of providing Subscription Television Services will be met for purposes of ECA Section 73(5)(a) with respect to BCV when:
- (a) the Authority has issued a final decision either approving or modifying the model A&I agreement;
  - (b) BCV satisfactorily demonstrates that it has modified all of its existing A&I agreements to conform to the approved A&I agreements and that it has offered the approved A&I agreement to any Access Seeker requesting or likely to be interested in this service; and
  - (c) the Chief Executive Officer of BCV signs an undertaking agreeing to cooperate fully in the development of a fair and reasonable RAIO conforming to the RAIO Guidelines in a further consultation to be carried out by the Authority;
95. An SMP Operator meeting the ICOL Compliance Triggers set out above will be considered to be in compliance for the purposes of ECA Section 73(5)(a) only.

**7.6 Compliance with the remedies on the Wholesale market for the origination of international calls on mobile networks, Market No. 15**

96. The Authority determines that the ICOL Compliance Triggers for this obligation will be met for purposes of ECA Section 73(5)(a) when the Chief Executive Officer of the SMP Operator on which the obligation has been imposed signs an undertaking

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committing the SMP Operator to maintain the current level of pricing unless directed otherwise by the Regulatory Authority.

### **7.7 Compliance with the remedies on the Wholesale market for the origination of international calls on fixed networks, Market Nos. 16 and 17**

97. The Authority determines that with the ICOL Compliance Triggers for this obligation will be met for purposes of ECA Section 73(5)(a) when the Chief Executive Officer of the SMP Operator on which the obligation has been imposed signs an undertaking committing the SMP Operator not to exceed the price ceiling established by the LAC (local access charge) decision unless directed otherwise by the Regulatory Authority.

### **7.8 Compliance with obligation to ring-fence Wholesale customer data**

98. The Authority determines that the ICOL Compliance Trigger for the obligation to ring-fence Wholesale customer data will be met for purposes of ECA Section 73(5)(a) with respect to BTC, BCV and BLDC when:
- (a) the first declaration confirming that adequate physical, technical and/or organizational measures, signed by the company's Chief Executive Operator and the executives responsible for any function involved in the supply of Wholesale services, has been submitted to the Authority together with a description of the relevant measures taken; and
  - (b) the Authority concludes that the measures taken are adequate to reasonably ensure that no Wholesale customer data is disclosed to any individual involved in the sale, marketing or supply of the SMP Operator's Retail services.

### **7.9 Compliance with the provisional remedies applied to the KeyTech Group**

99. The Authority determines that ICOL Compliance Triggers for the provisional remedies applicable to the KeyTech Group will be met by each member of the KeyTech Group for purposes of ECA Section 73(5)(a) when: (1) each such member has met all other ICOL Compliance Triggers specified in this General Determination that have been imposed on it; and (2) every member of the KeyTech Group with SMP<sup>19</sup> has provided evidence that the following requirements have been met:
- (a) They each have submitted to the Authority an undertaking signed by the Operator's Chief Executive Officer committing to comply in good faith with each of the obligations set out in paragraphs 77 - 82 above;
  - (b) If subject to an obligation to provide Wholesale services, they each have submitted to the Authority a detailed description of the measures it has taken to ensure that any information it obtains from or about its Wholesale customers relating to the provision of regulated Wholesale services is kept confidential within the company, in accordance with Section 4.3.3 above and, further, is not shared with, made accessible to or otherwise disclosed to any individual who holds a position with another member of the KeyTech Group, unless the informed

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<sup>19</sup> At the present time this obligation only applies to BTC and BCV.

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written consent of the Wholesale customer has been obtained in advance as directed in paragraph 81, above; and

- (c) Within 30 calendar days following the effective date of this General Determination, they each have provided to the Authority a list of all regular or specially scheduled non-public meetings or functions that involve personnel employed by, or working for, any other member of the KeyTech Group (regardless of whether the latter has been found to have SMP in a relevant market) as directed in paragraph 82, above.

### **8 NON-COMPLIANCE**

- 100. Failure by an Operator to comply with any of the applicable obligations imposed upon it by this General Determination may result in:
  - (a) the Operator not being issued a ECA Section 73(5)(a) compliance notice by the Authority; and/or
  - (b) the initiation of enforcement proceedings by the Authority pursuant to Sections 93 and 94 of the RAA, which may result in the Authority, among other things:
    - (i) imposing financial penalties of up to 10% of the Licensee's total annual turnover;
    - (ii) modifying, suspending or revoking the operator's ICOL;
    - (iii) directing the operator make restitution; or
    - (iv) directing the operator to remedy the contravention.

### **9 EFFECTIVE DATE**

- 101. This General Determination will become effective on the date on which it is published in the Gazette.

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Made this 7th day of August 2013

Chairman, Regulatory Authority