

VIRGIN ISLANDS**DRAFT DETERMINATION BY THE TELECOMMUNICATIONS REGULATORY COMMISSION
UNDER SECTION 26 OF THE TELECOMMUNICATIONS ACT, 2006****DRAFT DETERMINATION OF DOMINANCE FOR THE PROVISION OF FIXED BROADBAND
SERVICE 2015**

[Gazetted x 2015]

The Telecommunications Regulatory Commission (“the TRC”), in the exercise of the power conferred by Section 26 (3) of the Telecommunications Act, 2006 (No. 10 of 2006) (“the Act”), issues this Determination.

Introduction

1. This Determination defines the position of the Telecommunications Regulatory Commission (“TRC”) on market power in the provision of fixed broadband services and sets out findings of dominance. The separate consultation document “Market Analysis of Broadband” (“the Market Analysis”) sets out the rationale for the proposed market definition, findings of dominance and proposed regulation.
2. This Determination applies to the following public supplier, which is licensed to provide and which provides fixed broadband services from the Virgin Islands:

Cable and Wireless (BVI) Ltd¹ (“LIME”)**Purpose of this Determination**

3. The purpose of this Determination is to define the relevant markets for fixed broadband and determine if any public suppliers in the Virgin Islands (“VI”) are dominant in this market as set out in the Market Analysis.
4. A determination of dominance provides the legal basis for the imposition of regulatory obligations under section 26(4) of the Act on the public supplier determined dominant.

Market Review Framework

5. To determine whether a licensed public supplier or public suppliers are dominant in the relevant markets, the TRC has carried out the following three stages of analysis:
 - Definition of the relevant market;
 - Analysis of competition in the relevant market; and
 - Identification of dominant operator or operators, if any.
6. At each stage the TRC has relied upon well-established economic principles and tests to define markets, such as the Small but Significant Non-transitory Increase in Price

¹ Cable and Wireless (BVI) Ltd trades as LIME

(“SSNIP”) test to assess demand and supply side substitution. It looks at relevant factors to determine the level of competition, such as barriers to entry and expansion, and market shares.

7. Throughout the three stage process, the TRC has applied an analytical framework which is set out in the TRC’s Market Review² and is consistent with the Act and with international best practice in areas in which the Act might be silent. The tools and principles employed by the TRC are similar to those employed by other regulators and competition authorities, including the European Commission (“EC”) and OFCOM, the telecommunications regulatory authority of the United Kingdom.

Identification and determination of the relevant markets

8. As set out in the Market Review, the relevant market is a defined set of products or services and a defined geographic area in which competition occurs. It includes all goods and services that are considered to be close substitutes.
9. Market definition was undertaken with reference to the SSNIP test.

Product dimension

10. For the purposes of the Market Analysis, broadband services include the provision of fixed line broadband internet service to residential and non-residential (business) customers and the possibility of allowing network access to other public suppliers.
11. Fixed retail broadband services include the provision of internet service to both residential and non-residential (business customers).
12. Fixed wholesale broadband services allow the opening up of the fixed network to other licensed public suppliers to use some part of that network to offer retail internet service.
13. Fixed retail broadband services can allow customers to access the internet via speeds of up to 100 megabits per second (MB/s). Consumers can currently purchase speeds of up to 8MB/s in the Virgin Islands.
14. The retail market for fixed broadband is deemed to be separate from the retail market for mobile broadband service.
15. Similarly, the wholesale market for fixed broadband access is deemed to be separate from the wholesale market for mobile broadband access.
16. The TRC considers that there are no effective demand-side substitution services for fixed retail broadband services taking into consideration mobile broadband services. Faced with a SSNIP, the majority of buyers of retail fixed internet services, either a business or residential subscribers, are unlikely to entirely substitute another product such as mobile broadband for a fixed internet connection. This is because there is no other broadband product available on the market which offers the same level of speed, resilience in the event of natural disasters, and unlimited use. The consumer perception of wired broadband is that

² http://www.trc.vg/attachments/014_TRC_Market%20Review_Final.pdf

it can offer a faster and more reliable connection to the internet, whether that is the level of service that is offered or not.

17. The TRC also considers that there are no supply-side substitutes for fixed broadband. Faced with an increase in the price of fixed retail broadband services, another public supplier cannot step into the provision of fixed broadband service without undertaking long-term investment in a fixed fibre network.
18. The market for wholesale fixed broadband access is not yet developed and therefore no demand-side nor supply-side substitutes yet exist.
19. Overall, the TRC considers that there are no demand or supply side substitutes to the provision of fixed retail and wholesale broadband in the VI.

Geographic dimension

20. The geographic scope of the licences of all public suppliers of telecommunications services in the Virgin Islands is the Territory of the Virgin Islands. A licensed public supplier may supply fixed broadband services throughout the territory. Accordingly, the TRC considers the geographic dimension of the markets to be national.

Conclusion on the relevant markets

21. For the reasons set out above, the TRC considers that, for the purpose of this Determination, the relevant markets are:
 - i) The market for fixed retail broadband service.
 - ii) The market for fixed wholesale broadband access.

Identification and determination of dominance in the relevant markets

22. Having defined the relevant markets, the TRC then proceeded to analyse the extent of competition in each market. Section 26(3) of the Act refers to a public supplier as dominant with respect to a telecommunications network or a telecommunications service where, “individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors and users”.
23. As dictated in Section 26(3) of the Act and as outlined in the Market Review, the following factors were considered in the determination of dominance:
 - The relevant market;
 - Technology and market trends;
 - The market share of the public supplier;
 - The power of the public supplier to introduce and sustain a material price increase independently of competitors;
 - The degree of differentiation among networks and services in the market; and
 - Any other matters that the Commission deems relevant.

As the analysis in the Market Analysis sets out:

The market for fixed retail broadband was assessed for market power as follows:

- a) **The relevant market** has been defined as the retail market for fixed broadband services.
- b) **Technology and market trends** - LIME BVI's fixed network consists of fibre and copper wire. LIME BVI has fibre in parts of Road Town and connects the majority of the residential population to its core network via a copper access network. The global trend is towards next generation fixed broadband networks whereby fibre is used to offer connectivity as close to the customer premises as economically feasible. LIME BVI has been undertaking investment in laying fibre in the Virgin Islands to reach closer but not directly to residential premises.
- c) **The market share of the public supplier** is 100% attributable to LIME BVI. LIME BVI is the only provider of fixed line broadband services at the time of writing and therefore has 100% market share.
- d) **The power of the public supplier to introduce and sustain a material price increase independently of competitors.** As the only provider of fixed broadband service, LIME BVI is able to introduce and sustain price increases.
- e) **The degree of differentiation among networks and services in the market.** LIME BVI has the only fixed network in the BVI and is the only provider of fixed broadband services. Mobile broadband is not deemed to be a true substitute to fixed broadband.
- f) Any other matters that the TRC deems relevant of which none are identified.
 - a. **Barriers to entry.** Whilst all public suppliers have unitary licenses which allow the offering of service by any technology, a fixed line network or access to a fixed line network is required to enter the market for fixed retail broadband. Building a fixed line network or configuring an existing fixed line network to offer retail broadband network can take significant investment, time and resources which may be limited in a small geographic territory such as the VI. Similarly, as identified above there is no active market for fixed wholesale broadband access enabling other public suppliers to access LIME's network to offer retail service. The TRC therefore believes that at the time of publication barriers to entry persist.

The wholesale broadband access market was assessed for market power as follows:

- a) **The relevant market** has been defined as the market for fixed wholesale broadband access. The analysis in section 1 concluded that it was not necessary to divide the market between wholesale physical network access and wholesale non-physical network access in a market where there are no wholesale products currently available. It is hoped that this broad market definition will allow public suppliers the flexibility to demand and supply the type of wholesale product that is most needed.
- b) **Technology and market trends.** Different wholesale access approaches work in different markets. In some markets full unbundling of the local loop has enabled competition to

develop in the face of incumbent market power, whereas in other markets bitstream access can offer the degree of access required to enable competition to develop. The technology available allows operators to access an incumbent network at different levels so that a whole range of access choices should be available to operators wishing to offer a competing service. The trend in next generation network provision is geared towards both investment in high speed networks and encouraging competition through regulated access.

- c) **The market share of the public supplier.** In this market, if LIME BVI were to offer a fixed wholesale broadband product it would have 100% market share.
- d) **The power of the public supplier to introduce and sustain a material price increase independently of competitors.** In this market, if LIME BVI were to offer a fixed wholesale broadband product there are no substitutes so it would be able to profitably increase prices above the competitive level.
- e) **The degree of differentiation among networks and services in the market.** LIME BVI operates the only fixed network on the island which offers a fixed broadband service.
- f) Any other matters that the TRC deems relevant.
 - a. **Barriers to entry.** In order to offer wholesale broadband access, a public supplier needs to have a fixed network which is configured for broadband delivery. As above, this requires significant investment, time and resources which may be limited in a territory the size of the VI. Therefore the TRC believes that the barriers to entering this market are high.

The TRC sees that there are no other factors prevailing in the Virgin Islands which would suggest that LIME BVI is not dominant in the provision of fixed retail broadband services and fixed wholesale broadband access.

The Draft Determination

Market share

24. LIME has 100% of the fixed retail broadband market and 100% of the potential fixed wholesale market for broadband access.
25. The TRC sees that there are no other factors prevailing in the Virgin Islands which would suggest that LIME does not have significant market power in the provision of fixed retail broadband services and fixed wholesale broadband access. TRC therefore proposes to designate LIME BVI as dominant in the following markets respectively:
 - LIME BVI is dominant in the market for the fixed retail broadband service.
 - LIME BVI is dominant in the market for fixed wholesale broadband access.

Summary and conclusions on dominance

26. The current monopolistic structure of the relevant markets provides a strong presumption of dominance on the behalf of LIME BVI in the markets for the provision of fixed retail broadband service and fixed wholesale broadband access.
27. The TRC considers that, in the absence of regulation, LIME BVI is incentivized to charge monopoly prices for the provision of fixed retail broadband service and wholesale broadband access, which could be contrary to the principles of fair competition underlined by the Act. The TRC is concerned that LIME's BVI dominant position enables it to offer a low quality of service to its customers in terms of bandwidth speed and service delay and interruption.
28. Having regard to the above, in accordance with section 26 of the Act, the TRC hereby determines that:
 - LIME BVI is dominant in the market for fixed retail broadband.
 - LIME BVI is dominant in the market for fixed wholesale broadband access.

Issued by the Telecommunications Regulatory Commission on the xth day of x, 2015.

(Sgd.) Guy L. Malone
Chief Executive Officer