

TELECOMMUNICATIONS REGULATORY COMMISSION SANCTION NOTICE REGARDING THE INVESTIGATION CONCERNING MOBILE VOICE CALLS TO SPECIFIC CARIBBEAN DESTINATIONS

SECTION 1: Introduction

Introduction

- 1.1 Caribbean Cellular Telephone Limited (“CCT”) originally wrote to the Telecommunications Regulatory Commission (“TRC”) on July 14 2009 claiming that Cable and Wireless (BVI) Ltd (“LIME BVI”¹) and its affiliates charged termination rates to CCT for termination on its networks in the Caribbean to which LIME (BVI) was not subject. CCT claimed that LIME BVI would not be able to offer calling plans to affiliate company networks in foreign countries and territories for a low monthly fee to its Virgin Islands (“VI”) customers if LIME BVI were also subject to such charges. CCT requested that the TRC take action to review LIME²’s practices with respect to LIME BVI’s Licence³ and the Telecommunications Act, 2006 (“the Act”).
- 1.2 Through correspondence with CCT and LIME BVI, the TRC carried out a preliminary analysis to assess if the matter required a full formal investigation. The TRC also encouraged both parties to negotiate a mutually agreeable outcome. However, after protracted discussions, no negotiated outcome was reached between the parties. The failure of CCT and LIME BVI to reach a negotiated outcome and a preliminary analysis carried out by the TRC led the TRC to conclude that a formal investigation was needed.
- 1.3 The TRC’s formal investigation has now concluded and has found evidence of anti-competitive conduct by LIME BVI. The TRC has found evidence that the difference between the wholesale price charged to CCT to terminate on specific LIME networks in the Caribbean and the retail price LIME charges to its own customers to call specific LIME networks in the Caribbean constitutes a margin squeeze and breaches the prohibition on anti-competitive conduct as set out in the Act and LIME BVI’s licence.
- 1.4 In this Sanction Notice (“SN”), the TRC investigation team sets out its findings and its recommendation to proceed with enforcement action. The TRC Board will make a final determination (the “Final Determination”) following responses from LIME and CCT.

¹ LIME is the official trading name for Cable & Wireless (West Indies) Ltd. The document refers through to LIME and its affiliates

² LIME BVI and its affiliates

³ Licence for the operation of a telecommunications network providing telecommunications services in the Virgin Islands dated 25 May 2007

Section 2: The Facts

The product and services in question

(1) Retail level

2.1 The product that LIME BVI offers is a call from a LIME BVI number to a number in another LIME network (either fixed or mobile) in the Caribbean. This is treated as an “on-net” call by LIME BVI. LIME offer calls to other LIME Caribbean destinations as follows:

- From November 2008 to August 2010, LIME offered an All Talk package of 6000 minutes to the following destinations for \$50 a month (Anguilla, Antigua and Barbuda, British Virgin Islands Barbados, Cayman, Dominica, Grenada, Jamaica, Montserrat, St Kitts and Nevis, St Vincent and the Grenadines, Turks and Caicos). LIME continues to offer this package to a number of customers on a grandfathering arrangement⁴.
- From September 2010, LIME replaced the All Talk package with the All Talk Plus package which offers 2500 minutes, 2500 SMS and 1GB of data for \$50 to postpaid customers and 1500 minutes and 1500 SMS and 1GB of data to prepaid customers.
- LIME has also offered a \$99 Ultimate Unlimited Plan⁵ including unlimited calls to regional LIME mobile and landline numbers.
- LIME also offer out of plan calls to LIME Caribbean destinations charged at a per minute rate of \$0.30 (day), \$0.25 (evening) \$0.20 (weekend).
- This investigation is concerned with the LIME All Talk package but as set out in section 5.3, the results of the investigation carry over onto the All Talk Plus package.

2.2 The product that CCT offers is a call from a CCT number to a number in a LIME network in the Caribbean. This is an “off-net” call.

2.3 There is a distinction between such “on-net” calls from the VI to specific LIME Caribbean destinations which are included in a bundle of minutes and calls which are outside the bundle of minutes. LIME BVI customers who either do not purchase the bundles or who consume more than the allowance of minutes within the bundle (6000 minutes per month) had to pay a per minute rate of \$0.30 (day), \$0.25 (evening) and \$0.20 (weekend) to call other LIME numbers and \$0.20 for on-net calls in the VI. This investigation is concerned only with the calls contained within the All Talk bundle (6000 minutes for \$50 a month).

⁴ LIME have thus far not informed the TRC of how many customers remain on the All Talk Plan but confirmed some customers remain on this plan.

⁵ The Ultimate Unlimited Plan also offered unlimited calls to local LIME mobile and landline numbers. Unlimited calls to the USA, Canada, Puerto Rico, the US Virgin Islands and UK fixed lines, unlimited GPRS and worldwide text.

2.4 The analysis undertaken through this investigation looks only at the All Talk bundles. Based on the preliminary analysis, the focus of the investigation has been on the All Talk plans stated above rather than LIME's out of bundle price or Unlimited plans due to the self-contained nature of the plans which enable analysis of the data in isolation.⁶ It is necessary to be a LIME BVI customer to purchase either the postpaid or prepaid All Talk plan bundles ("All Talk Plan").

(2) Wholesale level

2.5 In order to complete a call to a fixed or mobile number on a LIME network, it is necessary to "terminate" it on the relevant fixed or mobile LIME network in the destination country. Since this service is provided by the terminating LIME network to the network operator of the calling party, it is provided at the wholesale level.

Market definition

2.6 When defining the relevant markets for the purposes of this investigation, the TRC has had regard to the TRC's Market Review Final Statement⁷ and the EU Commission Guidelines on market analysis for electronic communications networks and services (the "SMP Guidelines").^{8,9} The Market Review and the guidelines provide helpful guidance as to how demand and supply-side substitutability should be assessed, and as to how the Small but Significant Non-transitory Increase in Price ("SSNIP") test should be applied, in the context of electronic communications (including telecommunications)¹⁰.

2.7 In light of the nature of the products and services outlined above, the TRC considers that a consideration of their substitutability and geographic scope identifies the following relevant markets for the purposes of this case only¹¹:

(1) a retail or "services" market for voice calls from a number in the VI to numbers on the LIME mobile network in the VI. The product is a call from any network in the VI to a LIME mobile customer in the VI. This market is across networks and is national in nature as the call could originate on any network in the VI. There is no substitute to terminating a call on the LIME mobile network in the VI as per market 5 defined below;

⁶ This is without prejudice to the powers of the TRC to investigate LIME's practices in relation to other plans separately.

⁷ http://www.trc.vg/attachments/014_TRC_Market%20Review_Final.pdf

⁸ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services ('the SMP Guidelines') OJ 2002 C165/6.

⁹ The Market Analysis and the EU's SMP guidelines set out the process and methodology for ex ante market analysis. The EU Commission applies these principles in its ex post competition assessments.

¹⁰ In particular, the TRC refers to §§38 to 62 of the SMP Guidelines, which outline the main relevant principles of market definition, and §§63 to 69, which provide helpful examples of the distinctions commonly drawn by the EU Commission in this context.

¹¹ Markets 1, 2, 3, 4 and 9 as a whole encompass all the relevant retail activities concerned in this investigation. If these markets were segmented further or joined up together there would be no material impact upon the conclusions of this investigation. Therefore the TRC does not see a reason to expand explanation of the market definition further.

- (2) a retail or “services” market for voice calls from a number in the VI to numbers on the LIME fixed network in the VI. The product is a call from any network in the VI to a LIME fixed customer in the VI. This market is across networks and is national in nature as the call could originate on any network in the VI. There is no substitute to terminating a call on the LIME fixed network in the VI as per market 6 defined below;
- (3) a retail or “services” market for voice calls from a number in the VI to numbers on LIME mobile networks in the rest of the Caribbean¹². The product is a call from any network in the VI to a LIME mobile number in the listed countries. This market is across networks and is national in nature as the call could originate on any network in the VI. There is no substitute to terminating a call on the LIME mobile networks as defined in market 7 below;
- (4) a retail or “services” market for voice calls from a number in the VI to numbers on LIME fixed networks in the rest of the Caribbean¹³. The product is a call from any network in the VI to a LIME fixed number in the listed countries. This market is across networks and is national in nature as the call could originate on any network in the VI. There is no substitute to terminating a call on the LIME fixed networks as defined in market 8 below;
- (5) a wholesale or “access” market for voice call termination from numbers on non-LIME networks in the VI to the LIME mobile network in the VI. The product is the call termination market on LIME’s mobile network in the VI as explained in section 2.8. There is no other way to call a LIME mobile number in the VI other than by terminating a call on the LIME mobile network;
- (6) a wholesale or “access” market for voice call termination from numbers on non-LIME networks in the VI to the LIME fixed network in the VI. The product is the call termination market on LIME’s fixed network in the VI as explained in section 2.8. There is no other way to call a LIME fixed number in the VI other than by terminating a call on the LIME fixed network;
- (7) a wholesale or “access” market for voice call termination from numbers on non-LIME networks in the VI to LIME mobile networks in the rest of the Caribbean. The product is termination services provided by LIME mobile networks in the rest of the Caribbean. As with national call termination in 5), there is no other way of terminating a call to a LIME mobile number in the Caribbean other than on the LIME mobile network in that specific country as explained in sections 2.8 and 2.13; and
- (8) a wholesale or “access” market for voice call termination from numbers on non-LIME networks in the VI to LIME fixed networks in the rest of the Caribbean. The product is termination services provided by LIME fixed networks in the rest of the Caribbean. As with national call termination in 6), there is no other way of terminating a call to a LIME fixed number in the Caribbean other than on the LIME fixed network in that specific country as explained in sections 2.8 and 2.13; and

¹² The LIME Caribbean networks beyond the VI are: Anguilla, Antigua and Barbuda, Barbados, Cayman, Dominica, Grenada, Jamaica, Montserrat, St Kitts and Nevis, St Vincent and the Grenadines, Turks and Caicos

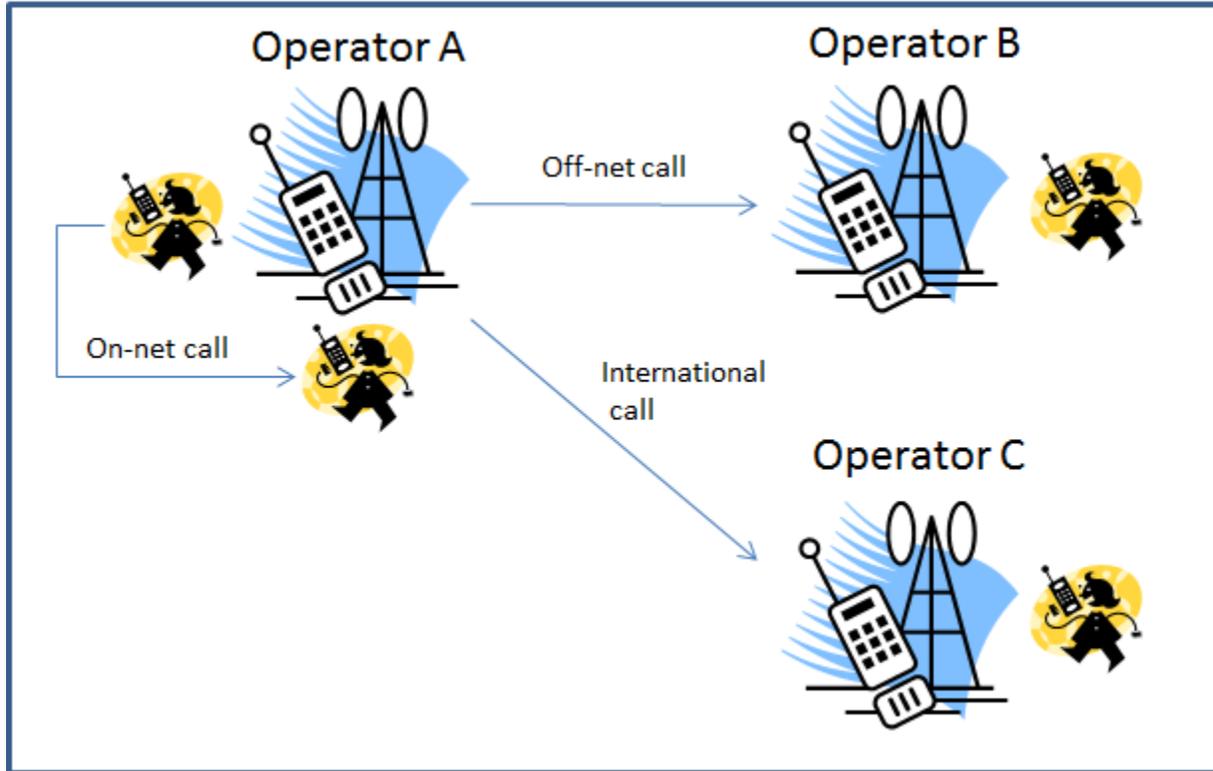
(9) a retail or “services” market for mobile subscription in the VI (postpaid and prepaid). A consumer can choose to be a customer of LIME or CCT, but in order to make calls from the LIME network must be a customer of the LIME network and similarly to make calls from the CCT network must be a customer of the CCT network. This market is national in nature as any customer could choose to be a subscriber of any mobile network in the VI as set out in section 2.12.

Explanation of the terminology and key concepts used in this case

Call Termination

2.8 In order for a customer to receive a call, that call must *terminate* on that customer’s network. Wholesale fixed or mobile voice call termination is the service necessary for a network operator to connect a caller with the intended fixed or mobile recipient of a call on a different network. If voice call termination, generally, was not available, a network operator could only terminate calls to other customers on its own network. This service is referred to as wholesale because it is sold and purchased by network operators rather than retail customers. In order to make a mobile voice call from one consumer to another, that mobile voice call must originate on the network of the consumer making the call (Mobile operator A in the diagram below) and terminate on the network of the consumer receiving the call (Mobile operator B in the diagram below). If the customers are on the same national network, i.e. they are customers of the same mobile operator, then that call will originate and terminate via the same network as an on-net call. If the customers are with different mobile operators then that call will originate on one network and terminate on another separate network as an off-net call. The principle also applies to fixed line termination. If the call is international, it will originate on one national network (A) and terminate on another national network (C) of the same or different network operator. Figure 1 below sets out the difference between an on-net call and an off-net call.

Figure 1



On-net/Off-net calls and the club effect

2.9 As explained above, an international call from the VI is usually termed an off-net call and in the case of a call from CCT to another LIME network (whether fixed or mobile), this is an off-net call. However, in the case of a call from LIME mobile BVI to another LIME fixed or mobile network in the Caribbean, this is treated by LIME BVI as an on-net call. In a national situation, a margin squeeze¹⁴ can involve operators pricing national on-net calls below the termination rate in order to grow market share and to benefit from a “club effect” as subscribers of the same network make mainly on-net calls to each other, an effect which multiplies as subscribership grows. As explained further in sections 4.11 – 4.16 this case demonstrates an international extension of this on-net/off-net club effect.

Upstream and downstream market

2.10 The upstream market is the wholesale (fixed or mobile) market for termination services to LIME networks in the Caribbean. This wholesale market is an essential input to the provision of retail call services to LIME networks in the Caribbean. For example, if this input is not provided, then it is impossible to make a call as a CCT customer in the VI to a LIME customer, in for example, Jamaica. CCT can purchase termination services to LIME networks from a third party provider but again this

¹⁴ As explained in section 4.8

service is subject to the termination rate that LIME charges the third party provider in the terminating country. The downstream market is the retail (fixed or mobile) market. This is the market whereby consumers buy the product which is a mobile voice call from the VI to a LIME affiliate fixed or mobile network in the Caribbean, as defined under the plan. In a competitive marketplace, the retail market would be competitive so that mobile customers in the VI could choose to subscribe to any of the mobile providers to purchase mobile voice calls from the VI to a LIME affiliate fixed or mobile network in the Caribbean. A customer has to be a subscriber of that network to be able to purchase mobile voice calls from that network to a LIME affiliate fixed or mobile network in the Caribbean.

Ex ante and ex post

2.11 Ex ante regulation, as defined in the TRC's Market Review 2010¹⁵, sets out regulation in advance as a preventive remedy to potentially anti-competitive behaviour. Ex post competition policy addresses competition problems from a backward looking perspective, assessing conduct which has already taken place. In this investigation, we have been assessing the potentially anti-competitive behaviour of LIME BVI (together with its affiliates) with respect to the provision of wholesale termination services to its affiliates in the Caribbean and its retail All Talk plans that may have taken place and are as such carrying out an ex post competition investigation. The execution of an ex post competition investigation does not rely upon Section 26 of the Act whereby the TRC may designate a public supplier as dominant because it is looking at behaviour that has already taken place and may indeed continue in the future. Instead, the basis of the investigation rests in Section 6 (d) of the Act whereby the TRC is "responsible for ensuring fair competition among licensees" as well as section 75 (1) (a) (iii) of the Act whereby the TRC "may take enforcement action against a licensee ... if, in the opinion of the Commission, the licensee ... is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including an anti-competitive manner".

Market power

2.12 In theory, at the retail level any customer of an MNO in the VI (for example, CCT or LIME BVI) can make a call to a LIME number in another Caribbean country. Thus, a subscriber who wants to call a LIME fixed or mobile number in another Caribbean country could, in order to do so, subscribe to either LIME BVI or CCT (for example).

2.13 However, whichever network the subscriber chooses to call the particular LIME number (in any country or territory), the operator of such a network must procure the wholesale service of mobile or fixed call termination on the relevant LIME network in the destination country. Each LIME operator in the Caribbean has 100% of the market share for the termination of voice calls to its network. This is because if any caller, anywhere in the world, wants to call one of its LIME fixed or mobile subscribers that call must be terminated via the LIME fixed or mobile network in that country. In order to reach that customer, the call cannot terminate on any network other than the relevant LIME fixed or mobile network. Even if the call is routed via a third party, the call must

¹⁵ http://www.trc.vg/attachments/014_TRC_Market%20Review_Final.pdf

ultimately terminate on the LIME network and as such will be subject to the termination rate charged by that LIME network.

2.14 Therefore, each LIME fixed and mobile network operator has a 100% monopoly (and, therefore (in the absence of sufficient countervailing buyer power as explained below) significant market power (“SMP”)) in the market for the termination of calls to its own network. The TRC is not seeking to designate LIME as “dominant” for the purposes of sections 26 or 29 of the Act¹⁶. However, relevant case law confirms that, in general, any mobile network operator and fixed¹⁷ network operator is dominant (which term has the same meaning as SMP) in the market for the termination of calls to its own network.

2.15 In this respect, the TRC has regard to the recent judgment of the English Court of Appeal in *Hutchison 3G UK Limited v Office of Communications* [2009] EWCA Civ 683, where the UK regulator (Ofcom) found that even a small UK mobile operator (H3G) had SMP in the market for the termination of calls on its network notwithstanding the countervailing buyer power of the substantial fixed-line incumbent, British Telecommunications plc (“BT”). Lloyd LJ held at §65 as follows:

“...for an undertaking to have a 100% position on a market raises a strong presumption of SMP. That presumption can be rebutted, but only on the basis of facts as regards the commercial context which show that potential buyers of the call termination service are in truth free to act in a way which counteracts the SMP that the network operator would otherwise have”.

2.16 In the *H3G* case, the Court of Appeal found that H3G had SMP despite the fact that H3G’s pricing could be challenged in a dispute resolution procedure which set prices within reasonable (and by implication non-anti-competitive) limits (*per* Lloyd LJ at §§66, 67, 72). The Court of Appeal noted that its decision was consistent with the decision of the European Commission in the “analogous” case of *RegTP*.¹⁸

2.17 In the present case, LIME is operational (often as the incumbent) at the retail and wholesale level in many Caribbean countries. CCT, on the other hand is present only in the VI. LIME as an international operator is accustomed to the concept of market power in the call termination market.

2.18 In Jamaica, one of LIME’s Caribbean markets, the Fair Trading Commission¹⁹ (“FTC”) recently stated that “each mobile network operator is effectively a monopolist in the market for call termination on its network.” The Jamaican Office for Utilities Regulation recently found that LIME was dominant in the mobile market for the termination of calls to its own network, and this finding was upheld on appeal by the Telecommunications Appeal Tribunal of Jamaica on May 31 2010. In Anguilla, LIME is classified as dominant in the termination of calls on its own fixed and mobile

¹⁶ The Market Review sets out a separate process for the determination of dominance through Market Analysis http://www.trc.vg/attachments/014_TRC_Market%20Review_Final.pdf

¹⁷ Decision DE/2005/0144 *RegTP*

¹⁸ Decision DE/2005/0144 *RegTP*, see *H3G* judgment at §§44-45

¹⁹ Jamaica Fair Trading Commission Staff Report on the Competitive Dynamics of Call Termination Provision 2010

networks in its licence²⁰. Therefore the TRC believes that LIME is familiar with the concept of significant market power in the termination of calls.

2.19 None of these findings bind the TRC but they are persuasive in demonstrating the relevant market definition and the existence of SMP on the relevant market. Furthermore, the market power that each LIME network operator enjoys in its termination market (the upstream market) could allow LIME to leverage market power in the retail market (the downstream market). LIME, through its various operations can offer low retail prices in the retail markets, at the same time charging relatively higher termination rates to competitors, such that consumers in the VI (for example) would choose LIME BVI in the retail subscription market because of the low prices of calls to LIME Caribbean destinations. If a competitor is faced with a high termination price then they can only charge that price plus origination costs (i.e., costs of transporting a call from a customer to the point of interconnection) and retail costs (such as marketing, customer care etc.) to their customers to call a LIME Caribbean number, otherwise they will make a loss.

2.20 In this case, the TRC has investigated whether LIME has used its market power in the market for wholesale call termination on specific LIME Caribbean networks to leverage market power on the retail market for voice calls from the VI to specific LIME Caribbean networks.

2.21 If all operators faced the same wholesale costs then there would be no incentive to set retail prices below cost unless the purpose was to gain market share and/or eliminate a competitor through predatory pricing. Therefore, if retail prices are set below the wholesale price, this would suggest that the operator is not actually facing the same advertised wholesale price but an internal wholesale cost which may be lower than the advertised wholesale price.

Market shares in the retail markets

2.22 The risk of LIME leveraging market power to exclude competitors of LIME BVI is not fanciful, in view of LIME BVI's current market share at the retail level. LIME's market share of the retail market for voice call origination in the VI to specific LIME Caribbean networks is unknown as the volume of traffic from Digicel (BVI) Limited to specific LIME Caribbean networks is unknown. However, LIME had a stable market share of [redacted] of the retail market for mobile voice subscription or in other words had [redacted] of mobile subscribers in the VI for the period under investigation (July 2009 – September 2010).

Data collection under the Investigation

2.23 Upon the publication of the Investigation Notice on 6 January 2011, a data request was issued to LIME and to CCT for completion by 8 February 2011. Data was submitted by CCT on 7 February 2011. Through agreement with the TRC, data was received from LIME on 26 February and then finally the revenue data was submitted by LIME on 31 March 2011, thus delaying the progress of the investigation. The TRC decided to extend the deadline for data submission in order to be able to

²⁰ <http://www.pucanguilla.org/Downloads/CWLicenceIssue14Dec04.pdf>

make a full analysis of the complaint based on data submitted by the operators in question for the purpose of the investigation.

2.24 Data was received from LIME BVI from June 2009 to September 2010. In order to eliminate any short term variations and obtain conclusive results, a twelve month average is used in all calculations using data from July 2009 when the complaint was originally raised to June 2010.

Section 3: Jurisdiction of the TRC

- 3.1 The TRC's jurisdiction over LIME (BVI) arises from the fact that it has licensed LIME BVI to provide telecommunication services in the VI. Under the Act, the TRC may take enforcement action if LIME BVI is carrying out its business in a manner contrary to the public interest within the meaning of section 75(1)(a)(iii) of the Act or is in breach of its licence (section 75(1)(a)(vi) of the Act). In accordance with section 6(o) of the Act, TRC shall carry out such "investigations in relation to the conduct of a person as will enable it to determine whether any person is engaging in conduct in contravention of [the] Act" (emphasis added). In determining whether LIME BVI's conduct contravened the Act, the TRC must accordingly consider conduct of its affiliates where relevant to the investigation of LIME BVI's own conduct. It is immaterial that those affiliates are located outside the VI.
- 3.2 Since the conduct of LIME BVI's business involves mutual interaction with operators outside the VI, the suggestion that LIME BVI is responsible only for its business operations within the confines of the VI is artificial (in particular, having regard to the nature of links between LIME BVI and its affiliate operators in other Caribbean destinations – as discussed below).
- 3.3 LIME networks' termination practices have a direct impact on and are inextricable from the manner in which LIME BVI carries out its business in the VI. Through its business in the VI, LIME BVI ultimately gives effect to and/or benefits from the conduct of various LIME operations, with potentially exclusionary and anti-competitive effects on the VI market. Therefore, in accordance with its statutory functions under section 6(o), section 75(1)(a)(iii) and section 75(1)(a)(vi) of the Act, and in order to assess the manner in which LIME BVI carries out its business under section 75(1)(a)(iii), it is incumbent on the TRC to evaluate the termination rates charged to terminate the calls to other LIME networks to the extent that these influence LIME BVI's conduct in the VI and influence competition in the VI telecommunications sector more generally.
- 3.4 It was appropriate for the TRC to assess LIME BVI's VI business in the cross-border context in which it operates having regard to: (a) the nature of LIME BVI's licence; (b) the relevance of LIME BVI's status as part of a single economic entity operating across borders; and (c) the doctrine of effects.
- (a) LIME BVI's licence*
- 3.5 LIME BVI's License expressly acknowledges that the services provided by LIME BVI have an extra-territorial aspect. The provision of those services is nonetheless regulated by the Licence:

Article 2.1(a) provides that "*Subject to the terms and conditions of this License, the Licensee is hereby authorised to establish, install, operate, maintain, exploit and use within, into and from the British Virgin Islands and all territorial waters a Telecommunications Network*". (emphasis added)

Article 2.1(b) provides that *“Subject to the Act and the terms and conditions of this License, the Licensee is hereby authorised to render the following Telecommunications Services within the boundaries of the British Virgin Islands, and between points within the British Virgin Islands and points outside the British Virgin Islands in conjunction with other carriers authorised by their respective national authorities to provide such services.”* (emphasis added)

Article 7.1(a) provides that *“The Licensee shall provide the Licensed Services within, into and out of the British Virgin Islands in accordance with the terms of this License...”*

3.6 The scope of the licensed activities reinforces the point that, in exercising its jurisdiction to determine whether LIME BVI has contravened the Act, the TRC must examine LIME BVI’s business in the light of the effects upon it of other LIME networks’ termination practices to the extent that they relate to the provision by LIME BVI of licensed services from the VI and have an impact on the market in the VI. Indeed, one of the services which LIME BVI provides in the VI is mobile phone connections with LIME networks outside the VI. The termination rates charged by those LIME networks to CCT (as compared to the costs actually incurred by LIME BVI) determine the competitiveness of the service provided by LIME BVI. This provides the context in which, and illuminates the manner in which, LIME BVI engages in licensed activities, and thereby conducts its VI business.

(b) Single Economic Entity

3.7 In discharging its statutory functions in terms of investigation of, and taking enforcement action against, licensees in the VI, it is material for the TRC to: (i) take account of the fact that a VI licensee constitutes part of a single economic entity operating across territorial borders; and (ii) to have regard to the activities of that entity insofar as relevant to the conduct of the particular VI licensee. For a full evaluation of the Single Economic Entity point, please see Annex 2.

3.8 In essence, the commercial reality is that LIME BVI implements in the VI the decisions of LIME. It does so by providing talk plans to VI customers which reflect the favourable termination costs it is charged (or incurs) as distinct from the less favourable termination rates charged to CCT. The TRC has jurisdiction to determine whether LIME BVI’s act of implementation, occurring in the VI, contravenes the Act. Further, it is material to have regard to the context in which the implementing acts occur. Without implementation by LIME BVI, there would be no termination rate differential in the VI as between the prices paid by other operators to terminate a call and the costs incurred by LIME to terminate a call such that LIME’s pricing regime would be of no effect in this jurisdiction. LIME BVI is therefore not merely a passive beneficiary of other LIME MNO’s termination rates. It also is solely responsible for implementing LIME’s pricing policy in the VI.

(c) The effects doctrine

3.9 LIME’s actions produce direct and substantial effects in the VI, and the TRC may investigate these actions insofar as they bear on the conduct of LIME BVI, a VI licensee. The Act confers on the TRC the power to investigate LIME’s cross-border activities, in circumstances where these produce, via

the conduct of a VI licensee, direct and substantial effects in the VI. This is consistent with the effects doctrine. That doctrine is recognised in other common law jurisdictions and under public international law. Under the doctrine, the origin of the activity which causes the relevant effects is not decisive of the question of territorial jurisdiction. What matters is the location where those effects are felt.

3.10 The effects doctrine is recognized in other jurisdictions in various guises. By way of illustration:

(1) Under US law, jurisdiction over commercial behaviour may be assumed on the basis of local effects alone. The US Supreme Court held in *Hartford Fire Insurance Co v California* 509 US 764 (1993) that it would have jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." The following cases were cited in support of this proposition by the Supreme Court, inter alia: *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, n. 6 (1986); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 444 (CA2 1945).

(2) A type of effects doctrine was recognised by the European Union Court of First Instance in Case T-102/96 *Gencor v Commission* [1999] ECR I-753. This case concerned the European Commission's prohibition of a joint venture between a South African and a British company on the grounds that this would bring platinum metal production carried out by their respective subsidiaries in South Africa under common control. The context for this prohibition was the Merger Regulation, which applies to a concentration according to quantitative thresholds based on worldwide and Community-wide turnover. One of the grounds on which the Commission's decision was challenged was that it was premised on the impermissible exercise of extra-territorial jurisdiction. In addition to upholding the Commission's jurisdiction on the basis that the impugned concentration would be implemented on the Community, the Court also considered the compatibility of this decision with public international law and recognised that "application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."

3.11 The effects doctrine is a particularly material consideration in the context of telecommunications regulation. The very nature of the telecommunications industry involves competition and cooperation between telecommunications operators which, though integrated into the same network, often do not occupy the same territory. This is all the more so in the case of the VI, which is part of an archipelago of small islands (the Caribbean region) interconnected and covered by multiple telecommunications providers. The fact that territorial diversity is inherent in telecommunications networks is reflected by various provisions in LIME BVI's License, reproduced above.

3.12 As can be seen, LIMEs BVI's License is premised on the fact that the geographical location of a licensee does not limit the cross-border scope of its VI based operations. Notwithstanding the potential physical dispersion of the parties to a network, it is self-evident that their co-ordinated activities are capable of having substantial effects concentrated within a particular locale.

- 3.13 In order to secure its efficacy as a telecommunications regulator, the TRC must be able to intervene in response to such effects.
- 3.14 As to the effects of LIME BVI's actions in the VI, it is the TRC's concern that LIME BVI's wholesale and retail pricing practices are anti-competitive. It cannot be disputed that the economic effects of these practices are felt in the VI. The fact that these effects are achieved *inter alia* by reference to the termination practices of LIME operations located outside VI is of no consequence.
- 3.15 In discharging its functions under the Act, the TRC had jurisdiction to investigate whether LIME BVI, *inter alia* by participating in a network of agreements or concerted practices with other LIME affiliates, engaged in anti-competitive conduct in the VI in breach of the Act and/or the conditions of its Licence. It was open to the TRC to consider that, by virtue of the common ownership of LIME fixed and mobile operations offshore and the close relationship between them, and LIME BVI's awareness of the termination rates set by its sister operators, LIME BVI was able to implement in the VI the overall plan and strategy of its parent, and thereby to reap the benefits of such concerted conduct in terms of excluding its competitor from the certain sections of the market in the VI.
- 3.16 For all these reasons, the TRC has jurisdiction.

Section 4 Findings of anti-competitive behaviour

Relevant provisions of the Telecommunications Act 2006 and the Licence

The Telecommunications Act 2006

- 4.1 The powers and responsibilities of the TRC are set out in the Telecommunications Act 2006 ('the Act'). Section 6(d) of Act provides that:

"the Commission shall be responsible for the regulation of licensees and authorisation holders and for ensuring fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services;"

- 4.2 Section 6(o) of the Act empowers the TRC to:

"carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of a person as will enable it to determine whether and to what extent any person is engaging in conduct in contravention of the Act."

- 4.3 Section 75(1)(a)(iii) of the Act provides that:

"the Commission may take enforcement action against a licensee or authorisation holder if, in the opinion of the Commission, the licensee or authorisation holder is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including an anti-competitive manner, or detrimental to the interest of clients, creditors or investors."

- 4.4 The prohibition in section 75(1)(a)(iii) and taking subsequent enforcement action is not dependent on any prior finding of dominance on the part of the licensee.

The Licence

- 4.5 On 25 May 2007 the TRC granted LIME BVI a licence under section 15 of Act for the operation of a telecommunications network providing telecommunications services in the VI (the “Licence”).
- 4.6 Article 10.1(e) of the Licence is headed “Prohibition against exclusivity in International Agreements”, and provides that:

“the Licensee shall not enter into any Contract with an international operator which would preclude such international operator from providing international Communications Services to any other Operator in the British Virgin Islands on like terms and conditions.”

- 4.7 Article 10.2 of the Licence, which is headed “Non-Discriminatory Treatment”, provides that:

*“the Rates, terms and conditions and technical standards pursuant to which the Licensee employs services utilising the Telecommunications Network or its Trunk Capacity Resale Services for its own provision of Final Services or Value-Added Services shall be identical or equivalent to those which it offers to other unaffiliated Public Suppliers.
The Licensee shall not discriminate against nor grant any preferences to other Telecommunications Service providers in the provision of Telecommunications Services.”*

The economic concept of Margin Squeeze

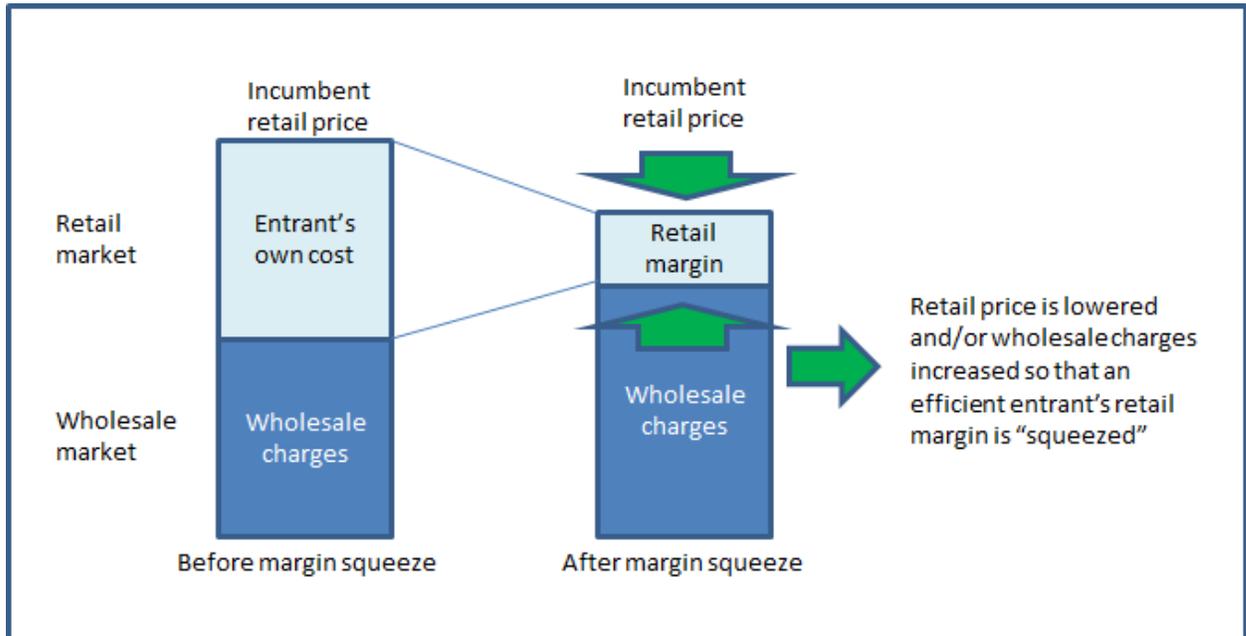
- 4.8 The concept of margin squeeze has been defined succinctly by the Organisation of Economic Co-operation and Development (“OECD”)²¹ as follows:

“a margin squeeze occurs when there is such a narrow margin between an integrated provider’s price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete. A margin squeeze can arise only when (a) an upstream firm produces an input for which there are no good economic substitutes, (b) the upstream firm sells that input to one or more downstream firms and (c) the upstream firm also directly competes in that downstream market against those firms.”

- 4.9 The “squeeze” occurs when the difference between the retail price and wholesale charges results in reducing a competitor’s retail margin as shown in figure 2 below.

²¹ OECD DAF/COMP (2009)36 Margin Squeeze, 9 September 2010
<http://www.oecd.org/dataoecd/30/17/46048803.pdf>

Figure 2



- 4.10 The key competitive concern with margin squeeze is that it limits, restricts or prevents the development of competition in the downstream market. As stated in the OECD report²²:

"Depending on the circumstances this may raise the price or reduce the quality or variety of products available to downstream customers. It may also undermine the success of reforms aimed at promoting competition in the downstream market."

Proof of a negative margin (a downstream retail price less than the wholesale charge of the integrated entity enjoying dominance upstream) is clear evidence of a margin squeeze. The margin should be large enough to allow an efficient operator to compete.

Margin Squeeze in the telecommunications context

- 4.11 In the telecommunications context margin squeeze forms part of the classic on-net/off-net competition issue, usually seen in national contexts. Operators may be pricing national on-net calls at a much lower level than the off-net price, and indeed below the termination rate, and in doing so may be encouraging customers to make more on-net calls than off-net calls, thereby increasing market share through the so-called "club effect". In this case, LIME is acting as a large operator in a regional context who is able to benefit from the club effect in comparison to CCT being operational only in one territory.

²² OECD DAF/COMP (2009)36 Margin Squeeze, 9 September 2010, Executive Summary, page 7

- 4.12 The European Commission refers to club-effect issue in the Explanatory Note to the its Recommendation on Termination rates²³, stating the following:

"Termination rates that are set above an efficient level of cost result in higher wholesale and retail prices. As smaller networks have a large proportion of off-net calls, this leads to significant payments to their larger competitors and hampers their ability to compete with on-net/off-net retail offers of larger incumbents. This can reinforce the network effects of larger networks and increase barriers to smaller operators entering and expanding within markets."

- 4.13 Similarly, the UK Ofcom made specific reference to the impact of anti-competitive termination rates on consumers in its March 2011 Mobile Call Termination Statement²⁴:

"Excessive MTRs would also likely lead to higher (retail) charges for off-net calls than for on-net calls and create competitive distortions to the disadvantage of smaller networks, which again would be detrimental to consumers in the long run."

- 4.14 The Communications Commission of Kenya ("CCK") referred to this issue in its 2010 statement²⁵ as follows:

"an in-depth analysis of the competitive landscape in the retail mobile and fixed voice markets reveals instances of market failures where the on-net to off-net price spread is perpetuating a "club effect" which arises when consumers tend to have a preference for a network with a large pool of subscribers in order to benefit from the possibility to call and be called at a lesser calling rate by the largest possible number of subscribers."

- 4.15 Analysys Mason²⁶ offer the following economic analysis on the subject:

"For example, an operator with a very large market share can offer expensive rates for calls to other operators (off-net calls) and large discounts on on-net calls. Because of its large market share, it is rare that subscribers need to go via another operator's network, making them less affected by the high off-net rates. The smaller competing operators therefore have to position their off-net rates against the large operator's on-net rate, since a significant proportion of their customer calls are off-net to the larger operator. They can also hardly seek to have higher on-net rates. As a result, smaller operators can have difficulty in competing. This situation can be worse

²³ Page 16 of the European Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, Explanatory Note, 7 May 2009, SEC (2009) 600. http://ec.europa.eu/information_society/policy/ecom/ doc/implementation_enforcement/eu_consultation_procedures/explanatory_note.pdf

²⁴ <http://stakeholders.ofcom.org.uk/consultations/mtr/statement>

²⁵ http://www.cck.go.ke/regulations/downloads/interconnection_determination_no2_2010.pdf

²⁶ <http://www.analysismason.com/About-Us/News/Newsletter/Regulating-on-net-discounts-in-emerging-countries-to-limit-the-club-effect/>

if the mobile termination rate is high as this tends to set a floor under the off-net price that can be economically offered by the smaller operator; if the true costs of termination are much lower than the termination rate then the larger operator can price on-net calls close to the mobile termination rate.”

4.16 In addition, Analysys Mason note that

”if the leading operator applies high on-net discounts, then a 'club effect' (or bandwagon) can develop: the new subscriber only has to select the leading operator in order to call and be called at cheaper rates. Such an effect can be a strong constraint on the development of competition.”²⁷

Legal aspects of the anti-competitive nature of margin squeeze

4.17 In addition to the widespread concerns of regulators, margin squeeze has also been recognised as potentially anti-competitive per se by the courts in several important legal jurisdictions. In *Deutsche Telekom*²⁸ the European Court of Justice (“ECJ”) emphasised at §183 that:

“[A] margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be.”²⁹

4.18 Similarly, in *Konkurrensverket v TeliaSonera Sverige AB*³⁰, a case involving a similar factual context to this matter, the ECJ reiterated this general approach at §§31 to 34:

”A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU...

“...In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.

²⁷ Confirming this point in practice, Analysys Mason advised the CCK on its interconnection determination NO.2 of 2010 restricting the operator(s) designated as dominant from offering on-net discounts, in addition to cutting mobile termination rates by 78% over three years.

²⁸ Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR 000 (not yet reported)

²⁹ See also §§31, 32 and 167 of *Deutsche Telekom*, *ibid.*

³⁰ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR 000 (not yet reported)

“In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.

“It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be (Deutsche Telekom v Commission, paragraphs 167 and 183).”

- 4.19 In the *Albion Water*³¹ case, the UK Competition Appeal Tribunal (“CAT”) adopted a similar approach to the anti-competitive nature per se of margin squeeze. In that case Dŵr Cymru was the dominant upstream provider of the necessary input (access to the Ashgrove water transportation network), Albion was the downstream rival and Shotton Paper the ultimate user of the water. The Tribunal held at §312 that:

“We...find that Dŵr Cymru abused its dominant position in the relevant market by quoting a First Access Price of 23.2p/m³ that in fact imposed on Albion a margin squeeze between that price and Dŵr Cymru’s then retail price of some 26p/m³. That margin squeeze arose because the margin between those two prices would not permit Albion, or any other efficient competitor, or a notional retail arm of Dŵr Cymru, to acquire a water resource and meet its own retail costs and overheads (let alone make a profit) were Albion or any other competitor to seek to compete with Dŵr Cymru by providing non-potable water to Shotton Paper via common carriage through the Ashgrove system. Had that margin squeeze succeeded, Dŵr Cymru would have, thereby, prevented any competition, preserved its monopoly, and eliminated Albion as a competitor, to the prejudice, notably, of the ultimate consumer Shotton Paper”.

The appropriate test for Margin Squeeze

- 4.20 In order to assess if LIME BVI (whether as part of a single LIME economic entity or by way of a network of agreements) is using market power to squeeze the margin between the retail price charged to LIME BVI’s customers and the wholesale price charged to CCT, such that CCT cannot efficiently replicate the offer, it is necessary to have regard to the equally efficient operator (“EEO”) test.³²

³¹ *Albion Water v Water Services Regulation Authority* [2006] CAT 33

³² This test is detailed in the ERG “Report on the discussion of the application of margin squeeze tests to bundles 2009” http://www.erg.eu.int/doc/publications/2009/erg_09_07_report_on_the_discussion_of_the_application_of_margin_squeeze_tests_to_bundles.pdf

Equally Efficient Operator Test

4.21 The EEO test assesses whether LIME BVI's own retail operations could trade profitably on the basis of the access price charged to its competitors by the wholesale operating arms of LIME's business (with regard to the single economic entity concept) or by the LIME affiliate networks (with regard to the network of agreements concept). The essential question under this test is whether the All Talk Plans would be profitable to LIME BVI if it had to pay the same access charge (or termination rate) as that charged to CCT.

4.22 Expressed in equation format, the test is concerned with whether:

$$\text{Retail cost} + \text{wholesale origination cost} + \text{wholesale termination cost} < \text{retail price}$$

4.23 A simple re-arrangement of the equation shows that if by itself *wholesale termination cost* > *retail price*, a margin squeeze will exist regardless the level of retail cost and wholesale origination cost.

Application of the Margin Squeeze Test

Applying the EEO Test

4.24 The appropriate wholesale termination cost to consider in this case is the termination rate that LIME BVI would have to pay if it were an off-net operator unaffiliated with the LIME networks across the Caribbean. CCT and LIME both submitted data showing the price that CCT pays to terminate calls on LIME's networks. These prices are used with LIME's traffic data to calculate the average termination price that LIME would pay. The data presented by LIME calculates an average termination charge across fixed and mobile traffic of [redacted].

4.25 The appropriate retail price is the average retail price paid by LIME BVI mobile customers under the All Talk plans over a defined period (July 2009 – June 2010). This is taken from the LIME data and is calculated by dividing total revenues under the plan (excluding other revenues for calls outside the plan) by total traffic to Caribbean destinations under and within the plan. This is calculated as [redacted] based on LIME revenue and traffic data.

4.26 As seen above, in the absence of margin squeeze wholesale termination cost must as a minimum be < retail price. However, using the calculated average wholesale price, the retail price is less than the wholesale termination cost as follows:

$$[\text{redacted}] > [\text{redacted}]$$

Accordingly, the data fails the EEO test.

Furthermore, LIME has presented information which states that it pays positive termination charges to other LIME entities in the Caribbean as detailed in annex 1. However, given an average retail price per minute of [redacted] to call these destinations, it would not be possible

to be paying these termination charges without either incurring a loss or cross-subsidising services. This points to the conclusion that LIME treats any termination charges as notional internal transfer payments which payments are commercially viable because LIME entities, including LIME BVI, operate as a single economic entity across the region.

Conclusion on the existence of a margin squeeze

4.27 As demonstrated above, there is clear evidence of a margin squeeze. The extent of this margin squeeze is significant because it does not only mean that CCT cannot replicate the offer that LIME make, but that if it tried it would have to pay LIME at least three times³³ more in wholesale termination rates than it would collect from customers (not even talking about covering its origination costs or retail costs).

4.28 It is enough, for the purposes of finding anti-competitive behaviour, that such a margin squeeze is in operation. However, the TRC also notes the consequent "club" effects of this particular margin squeeze arise in the VI, namely that:

- 1) any CCT customer who wants to call a LIME destination in the list of countries has to pay more than a LIME customer calling the same destination; and
- 2) any subscriber in the VI who planned to make a significant number of calls to a LIME destination in the list would likely take up a LIME subscription in order to benefit from the cheaper calls. The significant proportion of immigrant workers from LIME destination countries³⁴ would mean that LIME is better able to capture new subscribers entering the VI market from LIME destination countries than CCT could. In addition any existing CCT customers who wished to make a significant number of calls to LIME destinations in the Caribbean may churn to LIME or take up a LIME subscribership and reduce use of the CCT phone.

³³ [redacted] = 3

³⁴ DPU (Development Planning Unit of the Virgin Islands Government) estimate that at least 34% of the population in the VI is from other countries in the Caribbean.

Section 5 Remedies

5.1 Section 75(1) of the Act provides that the Commission may take enforcement action against a licensee if, in the opinion of the TRC, that licensee:

“(iii) is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including an anti-competitive manner, or detrimental to the interest of clients, creditors or investors...”

“(vi) is in breach of any term or condition of its licence....”

5.2 Section 75(2) of the Act provides that such enforcement action can *inter alia* include:

- (1) The imposition of a fine on the licensee in such amount as the TRC thinks fit (section 75(2)(b));
- (2) The issuance of instructions (section 75(2)(e)); and/or
- (3) The making of such order against the licensee as the TRC thinks fit, including a provisional or interim order.

5.3 Accordingly, the investigation team recommends to the TRC Board to issue an order that LIME BVI:

- 1) provide to CCT wholesale termination of calls to LIME fixed and mobile operations at rates that are not anti-competitive termination rates and cease otherwise imposing an anti-competitive margin squeeze on CCT from the date of the order; and
- 2) within thirty days of the Order, propose competitive rates to CCT for the termination on LIME Networks (under the All Talk and All Talk Plus plans³⁵). Such competitive rates as are ultimately agreed between CCT and LIME would apply retrospectively to all relevant call terminations from the date of the Order onwards. In the absence of agreement, the TRC may impose a solution on the parties in order to prevent the unlawful behaviour addressed in this Sanction Notice.

5.4 Furthermore, based on the facts described in this Sanction Notice and identified in the investigation thus far, the TRC proposes to impose a fine on LIME BVI for breaching the prohibition on anti-competitive behaviour in section 75(1)(a)(iii) of the Act and for breaching Articles 10.1(e) and 10.2 of the Licence.

5.5 The discretion of the TRC under section 75(2)(b) is broadly defined: it may *“impose a fine on the licensee or authorisation holder in such amount as it thinks fit”*. Section 10.5 (b) (ii) of LIME BVI’s licence states that the TRC may *“require the Licensee to pay a fine not exceeding the equivalent of ten percent (10%) of the annual turnover of the Licensee”*. In setting the fine, the TRC remains

³⁵ I.e. the LIME networks in Anguilla, Antigua and Barbuda, Barbados, British Virgin Islands, Cayman, Dominica, Grenada, Jamaica, Montserrat, St Kitts and Nevis, St Vincent and the Grenadines, Turks and Caicos

subject to its common law duties to exercise its discretion rationally³⁶ and to have regard to all relevant considerations (and no irrelevant ones)³⁷. The TRC will also exercise its discretion having particular regard to its general responsibility under section 6(d) of the Act to ensure fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services.

5.6 When setting the appropriate fine the TRC shall therefore consider (a) the seriousness of the anti-competitive conduct, (b) the duration of that conduct; (c) the need to deter both LIME BVI and other undertakings from engaging in anti-competitive conduct, (d) any aggravating circumstances and (e) any mitigating circumstances.

5.7 When assessing the gravity or seriousness of the infringement, the TRC shall have regard to a number of factors, including the nature of the products sold, the structure of the relevant markets, the shares of LIME in those markets, the entry conditions to those markets, the industry's general perceptions on margin squeezing, and the likely effects on competitors and third parties of the infringement.

5.8 In the present case, the TRC intends to take into account the facts as described in this Sanction Notice and identified in its investigation, and in particular the following circumstances:

- 1) the 100% monopoly which LIME enjoys in the upstream market over wholesale voice call termination from the VI to specific LIME fixed and mobile networks in the Caribbean;
- 2) the fact that LIME holds the largest market share of the retail market for subscribers in the VI and the fact of LIME's regional presence;
- 3) the exclusionary nature of the margin squeeze imposed in the downstream retail markets, which operated to limit, restrict and prevent the development of competition in those markets;
- 4) the 'club effect' (as set out above) of margin squeeze within the context of termination rates in the telecommunications sector and consequent disparities between on-net and off-net prices;
- 5) the territorial extent of the relevant markets in this case;
- 6) the duration of the anti-competitive conduct; and

³⁶ See in a competition context *R v Director General of Telecommunications, ex p Cellcom Ltd* [1999] ECC 314 at §26 and *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142 at §100. See more generally *R v Chief Constable of Sussex ex p International Trader's Ferry Ltd* [1999] 2 AC 418, at 452B-C, and *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, at 749A-B.

³⁷ See in a competition context *R v Director General of Telecommunications, ex p Cellcom Ltd* [1999] ECC 314 at §27 and more generally *In Re Duffy* [2008] UKHL 4 at §53.

- 7) the significant proportion of immigrant workers from LIME destination countries in the VI³⁸, a factor which magnifies the likely churn effect of the margin squeeze on CCT's potential and existing consumers.

5.9 When considering deterrence, it is important to note that deterrence must not be aimed solely at LIME BVI, but also at other undertakings which might be considering anti-competitive behaviour including margin squeezing. When determining the appropriate deterrent effect, the TRC intends to regard as the main factor the size and economic power of LIME BVI, with regard to its total turnover.

5.10 As regards aggravating circumstances, the TRC intends in particular to consider:

- 1) the fact that LIME instigated the anti-competitive behaviour. LIME (BVI) was the first MNO in the VI (November 2008) to launch a plan offering a large number of calls to LIME destinations across the Caribbean.

5.11 The TRC cannot at this stage identify any mitigating factors in respect of LIME BVI's conduct. Based on these considerations and with reference to section 10.5 (b) (ii) of LIME BVI's Licence which sets a cap of 10% of the annual turnover of the licensee, the investigation team recommend that a fine be imposed upon LIME BVI calculated on the following basis.

5.12 The kind of margin squeeze in this case could be regarded as very serious because of the factors listed in paragraph 5.8 above. It is possible, however, that LIME BVI's conduct could be regarded as not at the worst end of the spectrum because of the novel nature of this case. Although the prohibition in the Act and Licence is clear, this is first such investigation in the VI. Thus, the starting point which the investigation team consider to be appropriate is 5% of the turnover of LIME BVI in 2010 in order to have sufficient deterrent effect in relation to LIME BVI and other operators in the VI. As turnover is the focus of the capping provision in section 10.5 (b) (ii) of LIME BVI's Licence it is appropriate to use a percentage of turnover as the starting point for any penalty. As a matter of principle, it is also less vulnerable to manipulation than figures for profit or loss.

5.13 In view of the aggravating factors listed in paragraph 5.10 above, the investigation team recommends that the fine then be multiplied by 1.25. There are no mitigating factors.

5.14 In their response to the data request, LIME BVI stated that the audited financial results for 2010 were not yet available. The TRC has received royalty payments from LIME BVI which suggest a total turnover of [redacted]. Based on TRC calculations, the fine due would be [redacted].

5.15 It will be recommended that this fine of [redacted] be paid as a lump sum due within 30 days of the order. An additional per diem rate of 1% of the fine will be imposed if LIME BVI fails to address the other aspects of the order. The total fine will not, however, exceed the cap referred to above.

³⁸ DPU (Development Planning Unit of the Virgin Islands Government) estimate that at least 34% of the population in the VI is from other countries in the Caribbean.

Section 6 Conclusion

- 6.1 The TRC has carried out an investigation of LIME BVI and LIME's wholesale and retail pricing practices with respect to calls from the VI to specific Caribbean destinations and has found evidence of anti-competitive behavior. In particular:
- 1) based on the information gathered by the TRC, and applying the relevant margin squeeze tests, LIME BVI appears to be effecting or participating in a margin squeeze to the detriment of CCT; and
 - 2) as a matter of law, this margin squeeze is anticompetitive and it is appropriate, accordingly, to take regulatory action.
- 6.2 To this end, the investigation team proposes to the TRC Board to impose Sanctions on LIME including but not necessarily limited to:
- 1) An order that LIME BVI provide to CCT wholesale termination of calls to LIME fixed and mobile operations at rates that are not anti-competitive termination rates and cease otherwise imposing an anti-competitive margin squeeze on CCT from the date of the order;
 - 2) an order that LIME BVI, within thirty days of the order in (1) above, propose competitive rates to CCT for the termination on selected LIME Networks (under the All Talk and All Talk Plus Plans). Such competitive rates as are ultimately agreed between CCT and LIME would apply retrospectively to all relevant call terminations from the date of the Order onwards. In the absence of agreement, the TRC may impose a solution on the parties in order to prevent, in a strictly proportionate manner, the unlawful behaviour addressed in this Sanction Notice; and
 - 3) a fine equivalent to 6.25% of the annual turnover of LIME BVI in line with section 10.5 (b) (ii) of the Licence, for breaching the prohibition on anti-competitive behavior in section 75(1)(a)(iii) of the Act and for breaching Articles 10.1(e) and 10.2 of the Licence.
- 6.3 The TRC invites LIME to respond to this Sanction Notice by Friday August 5 2011, and to attend a private Hearing at a date to be confirmed separately by the TRC.

ANNEX 1: THE DATA AND CALCULATIONS

Calculation of the Average Termination Charge Payable by LIME

LIME submitted information as follows:

- Wholesale per minute termination charge payable by CCT to a LIME mobile destination by country
- Wholesale per minute termination charge payable by CCT to a LIME landline destination by country
- Total traffic from All Talk prepaid to LIME mobiles (not broken down by destination). [redacted] of prepaid traffic is to LIME mobiles.
- Total traffic from All Talk postpaid to LIME landlines (not broken down by destination). [redacted] of prepaid traffic is to LIME fixed.
- Total traffic from All Talk Postpaid to LIME mobiles and landlines by destination country (but not separated between fixed and mobile)

CCT submitted information covering the wholesale per minute termination charge payable to LIME to terminate on a fixed or mobile destination by country.

On the basis of this data, the TRC has calculated the average termination charge:

[redacted] average termination fee to LIME fixed and mobile destinations.

Calculation of the average retail price

The average retail price for calls within the plan to LIME destinations within the plan is calculated by dividing total revenue from the All Talk Plans by total traffic to All Talk destinations consumed within and under the plan. The average price is calculated at [redacted] based on data from July 2009 to June 2010.

Note that if total minutes (6000 per month) had been consumed under the plans, the minimum average retail price that could have been charged was [redacted].

Termination rates charged to CCT to terminate on LIME networks compared to the termination rates charged to LIME BVI to terminate on LIME networks

The termination rates charged to CCT by LIME BVI are presented for June 2010 taken from the CCT data submission and are compared to the LIME data submission.

Table 2 [redacted]

ANNEX 2

Single economic entity

Introduction

1. The TRC believes that, for the purposes of enforcing section 75(1)(a)(iii) of the Act and/or article 10(1)(e) of the Licence against LIME BVI, it may have regard to the fact that LIME BVI is part of a single economic entity which encompasses the LIME parent company and the LIME subsidiaries engaged in the conduct in issue. In order to secure the purpose of this section of the Act and/or article of the Licence, the TRC must, when examining a licensee's conduct, have regard to the context in which that occurs, including the commercial and substantial reality of the particular entities in question.
2. The TRC adopts this position on the basis of the proper construction of the Act, having regard to its terms and to the legislator's purposes in terms of securing competition in the VI in the public interest. Insofar as the TRC refers to the concept of a single economic entity, it does so for the purpose of illustrating and explaining the nature of its task under the Act. The TRC's statutory task clearly does not depend on EU law or the law of any other jurisdiction. Nonetheless, where other jurisdictions, including the EU, have engaged with the question how to assess the competitive conduct of economically linked entities, it is material for the TRC to have regard to the approach adopted in order to determine how best to discharge its functions under the Act.

Analysis

3. The TRC's view is that since LIME BVI and other LIME operations are subsidiaries of a single corporate group, namely LIME, they comprise a single economic entity. There are several factors which militate in favour of this conclusion:
 - (1) The Cable and Wireless Communications website states that "The Cable & Wireless Communications Group plc, headquartered in London, is managed as four regional operations – the Caribbean, Panama, Macau and Monaco & Islands. It operates full-service telecommunications businesses providing mobile, broadband and domestic and international fixed line services, as well as offering enterprise solutions and managed services."³⁹
 - (2) LIME BVI is wholly owned by Cable and Wireless Communications plc. As such, Cable and Wireless Communications plc is positioned to exert decisive influence over LIME BVI's business activities. Further, LIME BVI's operating affiliates in the Caribbean are owned by Cable and Wireless Communications plc.⁴⁰ Through its ownership of a

³⁹ http://www.cwdemerger.com/downloads/cwc_listing_announcement.pdf

⁴⁰ In LIME's responses dated 25 February 2011 to the TRC's questions, LIME gave the following details regarding ownership of LIME BVI's operating affiliates in the Caribbean:

network of operating affiliates that includes LIME BVI, Cable and Wireless Communications plc is positioned to co-ordinate the business activities of LIME BVI in the VI with the business activities of LIME affiliates located in other territories.

- (4) Owing to the position of control enjoyed by Cable and Wireless Communications plc in relation to the LIME network of operating affiliates, marketing decisions taken at regional level are capable of implementation in multiple territories. Accordingly, LIME was able to offer, and still offers, the All Talk and All Talk Plus packages across LIME entities in the Caribbean as part of a regional strategy. LIME BVI's activities in the VI are part of that strategy.

4. In light of these factors, the TRC considers that, in assessing LIME BVI's business activities in the VI, it is appropriate to have regard to LIME BVI's status as part of a single economic entity operating in territories across the Caribbean pursuant to a regional strategy.

-
- (i) The following are indirect subsidiaries wholly owned by Cable and Wireless Communications plc: Cable and Wireless (Anguilla) Limited; Cable & Wireless Antigua & Barbuda Limited; Cable and Wireless (Cayman Islands) Limited; Cable and Wireless (West Indies) Limited – Monserrat Branch; Cable & Wireless (St Lucia) Limited; Cable & Wireless St. Vincent and the Grenadines Limited; Cable and Wireless (TCI) Limited; CWC Cable and Wireless Communications Dominican Republic SA; CWI Caribbean Limited; and
 - (ii) The following are indirect subsidies owned by Cable and Wireless Communications plc as to the percentages stated in parenthesis: Cable & Wireless Barbados Limited (81.1%); Cable & Wireless Dominica Limited (80%); Cable & Wireless Grenada Limited (82%); Cable & Wireless Jamaica Limited (82%); Cable & Wireless St Kitts & Nevis Limited (77.23%); Telecommunications Services of Trinidad and Tobago (49%).