

TELECOMMUNICATIONS REGULATORY COMMISSION

VIRGIN ISLANDS

CONSULTATION ON THE VIRGIN ISLANDS TELECOMMUNICATIONS  
MARKET REVIEW

14<sup>th</sup> October 2010

Reference Number: C/06/2010

The address for responses to this document or enquires regarding this document is:

Consultation on the Telecommunications Market Review

Telecommunications Regulatory Commission

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The deadline for responses is **1 November 2010**



## Instructions for submitting a response

The Telecommunications Regulatory Commission of the Virgin Islands (“TRC”) invites comments on this consultation document from all interested parties.

Comments should be submitted by **1 November 2010**. A two week deadline is applied to this consultation given the need to expedite the market review process. Further comments can be submitted on each market during the market review process.

Preferably responses to this document should be sent by email to [consultations@trc.vg](mailto:consultations@trc.vg) (indicating the subject: “Consultation on the Framework for Telecommunications Market Review”). Alternatively, the responses may be sent to the address (or the number) below:

Consultation on the Framework for Telecommunications Market Review –Telecommunications Regulatory Commission P.O. Box 4401 or 27 Fish Lock Road, 3<sup>rd</sup> Floor Road Town, Tortola, British Virgin Islands VG 1110 Fax: (284) 494 6786

Responses should include:

In the case of responses from corporate bodies (legal persons):

- the name of the company/institution/association/other organisation;
- the name of a principal contact person; and
- full contact details (physical address, postal address, telephone number, fax number and email address).

In the case of responses from individual (natural) persons, name and contact details (including email).

In the interest of transparency, the TRC will normally make all submissions received available to public, subject to confidentiality of the information received. The TRC will evaluate requests for confidentiality according to relevant legal principles.

Respondents are required to clearly mark any information included in their submission which they consider to be confidential, and provide reasons why that information should be treated as such. Where information claimed to be confidential is included in a submission, respondents are required to provide both a confidential and a non-confidential version of their submission. The TRC will determine whether information claimed to be confidential is to be treated as such and, if so, will not publish that information. In respect of information that is determined to be non-confidential, the TRC may publish or refrain from publishing such information at its sole discretion. Once the TRC has received and considered responses to this consultative document, it will issue a final statement on the consultation (together with a report on the consultation) which will be published on the TRC website.

## Consultation on the Virgin Islands Telecommunications Market Review

### 1. Introduction

- 1.1. Competitive market forces should be allowed to function properly in the Virgin Islands (the “VI”) to ensure the choice of high quality and reasonably priced communications services to the end user. In certain telecommunications markets, especially in the early stages of liberalisation, competition may not be effective and therefore some form of ex ante regulation may be required. Ex ante regulation can help to prevent anti-competitive behaviour as it is set in advance. Ex post competition policy can be applied after any misconduct has occurred to rectify the situation. The purpose of ex ante regulation is to apply a remedy as a form of preventative medicine for anti-competitive behaviour which results in consumer harm. The goal of regulation is to benefit the end user.
- 1.2. In order to determine where competition is ineffective in VI telecommunications markets, it is necessary to set out the different telecommunication market areas in the VI for further review and analysis. This document seeks to set out the key telecommunication areas in the VI which are being prioritised for market analysis. At the market analysis stage, specific telecommunications markets will be defined. The defined market is then subject to market analysis which determines whether regulatory obligations should be imposed in order to create conditions for effective competition.
- 1.3. The key issue is to assess whether any public supplier of telecommunications services is dominant in the provision of telecommunications services in a defined market and to assess how it would be possible for that public supplier to abuse its market power to the detriment of consumers. In this way, the concept of dominance is synonymous with that of significant market power<sup>1</sup> (SMP) as employed by the European Commission under the European Framework for Communications. The relevance of the European regulatory approach to the VI is explained in section 5.3<sup>2</sup>.

### 2. The Legal Framework in the VI

- 2.1. Section 26 (3) of the Telecommunications Act, 2006 (the “Act”) empowers the Telecommunications Regulatory Commission (the “TRC”) to determine a public supplier dominant with respect to a relevant market. The Act defines 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 and, for such determination, the TRC shall take into account the following factors:

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<sup>1</sup> The concept of dominance is synonymous with SMP at face value but different methods of application (backward looking or forward looking) may result in different outcomes.

<sup>2</sup> Official Journal of the European Commission 2002/C 165/03 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>

- a) The relevant market;
  - b) Technology and market trends;
  - c) The market share of the public supplier;
  - d) The power of the public supplier to introduce and sustain a material price increase independently of competitors;
  - e) The degree of differentiation among networks and services in the market; and
  - f) Any other matters that the TRC deems relevant.
- 2.2. The legal framework in the VI allows the TRC to define markets and assess whether there is significant market power in those markets and to declare a public supplier dominant. Section 26 (4) of the Act goes on to say that where the TRC determines that a public supplier is dominant in any market, the TRC shall include additional terms and conditions in the licence “for the purposes of regulating tariffs, protecting the interest of users and other licensees including the provision of adequate facilities and interconnection and access services, and of ensuring fair competition among licensees as it considers appropriate.” In other words, where the TRC finds a public supplier dominant, it is empowered by the Act to apply ex ante regulation.
- 2.3. The purpose of this document is to set out the TRC’s position on the framework and process for assessing the competitiveness of certain market areas and identifying dominant public supplier/s (if any) with a view to designing and applying appropriate regulation. The ultimate goal of this process is to ensure that the end user benefits from real competition in the marketplace. This framework is now open to public consultation and the TRC invites responses to this document. This document is not designed to make any judgment on the competitive state of any of the telecoms market in the VI, it is simply to set out the TRC’s position on an appropriate process for assessing the competitive state of the telecoms markets in the VI. The purpose of the framework is to explain how the TRC proposes to ensure a level playing field for competitive telecommunications in the VI and to create certainty for market players and consumers alike.

### **3. The Proposed Process**

- 3.1 In order to set out the relevant markets for review, it is necessary to take into account both the key product areas in the VI and the market areas where specific problems have been identified. These areas are then grouped into market clusters which will be subject to formal market definition at the market analysis stage and prioritised for review.
- 3.2 The identification of a market cluster for analysis does not in itself mean that the market requires regulatory intervention. It is only where the TRC finds that effective competition is lacking on a respective market that the TRC will impose a remedy. The key aim of the regulatory framework is to maximise consumer benefits in terms of choice, price, quality and innovation by promoting and ensuring effective competition.

#### **4. Market Areas for Review**

4.1 The key telecoms products and services in the VI are:

- Fixed voice and data
- Mobile voice and data
- Multi-channel TV

#### **Market areas with identified potential competition issues**

4.2 The TRC has identified a number of areas with potential competition issues. These include issues which have been brought to the TRC's attention by stakeholders within the industry. The issues identified below are by no means exhaustive but are intended to help prioritise the market areas for review so that the TRC can address the areas with the potentially most pressing and/or serious competitive problems as soon as is possible. The TRC invites responses on these and any further issues that should be identified.

##### **1. Fixed Broadband Access (voice and data)**

###### **a) Fixed retail voice services**

*With one incumbent fixed line operator in the provision of fixed line voice service, fixed line voice national and international calls may not be subject to competitive pressures depending upon the substitutability with mobile and voice over internet protocol (VoIP) solutions. Business fixed voice services such as PBX connections may also have limited competitive pressures which could mean that the incumbent may be able to exert anti-competitive pressures to the detriment of consumers. In order to address competition problems identified in addition to analysis of a retail market(s), analysis of a related wholesale market consisting of upstream inputs in fixed retail voice services may be needed.*

###### **b) Broadband retail services**

*There is one fixed broadband licensee with an extremely significant market share in the provision of broadband internet service. Actual behaviour in the market suggests that an incumbent operator might be able to profitably sustain price increases of 5-10%. An absence of competition in the provision of broadband service would also be related to the lack of competitive capacity available through international connectivity (see below) and therefore it may be necessary to analyse the two areas in parallel. Furthermore, in order to address competition problems identified in addition to analysis of a retail market(s), analysis of a related wholesale markets consisting of upstream inputs in broadband retail services may be needed.*

##### **2. Calls to specific Caribbean destinations**

*Operators with pan-Caribbean operations may be able to offer per minute retail prices to specific Caribbean destinations that may not be possible for other operators to replicate. This may present a competition problem whereby public suppliers without a pan-Caribbean operation are*

unable to compete on an equal basis. It may be necessary to define and analyse the retail market for calls to specific Caribbean destinations as well.

### **3. Call termination**

*Licensees with different market shares and traffic patterns may have different views on the appropriate level of termination rates. Termination rates are typically regulated in calling party pays regimes<sup>3</sup> and it is now timely for the TRC to review this market. The wholesale markets for fixed and mobile voice call termination and SMS termination may be appropriate for review.*

### **4. International connectivity**

*With only one operator having own facilities for international connectivity there is a lack of competition in international connectivity which needs to be assessed. Licensees may have limited access to international links which negatively impacts the growth of new data services as well as, potentially, competition in relation to voice services.*

### **5. Retail and wholesale markets for mobile roaming**

*The presence of pan-Caribbean operators creates asymmetry in relation to abilities of public suppliers, without operations in other territories in the region, to offer roaming services on the same level and may allow anti-competitive practices which may allow for discriminatory pricing practices at both the wholesale and retail levels.*

### **6. Multi-channel TV**

*A single provider of multi-channel TV services may be able to vertically restrain the distribution of content by charging a distribution fee to content providers, which have to rely on such a provider as the single option for their content to reach end-users. A single provider of multi-channel TV services may also restrict consumer choice and quality of service compared to a competitive market.*

**Question 1:** Are there other market areas with competitive problems other than those identified under 4.2 that should be addressed through the market review?

### **Prioritise cluster markets for market analysis**

4.3 By taking account of the key telecommunications products and services in the VI and the list of problem areas, the following market clusters have been identified and prioritised in the following order for analysis.

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<sup>3</sup> Calling party pays regimes require the calling party who originates the call to pay the full price of the call and the receiving party does not pay to receive the call. This call can only be terminated on the called party's network and hence a monopoly price for termination may apply in the absence of regulation.

1. Wholesale Call and SMS termination on individual fixed and mobile networks
2. Wholesale call termination to specific Caribbean destinations
3. Fixed Broadband Access (and fixed voice services; may include analysis of related wholesale markets)
4. International roaming in the Caribbean (retail and wholesale)
5. Multi-channel TV services and distribution of broadcasting content
6. Wholesale International connectivity

The first relevant market cluster to be reviewed is the Wholesale Call and SMS termination on fixed and mobile networks. It is necessary to analyse this market cluster first as the conclusions drawn on interconnection will impact further market analysis. The purpose of this framework is create a predictable regulatory environment whereby public suppliers can anticipate the path of regulation where appropriate whilst regulation may be applied to the most pressing areas to address concerns in the pan-Caribbean calling and fixed broadband access markets.

In all these market clusters, the first step is formal market definition followed by an analysis of evidence of any significant market power within that market (or markets).

**Question 2:** Do you agree with the list of market clusters set out in 4.3 for analysis by the TRC?

**Question 3:** Is this the appropriate prioritisation of markets for review?

## 5. Market Analysis

5.1 Once this consultation is complete, the TRC propose to conduct market definition and analysis.

5.1 The purpose of market analysis is to assess if there is any significant market power (“SMP”) which enables anti-competitive behaviour. It is the assessment of significant market power or equivalently of dominance which determines whether ex ante regulation should be applied or not. The SMP assessment focuses on the market power of a specific licensee in a given market with a view to determining whether that public supplier should or should not be made subject to ex ante regulation in that relevant market. Regulation will only be justified if one or more public suppliers are found to have significant market power on a market.

5.3 This market analysis framework is intended to assess how competitive each relevant market is in the VI. It is designed to assess which markets are functioning competitively and which are not and to identify the causes of a lack of competition and to propose the appropriate remedy to ensure effective competition. This framework for ex ante regulation reflects some of the basic principles of the European Commission’s common regulatory framework for electronic communications networks and services. The European framework follows a methodology of market definition and analysis which equips Regulators to make well-reasoned decisions to apply ex ante regulation based on a stable and predictable framework rather than in an ad hoc manner. In the case of the VI it is necessary to identify which markets require analysis and possible ex ante regulation rather than

simply to translate the European system across to the VI. The European system presents a framework, which has been implemented in or adapted to a variety of countries of different sizes and market characteristics. Therefore it can be adapted to the needs and competitive nature of the VI allowing for local circumstances.

5.4 It is essential that ex ante regulatory obligations should only be imposed where a defined market is not effectively competitive. This would be in the case of a market where one or two undertakings have significant market power. For the purposes of this framework, as is the case in the European Commission Guidelines on market analysis and the assessment of significant market power<sup>4</sup>, the definition of significant market power is equal to the concept of dominance. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive over a short to medium timeframe (normally, one to two years) and thus whether any lack of effective competition is durable. Under the European framework, newly emerging markets are traditionally not subject to regulatory pressure, where de facto the market leader is likely to have a substantial market share. Market definition and competitive structure change over time therefore it is necessary to conduct market reviews on a periodic basis. If one or more public suppliers are found to have significant market power in a relevant market, following the market analysis, specific obligations (including obligations of non-discrimination) may be imposed to address the market failures in that market. The range of remedies may include granting access to specific services and/or facilities to competing public suppliers, price regulation, requirements of non-discrimination, transparency, accounting rules (accounting separation), cost accounting etc. depending upon the nature of the competitive problem. As a result, competitive forces assisted by a regulatory framework should bring the desired benefits to end users.

5.5 The objective of the framework is to ensure that the communications sector functions competitively to the maximum benefit of consumers in the VI. Therefore the purpose of the market analysis is to ensure that the Regulator:

- i) Ensures that all users derive maximum benefit in terms of choice, price and quality
- ii) Ensures that there is no distortion or restriction of competition in the electronic communications sector
- iii) Encourages efficient investment in infrastructure and the promotion of innovation

This framework is aimed at ensuring effective competition in the VI telecoms markets and in guaranteeing legal certainty.

The first step in the market analysis will be to define the market under review.

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<sup>4</sup> European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services (2002/C 165/03) <maybe web link could be useful?>

## **6. Market definition**

- 6.1 The market clusters set out for market analysis will be subject to formal market definition. Each market cluster may be formally defined as a market or number of markets. Under market definition both the product and service markets and the geographic market is defined.
- 6.2 A product and service market is usually defined through the demand-side and supply-side substitutability tests. These tests take the case of a hypothetical monopolist who increases price by 5-10% and can profitably sustain this price increase. This test is also called the small but significant non-transitory increase in price test or SSNIP test. The demand-side substitutability test assesses whether there are any substitutes to a product in a defined market. So for example, if the product in question is fixed line broadband access, then if the hypothetical monopolist was to increase price by 5-10% and there were to be little change in demand such that the price increase is profitable to the monopolist, then the market would be defined as fixed line broadband access. If as a result of the price increase there were to be a significant reduction in demand and a switch to another product such as mobile broadband access then the market would need to be widened to include both mobile and fixed broadband internet access. The definition of this market would then be continuously widened until no further substitution took place. A supply-side substitutability test assesses if there are close substitutes to the seller. So if the hypothetical monopolist were to increase price, then the test is to assess if any other suppliers can enter the market to supply the product or an alternative product. The test is again, can the hypothetical monopolist sustain a profitable price increase and if not then the market needs to be widened. Demand-side substitutability focuses on the delineation of the market from the buyers point of view and supply-side substitutability may help to strengthen the market definition by identifying the number of market participants.
- 6.3 A geographic market is defined with respect to the scope of service within a defined territory, within which competitive conditions are sufficiently similar. In many instances the geographic market would coincide with the territory that the licensees are licensed to operate their networks or provide their services. In theory, sub-national markets could be defined. However, because of the size of the VI, the necessity to use resources of the TRC and market players efficiently, and the fact that there are no sub-national licences, it is unlikely that it might be the case in the VI. The TRC may also define transnational markets.
- 6.4 The next step is to establish whether any public supplier is dominant on the market.

## **7. Designation of significant market power and dominance**

- 7.1 As per Section 26 (6) of the Act the TRC must hold a public consultation before determining that a public supplier is dominant. The TRC must publish details about the consultation in the Gazette, on the TRC's website and in a VI newspaper at least fourteen days before the commencement of the consultation.
- 7.2 Section 26 (3) of the Act states that "the Commission may determine that a public supplier is dominant with respect to a telecommunications network or a telecommunications service where, individually or jointly with other, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors and users". This definition is very

much in line with the European definition in the Framework Directive<sup>5</sup>. The Directive goes on to explain that two or more undertakings can be found to be in a joint dominant position even if in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated effects. The structure of this market is likely to display the following characteristics:

- Mature market
- Stagnant or moderate growth on the demand side
- Low elasticity of demand
- Homogeneous product
- Similar cost structures
- Similar market shares
- Lack of technical innovation, mature technology
- Absence of excess capacity
- High barriers to entry
- Lack of countervailing buyer power
- Lack of potential competition
- Various kinds of informal or other links between the undertakings concerned
- Retaliatory mechanisms
- Lack or reduced scope for price competition

This list is not exhaustive or prescriptive, it simply highlights the kind of evidence required to support the assertion concerning the existence of joint dominance.

7.3 Section 26 of the Act empowers the TRC to designate an undertaking as dominant on the basis of market share as explained in section 2.1. In line with the European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services<sup>6</sup>, firms with market shares of no more than 25% are unlikely to enjoy a position of significant market power. Firms with market shares over 40% are likely to have significant market power and be dominant. In line with established case law, market shares over 50% are evidence of dominance. A firm with a large market share may have SMP and be in a dominant position, if its market share remains stable over time. If a firm is gradually losing market share, this may be a sign that the market is becoming more competitive but it does not mean that the firm still does not have SMP. Similarly, fluctuating market shares may be indicative of a lack of market power in a defined market. Market shares are not wholly indicative of economic strength in a market and hence other factors will be taken into account when assessing dominance and market power.

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<sup>5</sup> Article 14 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, Undertakings with Significant Market Power <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:HTML>

<sup>6</sup> European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services (2002/C 165/03) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>

7.4 Where a market is deemed effectively competitive no obligations shall be imposed or obligations shall be withdrawn. Where a market is deemed not effectively competitive, the TRC shall identify the undertakings with significant market power on that market (dominant undertakings) and shall normally impose, amend or retain regulatory obligations.

7.5 Regulatory intervention should, as a matter of best-practice, be proportionate to the problem. Therefore, it is necessary to have access to information concerning each market which may be susceptible to anti-competitive behaviour to assess the need for and impact of regulatory intervention to ensure that any regulatory intervention is as well-targeted and justified as possible. However, the TRC will have to take into account the availability of information on the market and the need to exercise judgement, where information may not be available at all or at the required level of granularity.

**Question 4:** Do you have any comments on the proposed market definition and analysis procedure?

## **8. Remedies**

8.1 The final step under this process is to apply a remedy or remedies if a public supplier is determined dominant on a market. Further to the general right of the TRC to impose appropriate remedies as set out in Section 26 (4) of the Act (reproduced in paragraph 2.2 above), under Section 29 (2) of the Act, the TRC is empowered to establish price regulation regimes where a licensee has a dominant position in the relevant market. In general, remedies will be applied only when necessary and will be proportionate to the weight of the competitive problem. The remedy applied may include price regulation of the retail and/or wholesale market but the full range of remedies will be considered in each case depending on the source and nature of the identified competitive problem.

## **9. Conclusion: Recommended Relevant Market Clusters for Review**

9.1 It is the view of the TRC as set out in section 4.3, that the following market clusters should be prioritised in order to deliver the maximum benefit to consumers within the minimum timescale:

1. Wholesale Call and SMS termination on individual fixed and mobile networks
2. Wholesale call termination to specific Caribbean destinations
3. Fixed Broadband Access (and fixed voice service; may include analysis of related wholesale markets)
4. International roaming in the Caribbean (retail and wholesale)
5. Multi-channel TV services and distribution of broadcasting content
6. Wholesale International connectivity

9.2 Comments on the list of relevant market clusters are welcomed during this consultation period and the TRC will take into account arguments put forward to amend the list where necessary. Despite the relatively small size of the VI telecoms market, a regulatory framework needs to be put in place to ensure stable and predictable regulation to the benefit of consumers and public suppliers alike. The same regulatory issues will arise in the VI as in the largest telecoms market for example, issues

of on-net dominance<sup>7</sup>, but the key in a small market such as the VI is to have the structure in place and to be able to react quickly with the appropriate remedy or safeguard mechanism.

9.3 The TRC therefore proposes to define and analyse these market clusters. All licensees will be required to submit information under the Act and will be allowed adequate time to do so. The TRC will analyse each market for evidence of significant market power. The TRC will take an evidence based approach to determining the competitiveness of each market (having regard to possible limitations of data available) and will take into account international benchmarks and best practices. The guiding principle for assessing and addressing any dominance must be the ultimate impact on consumers.

## 10. Consultation Response

The Commission invite responses to this document and to the following questions. This list of questions is not intended to be exhaustive and responses may address these and other questions and may share views on all aspects of the framework for ex ante regulation in the VI.

**Question 1:** Are there other market areas with competitive problems other than those identified under 4.2 that should be addressed through the market review?

**Question 2:** Do you agree with the list of market clusters set out in 4.3 for analysis by the TRC?

**Question 3:** Is this the appropriate prioritisation of markets for review?

**Question 4:** Do you have any comments on the proposed market definition and analysis procedure?

**Consultation responses should be submitted to the TRC by 1 November 2010:**

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