

VIRGIN ISLANDS

DETERMINATION BY THE TELECOMMUNICATIONS REGULATORY COMMISSION UNDER SECTION 26 OF THE TELECOMMUNICATIONS ACT, 2006

DETERMINATION OF DOMINANCE FOR THE PROVISION OF FIXED BROADBAND SERVICE 2015

[Gazetted 2015]

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

Introduction

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

Cable and Wireless (BVI) Ltd¹ (“LIME”)

Purpose of this Determination

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

Market Review Framework

5. To determine whether a licensed public supplier or public suppliers are dominant in the relevant markets, the Commission has carried out the following three stages of analysis:
 - Definition of the relevant market;
 - Analysis of competition in the relevant market; and
 - Identification of dominant operator or operators, if any.

¹ Cable and Wireless (BVI) Ltd trades as LIME

6. At each stage the Commission has relied upon well-established economic principles and tests to define markets, such as the Small but Significant Non-transitory Increase in Price (“SSNIP”) test to assess demand and supply side substitution. It looks at relevant factors to determine the level of competition, such as barriers to entry and expansion, and market shares.
7. Throughout the three stage process, the Commission has applied an analytical framework which is set out in the Commission’s Market Review² and is consistent with the Act and with international best practice in areas in which the Act might be silent. The tools and principles employed by the Commission are similar to those employed by other regulators and competition authorities, including the European Commission (“EC”) and OFCOM, the telecommunications regulatory authority of the United Kingdom.

Identification and determination of the relevant markets

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

Product dimension

10. For the purposes of the Market Analysis, broadband services include the provision of broadband internet service to residential and non-residential (business) customers at a fixed location and the possibility of allowing network access to other public suppliers.
11. Fixed retail broadband services include the provision of internet service to both residential and non-residential (business) customers.
12. Fixed wholesale broadband services allow the opening up of the fixed network to other licensed public suppliers to use some part of that network to offer retail internet service.
13. Fixed retail broadband services can allow customers to access the internet via speeds of up to 100 megabits per second (Mbp/s). Consumers can currently purchase speeds of up to 48 Mbp/s in the Virgin Islands.
14. The retail market for fixed wireline broadband is deemed to be separate from the retail markets for fixed wireless and mobile broadband service.
15. Similarly, the wholesale market for fixed broadband access is deemed to be separate from the wholesale markets for fixed wireless and mobile broadband access.
16. The Commission considers that there are limited demand-side substitution services for fixed retail broadband services taking into consideration mobile broadband services. Faced with a SSNIP, the majority of buyers of retail fixed internet services, either business or residential subscribers, are unlikely to entirely substitute another product such as mobile broadband for a fixed internet connection. This is because there is no other broadband

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

product available on the market which offers the same level of speed, resilience in the event of natural disasters and unlimited use. The consumer perception of fixed broadband is that it can offer a faster and more reliable connection to the internet, whether that is the level of service that is offered or not. The Commission has considered fixed wireless as a potential demand side substitute to fixed wireline broadband but sees that this product has portability characteristics and is not available in all the same locations at the fixed wireline network. The Commission notes that the development of this product is still in its relative infancy in the VI.

17. The Commission considers that there are no supply-side substitutes for fixed broadband. Faced with an increase in the price of fixed retail broadband services, another public supplier cannot step into the provision of fixed broadband service to offer the same maximum connection speeds without undertaking long-term investment in a fixed fibre network.
18. The market for wholesale fixed broadband access is not yet developed and therefore no demand-side nor supply-side substitutes yet exist.
19. The Commission considers that fixed wireless is a potential demand side substitute where customers demand the levels of speed offered by fixed wireless but is not a demand side substitute at the higher connection speeds and is therefore not a complete demand side substitute.
20. Overall, the Commission considers that there are no demand and supply side substitutes to the provision of fixed retail broadband and no demand and supply side substitutes to the provision of fixed wholesale broadband in the VI.

Geographic dimension

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

Conclusion on the relevant markets

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

Identification and determination of dominance in the relevant markets

23. Having defined the relevant markets, the Commission then proceeded to analyse the extent of competition in each market. Section 26 (3) of the Act refers to a public supplier as dominant with respect to a telecommunications network or a telecommunications service where, “individually or jointly with others, it enjoys a position of economic strength

affording it the power to behave to an appreciable extent independently of competitors and users”.

24. As dictated in Section 26 (3) of the Act and as outlined in the Market Review, the following factors were considered in the determination of dominance:

- The relevant market;
- Technology and market trends;
- The market share of the public supplier;
- The power of the public supplier to introduce and sustain a material price increase independently of competitors;
- The degree of differentiation among networks and services in the market; and
- Any other matters that the Commission deems relevant.

As the analysis in the first Market Analysis and the second Market Analysis set out:

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

- a) **The relevant market** has been defined as the retail market for fixed broadband services.
- b) **Technology and market trends** – LIME’s fixed network consists of fibre and copper wire. LIME has upgraded its network to offer superfast broadband which offers a fibre connection reaching closer but not directly to residential premises. The global trend is towards next generation fixed broadband networks whereby fibre is used to offer connectivity as close to the customer premises as economically feasible.
- c) **The market share of the public supplier** 100% is attributable to LIME. LIME is seen by the public as the only provider of fixed line broadband services.
- d) **The power of the public supplier to introduce and sustain a material price increase independently of competitors.** As the only provider of fixed broadband service, LIME is able to introduce and sustain price increases. LIME has recently introduced the second price increase of over 10% in the past five years.
- e) **The degree of differentiation among networks and services in the market.** LIME has the only fixed line network in the BVI which is capable of offering speeds of up to 48 Mbp/s and is the only provider of fixed broadband services at this speed. Fixed wireless and mobile broadband are not deemed to be substitutes to fixed broadband due to the lower connection speeds offered.
- f) Any other matters that the Commission deems relevant.
 - a. **Barriers to entry.** Whilst all public suppliers have unitary licenses which allow the offering of service by any technology, a fixed line network or access to a fixed line network is required to enter the market for fixed retail broadband. Building a fixed line network or configuring an existing fixed line network to offer retail broadband network can take significant investment, time and resources which could constitute a barrier to entry. Similarly, as identified above there is no active market for fixed wholesale broadband access enabling other public suppliers to access LIME’s

network to offer retail service. The Commission therefore believes that at the time of publication barriers to entry may persist.

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

- a) **The relevant market** has been defined as the market for fixed wholesale broadband access. The analysis in section 1 of the first Market Analysis concluded that it was not necessary to divide the market between wholesale physical network access and wholesale non-physical network access in a market where there are no wholesale products currently available. It is hoped that this broad market definition will allow public suppliers the flexibility to demand and supply the type of wholesale product that is most needed.
- b) **Technology and market trends.** Different wholesale access approaches work in different markets. In some markets full unbundling of the local loop has enabled competition to develop in the face of incumbent market power, whereas in other markets bitstream access can offer the degree of access required to enable competition to develop. The technology available allows operators to access an incumbent network at different levels so that a whole range of access choices should be available to operators wishing to offer a competing service. The trend in next generation network provision is geared towards both investment in high speed networks and encouraging competition through regulated access.
- c) **The market share of the public supplier.** In this market, if LIME were to offer a fixed wholesale broadband product it would have 100% market share.
- d) **The power of the public supplier to introduce and sustain a material price increase independently of competitors.** In this market, if LIME were to offer a fixed wholesale broadband product there are no substitutes so it would be able to profitably increase prices above the competitive level.
- e) **The degree of differentiation among networks and services in the market.** LIME operates the only fixed network on the island which offers a fixed broadband service. Fixed wireless and mobile networks are not seen as a substitute at the wholesale level because fixed wireless and mobile networks cannot offer the same maximum connection speeds as a fixed wireline network and therefore a wholesale consumer would not be able to offer the full range of broadband products.
- f) Any other matters that the Commission deems relevant.
 - a. **Barriers to entry.** In order to offer wholesale broadband access, a public supplier needs to have a fixed network which is configured for broadband delivery. As above, this requires significant investment, time and resources which may be limited in a territory the size of the VI. Therefore the Commission believes that the barriers to entering this market may be high.

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

The Determination

Market share

25. LIME has 100% of the fixed retail broadband market and 100% of the potential fixed wholesale market for broadband access.
26. The Commission sees that there are no other factors prevailing in the VI which would suggest that LIME does not have significant market power in the provision of fixed retail broadband services and fixed wholesale broadband access. The Commission therefore declares LIME as dominant in the following markets respectively:
 - LIME is dominant in the market for the fixed retail broadband service.
 - LIME is dominant in the market for fixed wholesale broadband access.

Summary and conclusions on dominance

27. The current monopolistic structure of the relevant markets provides a strong presumption of dominance on the behalf of LIME in the markets for the provision of fixed retail broadband service and fixed wholesale broadband access.
28. The Commission considers that, in the absence of regulation, LIME is incentivized to charge monopoly prices for the provision of fixed retail broadband service and wholesale broadband access, which could be contrary to the principles of fair competition underlined by the Act. A price increase on 1 November 2015 provides further evidence of LIME's dominant position. The Commission is concerned that LIME's BVI dominant position restricts consumer choice and harms consumer welfare as consumers suffer price increases and connection speeds below the level sold.
29. Having regard to the above, in accordance with section 26 of the Act, the Commission hereby determines that:
 - LIME is dominant in the market for fixed retail broadband service.
 - LIME is dominant in the market for fixed wholesale broadband access.

Issued by the Telecommunications Regulatory Commission on the 7th day of December, 2015.

(Sgd.) Guy L. Malone
Chief Executive Officer