



Government of
The Republic
of Vanuatu



TRR
Telecommunication &
Radiocommunication
Regulator

PO Box 3547
Port Vila
Vanuatu
Tel: +678 27621

Regulator's Feedback on Comments relating to TRR Draft Competition Guideline

1 Purpose

- 1.1 This Report contains Feedback on comments received as part of a Consultation on Draft Competition Guidelines issued on 13th June 2011. The consultation ended on 21st July 2011. Only one submission was received from Telecom Vanuatu Limited (TVL).

2 Background

- 2.1 The purpose of the TRR Competition Guidelines is "to ensure a transparent and predictable policy" by providing an "outline of TRR's approach to enforcing Part 5 of the Telecommunications and Radiocommunications Regulation Act No. 30 of 2009 (the "Act") that will assist TRR to achieve the objectives of the Act which are to:
- a) Facilitate the development of the telecommunications sector; and
 - b) Manage radio-frequency spectrum,
In order to promote national, social and economic development.

3 Summary of Key Points raised and respective views provided by TRR as response

- 3.1 **Comment on section 1: Purpose:** “Clearly the Guidelines are not legally binding on any party. The Act takes precedence for all legal interpretations. The Guidelines should not attempt to expand on the Act or interpret the Act out of appropriate context, as this would be inappropriate.”
- 3.2 **TRR response:** As mentioned in Section 1.1 the guidelines’ purpose is to provide guidance on how TRR will implement Part 5 of the Act. It intends to reduce the uncertainty on how the law will be implemented by TRR. We agree that the Act takes precedence for all legal interpretations. As mentioned in Section 1.1, “these guidelines do not legally bind TRR.”
- 3.3 **Comments on section 2: The market:** The following key concerns and comments were received:
- a) concerns about lack of clarification on the kind of data to be used or on what approach TRR would use should no data is available;
 - b) Concerns on the use of market participants’ own views on their product to analyze demand-side substitution;
 - c) Request to clarify who has the burden of proof regarding the definition of the relevant geographic market when this may not correspond to the national market;
 - d) Concerns regarding the possibility of considering bundled products as the relevant product because this may imply that supply-side substitution considerations may overrule demand-side considerations.
- 3.4 **TRR response:** Our response for each of the points above follows:
- a) The source of data will depend on the particular case at hand. TRR will take care to collect information that will assist to establish the boundaries of the product market and that truly reflect the market conditions of the case at hand. In addition, TRR may decide to support its analysis with precedents from other jurisdictions if these are deemed relevant to the case under consideration.
 - b) TRR may decide to use the market participants’ own views about their product if it sheds light on the boundaries of the relevant market. Obviously, this would be just one among many considerations TRR would use to define the boundaries of the market;
 - c) As indicated on section 2.19 of the guidelines “TRR will assume that a market is national unless proven otherwise. The burden of proof lies with the person requesting a decision under Part 5 by TRR.”
 - d) When determining the relevant product market, considerations of supply-side substitution will complement demand-side substitution considerations. The use of bundled products as relevant product market will depend on the particular case at hand. In these cases, the use of the SSNIP test would still apply.

3.5 **Comments on section 3: Determination of dominance:** The following key concerns and comments were received:

- a) Concerns about the definition of bottleneck facilities in the guidelines not being in line with the Act;
- b) Concerns about the list of possible facilities that TRR may designate as bottleneck facilities provided in section 3.4 of the guidelines;
- c) Concern about the approach outlined in the guidelines to assess market power (section 3.5 of guidelines) which “is dealt with in the telecoms act which refers to gross revenue.”;
- d) Concern about a divergence between the Act and the guidelines regarding the link between control of a bottleneck facility and market power: “...the linkage between bottleneck ownership and market power should be reconsidered as this is not linked with the Act.”
- e) Concern about the use of market share as a factor to consider in the assessment of market power;
- f) Comment indicating factors to consider when determining market share should be on a case-by-case basis and following the definitions in the Act;
- g) Comment indicating guidelines do not address issue of anti-competitive pricing.

3.6 **TRR response:**

- a) Section 3.3 of the guidelines reproduces the definition of a bottleneck facility provided in Part 1 of the Act.
- b) Comment regarding section 3.4 of the draft guidelines is noted. Our intention is to flag a sample of facilities TRR may consider as candidates for bottleneck designation. We further noted the comment regarding cellular towers as being duplicated in Vanuatu and as such does not fall into this definition. This section has been revised in the Final Competition Guidelines.
- c) We presume the reference to gross revenue refers to the first criterion prescribed in the Act under section 21 (1) (a) to designate a service provider as dominant which we refer in the guidelines as the “bright-line test.” The Act prescribes this rule for the determination of dominance not for assessing market power. Your comment appears to confuse these two concepts.

- d) We do not agree with the comment; while the Act does not define market power explicitly, in Section 21 (1b) of the Act a second option for the designation of dominance is described. This second option establishes two conditions. First, either the service provider has a “position of economic strength or controls a bottleneck facility”, AND second, such strength or control affords the service provider the power to behave to an appreciable extent independently of competitors, customers, end users or potential competitors.” In our guidelines we labelled this second option “Market Power” and reproduced the aforementioned criteria following precisely the Act (see section 3.1 (b) of the guidelines). As explained above, this second criterion which we labelled in the guidelines, “Market Power” is linked with the control of a bottleneck facility in agreement with section 21 (1b) in the Act.
- e) As explained in section 3.5 of the guidelines, market share would be only one of a multiplicity of factors to assess the degree of market power. Because telecommunications markets usually exhibit high concentration, a firm with a high market share in an already highly concentrated market is likely to have a “position of economic strength.” (See section 21 (1b) in the Act). Of course TRR will use market share considerations in conjunction with others when assessing dominance with the second criterion described in the Act in 21(1);
- f) TRR agrees;
- g) Guidelines do address this issue in the section on abuse of dominance (section 5).

3.7 Comments on section 5: Abuse of dominance: Comments are summarized below:

- a) Comment indicating “TRR suggests that a new entrant needs to be prepared and able to enter into substantive discussions on the form of any interconnection and that it should carry its own risk in market entry. An existing operator should not be disadvantaged or suffer any impact or potential loss through the entry of a new operator as a result of interconnection with that operator.”;
- b) Comment on alleged predatory pricing and margin squeeze by rival firm.

3.8 TRR response:

- a) TRR did not suggest or imply what is set out in the comment.
- b) TRR notes that the comment is not a comment about the guidelines.

3.9 Comment on section 6: Pre-approval of certain conduct:

- a) “...this section needs to be further clarified as a dominant operator is unlikely to volunteer for pre-approval if it can take action and then have considerable delay before TRR deal with a complaint.”

3.10 TRR response:

- a) The comment appears to have misinterpreted 6.14 and 6.15 of the draft guidelines which refer to section 24 of the Act. Section 24 permits any person to request pre-approval of an agreement or conduct prescribed by section 22 or 23 which may not have an adverse effect on competition to request pre-approval of such conduct. As the Act indicates, this is an option which persons may or may not exercise. Importantly, TRR wants to clarify that a pre-approval should not be taken to amount to a contravention of any provision under Part 5 of the Act.

3.11 Comment on section 8: The process for lodging and assessing a complaint:

- a) “..suggest that such a process should not be overly burdensome on the applicant. The proposed process requires the involvement of legal support at an early stage and this should be reconsidered. One the issue of evidence it is often difficult for one operator to gather full evidence about another. This is why the Act allows for powers of effective discovery for the TRR.(...).. To state that ‘a complaint will not be accepted without all of the evidence required for TRR to properly assess it’ seems to move the burden of proof away from the TRR who has the power to discover.”

3.12 TRR response:

- a) Because TRR has limited resources, we need to allocate these to those allegations that are substantiated with sufficient evidence. Once the information accompanying the complaint is received, TRR has three options, (1) do not pursue further investigation due to lack of evidence of any violation of Part 5; (2) request more information from the party filling the complaint before making a decision; or (3) Initiate an investigation. It is only when TRR decides to initiate a formal investigation that it will use the discovery powers conferred upon us by the Act. Of course the new information collected by TRR will complement the information that accompanied the complaint. The burden of proof will depend on each case at hand; some conducts are *per se* illegal, while others need to prove they are anti-competitive.

3.13 Comment on Annex 1: Template for submitting a complaint:

- a) “...has already attempted to utilize this template and found that it is difficult to manage. At the preliminary stages it should not require an operator to have such a level of legal input in doing so it incurs substantial costs. The template should be simplified...”

3.14 TRR response:

- a) TRR had provided the template in its simplest form to be able to gather information at least at a minimum. TRR is able to assist with clarifications where the party completing the document is having difficulties understanding the requirements or questions.