



TRR Response Report to Comments on Market Definitions

Background

TRR released a Consultation Paper on 16 October 2015 that set out for public comment draft market definitions for the purpose of regulation under the Telecommunications and Radiocommunications Regulation Act 2009 (“the Act”). The Consultation Paper proposed to update the list of retail markets defined by the previous administration in 2008/09, while also signalling a change in approach to focus first and foremost on wholesale markets. In total TRR proposed to define 11 markets and listed them in order of priority as:

- a) Wholesale access to international bandwidth (Market 11)
- b) Wholesale leased line services (Market 10)
- c) Wholesale broadband access (Market 9)
- d) Wholesale market for call termination on individual networks (Market 6)
- e) Wholesale mobile access and call origination services (Market 7)
- f) Retail internet access services (Market 4)
- g) Retail mobile services (Market 3)
- h) Retail national voice calls (Market 1)
- i) Wholesale fixed access and call origination services (Market 8)
- j) Retail leased lines (Market 5)
- k) Retail international voice calls (Market 2).

Comments were invited from interested parties on the document as a whole and, specifically on a set of 12 questions that were identified in the document. The deadline for submissions was set at 27 November 2015, by which time three responses had been received from:

- Telecom Vanuatu Limited (“TVL”);
- Digicel (Vanuatu) Limited (“Digicel”); and
- Pacific Islands Regulatory Research Centre (“PIRRC”).

Overall Response

The responses outlined in the table format below are the responses to the 12 specific questions raised in the Consultation Paper. These detailed responses provide evidence of divergent views regarding the need for market definition and the likely implications for future regulation of those markets that have been defined.

- TVL asks that the market definitions take full account of the “profound changes” that are taking place in the telecommunications markets in Vanuatu, especially increasing convergence and increasing competition from Over The Top (OTT) players.
- PIRRC argues that the approach to market definition is flawed because it does not take adequate account of new business models that are emerging, especially those dependent on advertising revenue, and as a result that competition in many of the markets may be stronger than the Public Consultation indicates. The regulator needs to understand the economics (the interplay between costs, prices and demand) in order to understand the markets. It also challenges TRR to articulate the “goal of the current regulatory analysis of the hypothetical wholesale markets”.
- Digicel contends that the intention of the Act is “very limited circumstances in which *ex ante* regulation may be applied” and, in view of the rapidly changing telecommunications landscape, argues that there is no purpose in defining markets in advance of specific competition issues being identified. Digicel suggests that the major such issue at present is access to the Interchange submarine cable and submits that “if the resources that have been applied to the preparation of the Consultation Paper had been applied to the expeditious resolution of those complaints, then they may have been resolved more quickly to the benefit of the industry and the customers it serves.” Digicel also states that “the Consultation Paper contains little if any actual evidence to support the conclusions that have been reached” and, citing the example of the New Zealand Commerce Commission, “does not follow the rigorous methodology that is applied in other markets”.

Before addressing the comments made on the specific questions raised in the Consultation Paper, TRR first addresses these general issues raised by respondents.

1. The growth of OTT players is part of the reason for TRR favouring a move away from the regulation of retail markets (which are now more obviously competitive in the light of OTTs) and towards wholesale regulation of those network facilities and services that are required for service providers to compete at the retail level. Furthermore TRR recognises that, when these markets are analysed in more detail, it may well be the case that OTTs, with their various and different business models, are found to be providing effective retail competition without the need for additional wholesale remedies. In TRR’s opinion this constitutes a very good reason for defining markets now and then conducting analysis to determine the extent of effective competition within them.
2. TRR does not accept Digicel’s view that the Act establishes “very limited circumstances in which *ex ante* regulation may be applied”. The Act specifically allows for TRR to define markets (Section 20) and designate dominant service providers within those markets (S.21) with the aim of preventing anti-competitive practices (S.22) and abuse of dominance (S.23). Nowhere in these sections is it stated whether regulation (i.e. remedies for anti-competitive practices or abuse of dominance) should be applied *ex ante* or *ex post*. However it is clear from S.21, and specifically sub-S.21(3), that the TRR may define markets and designate dominance *ex ante* in anticipation of a future need to regulate dominant service providers in those markets.

3. The real question therefore is how far in advance of an anticipated need to regulate is it appropriate for TRR to define markets and assess dominance? There are several possibilities:
 - a) Making a decision on markets and dominance now
 - b) Making a preliminary decision on markets and dominance now, but subject to review whenever an identifiable need for regulation appears (e.g. by way of a complaint)
 - c) Making a preliminary decision on market definition now, then reviewing each market in priority order so as to make decisions on dominance (and remedies for dominance) on a progressive basis.
4. Given the concern, expressed by both Digicel and TVL, that access to the Interchange submarine cable should be regulated, it is concomitant upon TRR to define the relevant market and assess dominance prior to any subsequent regulation should it be required. TRR is therefore of the view that the approach c) described above should be followed with individual markets being analysed (and if necessary redefined) as and when there is cause to do so. The market for access to international bandwidth is a priority for such analysis as it is a previously undefined market.
5. As Digicel also points out, Part 6 of the Act deals separately with interconnection and its regulation, so there is arguably no pressing need for analysis of interconnection markets (i.e. call termination and call origination). This leaves two other markets that TRR considers to be important, although of lesser priority than the market for access to international bandwidth, namely: wholesale broadband access and wholesale leased lines. In response to points raised by TVL these markets will be redefined so as to be technology neutral, and hence include *inter alia* fixed, mobile, microwave and satellite technologies.
6. For all the remaining markets, TRR proposes at this stage simply to define the market whilst leaving detailed market analysis and determination of dominance to a future occasion when need for such analysis may arise.

TRR would like to remind the respondents that throughout this Paper only competition regulation, as defined in s.22 and s.23 of the Act, is being considered. Other forms of regulation (e.g. consumer protection) may also be needed, but these forms of regulation were outside the scope of this Paper.

TRR would also stress that this Paper indicated TRR's preferred approach, based on international regulatory best practice, to reviewing and defining relevant markets. TRR's approach is and will continue to be evidence-based and any such regulation or regulatory intervention will continue to be undertaken in consultation with the relevant and appropriate parties.

This Paper does not limit or restrict TRR's powers under the Act to regulate on an ex-ante or ex-post basis in response to a specific need or complaint.

Topic	Comment	Proposed TRR Response
<p>OF REGULATORY MARKET DEFINITION</p> <p>Please comment on the proposed approach to market definition based on the limits of product substitutability</p>	<p>TVL argues that one limitation of substitutability test to define markets is the "so-called cellophane fallacy" that results in unduly broad market definition. It is also concerned of the dangers of "false positives" where conduct that does not cause actual damage is wrongly punished.</p> <p>Digicel submits that any market analysis must be undertaken in accordance with international best practise and in the context of a specific suspected abuse of dominance.</p> <p>PIRRC argues that business models need to be taken into account as well as substitutability of their service offerings. For example, it could be said that two different VoIP providers are in different markets if one were to be advertising based and the other subscription based.</p>	<p>TRR agrees that regulatory market analysis should follow international best practice. It has sought to follow such practice while also recognising (as all the respondents do at different times) that a fully-fledged market analysis process such as that of the European Union would be disproportionate to the circumstances of Vanuatu.</p> <p>With that caveat, there appears to be strong support for the approach to defining markets in terms of substitutability. The TRR therefore intends to retain this approach, whilst also being mindful of the different business models service providers bring to each market.</p>
<p>Are there any reasons not to define all telecommunications markets in Vanuatu as national markets?</p>	<p>TVL acknowledges that most countries have defined national markets, but suggests that network deployment and market shares may vary between regions, and this should be reflected in the competition analysis.</p> <p>Digicel argues that it is not possible to make such a generalisation. The geographic dimension of a market will depend on the specific circumstances that are the subject of analysis.</p> <p>PIRRC supports a presumption of national markets over against smaller markets, but it also points to the European Union in arguing that a multinational market is the most appropriate structure to deliver value to consumers.</p>	<p>National markets are a compromise between the desire for greater granularity (as proposed by TVL) and the desire for scale economies and efficiency (as proposed by PIRRC). In view of its almost universal adoption as a default position, TRR continues to consider it a good starting point. However, where persuasive evidence exists that a specific market has significant regional differences, TRR will be open to adopting an alternative geographical definition.</p>
<p>S PREVIOUSLY REGULATED BY TRR</p>		
<p>Do you agree with the proposal to combine fixed and mobile calls in the</p>	<p>TVL points to empirical evidence of substitutability between fixed and voice services: subscribers</p>	<p>TRR accepts Digicel's point that the positions in the Consultation Paper were established on the basis of broad</p>

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4	<p>definitions of Market 1 and Market 2? If possible, please provide evidence to support your answer.</p> <p>Please comment on whether it is necessary to retain a market for retail mobile services (Market 3) as well as including the same services in Markets 1, 2 and 4.</p>	<p>and traffic have migrated from fixed lines to mobiles over recent years and this trend is likely to increase with 3G and 4G mobile.</p> <p>Digicel says that no cogent evidence has been provided in the Consultation Paper that would support any conclusion; it has also had insufficient time to be able to commission its own independent analysis.</p> <p>PIRRC agrees saying that if mobile telephony and land lines are capable of the same transmission speeds and reliability, the difference in the underlying serving platform is irrelevant to an analysis of competition.</p>	<p>principles and without the support of detailed market data. The purpose of the consultation was to expose the hypotheses to scrutiny by the very operators who do have access to such data, and might use it either to support or rebut the hypothesis. This does not require commissioning independent analysis, although TRR would welcome any such analysis that Digicel or another operator may wish to provide. The correct place for that detailed analysis, as Digicel itself points out, is when there is a complaint about, or significant risk of, anti-competitive behaviour. That analysis will come later. For now it is regrettable that Digicel did not engage more fully with the draft proposals in the Consultation Paper on the basis of such evidence that is readily available.</p> <p>Given such analysis as TRR did present in the Consultation paper, and the support of TVL and PIRRC for the proposal, it intends to proceed on the basis that fixed and mobile calls should be combined in Markets 1 and 2.</p>
	<p>TVL agrees. There is only one-way substitution fixed-to-mobile; mobile network deployment is predominant; even for broadband a hypothetical fixed monopolist would find it difficult to increase prices above the competitive level in light of the wide availability of mobile and the fact that services are generally optimised for mobile usage. However, it is important that the growing penetration of smartphones and proliferation of OTT players is recognised in the market definition.</p> <p>Digicel says that no cogent evidence has been provided in the Consultation Paper that would support any conclusion; it has also had insufficient time to be able to commission its own independent analysis.</p> <p>PIRRC notes that Skype, for example, falls into markets 1, 2, and 3 but unlike many of its "competitors" it does not charge for many of its voice services. Similarly, market 4 could include Digicel, TVL and Facebook's free initiative.</p>	<p>TRR notes that the additional evidence presented by TVL and PIRRC cuts both ways. The one-way substitution from fixed to mobile is supportive of a separate mobile service market; the increasing use of OTTs such as Skype that can sit on either fixed or mobile platforms suggests the opposite.</p> <p>For now, TRR is minded to retain a separate mobile services market definition, but to keep this under review. Given the general view that retail markets can largely be left free of ex-ante regulation this decision will in any case have little or no impact on the market.</p>	

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5	Do you agree with the defined scope of these retail markets based on the application of the Hypothetical Monopolist Test (Figure 1)? If not, please provide evidence in support of your alternative view.	<p>TVL argues that point-to-point microwave links should be part of this market, as they are widely used for inter-island links and limit the ability of fixed operators to vary the price of leased lines. Also TVL argues that IP-based services should not be part of this market as they do not offer QoS guarantees.</p> <p>Digicel does not agree and claims that the Consultation Paper lacks the market data and analysis to support any conclusion; it has also had insufficient time to be able to commission its own independent analysis.</p> <p>PIRRC argues that, absent a finding of a lack of substitutability, separate markets for dedicated and non-dedicated transport should not be identified.</p>	<p>The responses of both TVL and PIRRC both question the definition of the market for retail leased lines. PIRRC questions whether there is substantive difference between dedicated and non-dedicated transport (presumably provided through retail internet access). Whilst there is certainly a degree of substitution, and arguably it is increasing, for some customers there remains a binding need for guaranteed quality of service that the Internet does not provide. Hence, in TRR's view, there remains for now a separate market for retail leased lines.</p> <p>TVL argues for the inclusion of microwave point-to-point links in this market. Insofar as these links are provided at a retail level TRR agrees that they are a direct substitute for fixed network leased lines. It is proposed that the market definition be changed to read to exclude the words "over the fixed network" so that it includes all leased lines however provided.</p>
OTHER CANDIDATE MARKETS FOR REGULATION			
6	Please comment on the wholesale components for each defined retail market as presented in Figure 2. Have any important wholesale components been omitted?	<p>TVL agrees with the different wholesale components.</p> <p>Digicel considers that there are also likely to be other suppliers in the supply chain, including applications providers and equipment providers. However, it is not possible to undertake any objective analysis in the abstract and without understanding the particular behaviour that is intended to be addressed.</p>	<p>TRR acknowledges that Figure 2 did not cover all possible suppliers in the supply chain, but the Figure looks only at the provision of network capacity (rather than equipment and applications).</p> <p>The original draft will be retained.</p>
7	Do you agree with the 5 wholesale markets that have been identified and, in particular, with the proposal that separate markets are defined for fixed and mobile services? Please provide supporting evidence for your views.	<p>TVL argues that technological developments and investments are resulting in increasing competition between copper, fibre and LTE networks call into question the relevance of the three markets (8, 9 and 10) that are based on traditional copper loops. Further, the number of xDSL lines is declining and there is no likely prospect of new entrants wanting LLU-based ADSL.</p> <p>Likewise PIRRC is concerned that infrastructure sharing will likely result in a disaggregation of</p>	<p>TRR accepts that there is a strong trend towards convergence, so that the same applications can be provided over different network platforms, including copper, fibre and mobile. It should be noted that the proposed definitions do not attempt to define separate markets based on technology, other than the distinction between fixed and mobile for access and call origination. These separate markets are retained for analogous reasons for identifying a separate retail mobile services market (Market 3). So long as that retail market exists, mobile access and call origination need to be separately identified as a necessary wholesale input. TRR acknowledges that this may not be necessary in the long-</p>

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8	Do you agree with the defined scope of these wholesale markets based on the application of the Hypothetical Monopolist Test (Figure 4)? If not, please provide evidence in support of your alternative view.	<p>infrastructure and create a "lower market" run by non-carriers. It describes the creation of a wholesale market for fixed line access as "an expensive experiment" disproportionate to a country of Vanuatu's size.</p> <p>Digicel does not agree, in view of the lack of local market data and analysis. It further notes that interconnection is defined in the Act and so any market definition in relation to the supply of interconnection is likely to be of little utility.</p> <p>PIRRC believes that the notion of a wholesale market for terminating access is a by-product of the creation of terminating access charges. To assume there is such a wholesale market without an analysis of whether other providers (and the incumbent) can profitably and sustainably maintain a business is premature, especially in small markets such as Vanuatu.</p> <p>TVL agrees. It notes that Digicel is also a fixed line provider.</p> <p>Digicel says that no cogent evidence has been provided in the Consultation Paper that would support any conclusion; it has also had insufficient time to be able to commission its own independent analysis.</p> <p>PIRRC points out that some of these markets do not currently exist and hence the market definitions are suspect. For example, the opportunity to buy access to the submarine cable from multiple providers is unknown, as is the degree of competition for dedicated lines.</p>	<p>term, and that very fact makes it a low priority to consider ex-ante regulation of wholesale access and call origination markets. Nevertheless TRR will retain this separation in wholesale market definitions pro tem.</p> <p>TRR proposes to retain the defined scope of these markets with the exception that the words "over fixed network infrastructure" should be removed from the definition of wholesale leased lines. This change is consistent with change proposed to the equivalent retail market definition.</p> <p>TRR agrees that some of the markets are notional in that they either don't exist or have only one supplier offering a more narrowly-defined service. However, the markets are defined so that potential future competitors could also be included without having to change the market definition.</p>
SUITABILITY AND PRIORITISATION			
9	Do you agree that currently each of the 11 candidate markets is suitable for ex-ante regulation?	TVL believes that ex-ante regulation should be limited to wholesale markets, and only applied as a last resort in retail markets. For retail markets 1,2,4 and 5 TVL believes that ex ante regulation is not required because markets are already	TRR notes and agrees with the view that ex-ante regulation should be restricted to wholesale markets unless or until that regulation proves ineffective in addressing dominance at retail level. See also Q10.

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		<p>competitive and the level of competition is high, including from OTTs and cross-platform competition.</p> <p>Digicel disagrees and further notes that the TRR would be acting <i>ultra vires</i> if it sought to impose ex ante regulation that was contrary to the requirements of the Act.</p>	<p>TRR also notes and agrees that its actions should always be consistent with the requirements of the Act.</p>
10	<p>Please comment on the suggestion that, once effective wholesale remedies are in place, the retail markets (Markets 1-5) may no longer be suitable for ex-ante regulation. Over what timescale do you envisage this change happening?</p>	<p>TVL agrees that retail regulation should only be imposed where wholesale regulation is ineffective over several years; nevertheless TRR should conduct regular market reviews before abolishing retail market regulation entirely.</p> <p>Digicel claims that there is no cogent evidence or analysis to be able to support any conclusions in relation to this question. Any responses would be little more than conjecture.</p> <p>PIRRC agree. It argues that the mobile service market is competitive with two providers and no evidence of collusion or unreasonable returns on investment. It also points to retail internet access provided through fixed line or mobile.</p>	<p>Although none of the respondents offers a timescale for peeling back retail market regulation, TRR is minded to retain the retail markets on the list of relevant markets while refraining from additional regulation of those markets unless there is clear evidence of the need to do so.</p>
11	<p>What are your views on the recommended procedure for the prioritisation of markets to be defined for the purposes of ex-ante regulation?</p>	<p>TVL believes that when prioritising markets TRR should take account of a) the presence of high and non-transitory barriers to market entry and b) whether the market tends towards effective competition within the relevant time horizon.</p> <p>Digicel considers that such ex ante regulation is likely to be <i>ultra vires</i>, unwarranted and likely to lead to adverse outcomes for the industry and the consumers it serves.</p>	<p>TRR notes that the two issues referred to by TVL have been taken into account in determining whether the markets are candidates for ex-ante regulation. As all of them pass those tests, it would not therefore be helpful to include these criteria in the prioritisation process. However, the extent of current or potential competition within the market has also been considered by TRR in the prioritisation process.</p> <p>TRR does not accept that ex-ante regulation is likely to be <i>ultra vires</i>, but it acknowledges that it can result in market distortion and hence all such interventions should be well justified.</p>
12	<p>Please comment on the proposed priority markets. If you wish to suggest an alternative set of priorities please provide</p>	<p>TVL agrees that wholesale access to international bandwidth should be top priority. TVL argues that wholesale broadband access and wholesale leased lines should be removed from the priority</p>	<p>TRR accepts that, with the broader definition of the leased line markets, both wholesale and retail, these are of slightly less importance than identified in the Consultation Paper. Nevertheless, both wholesale broadband access and</p>

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	supporting evidence.	<p>list because of fibre roll-out programmes and the availability of alternative platforms.</p> <p>Digicel says that no cogent evidence has been provided in the Consultation Paper that would support any conclusion; it has also had insufficient time to be able to commission its own independent analysis.</p>	<p>wholesale leased lines are important inputs to the retail internet access market, so TRR continues to give these markets priority.</p>



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