



# PUBLIC CONSULTATION DISCUSSION PAPER ON MARKET DEFINITION AND DOMINANCE 2023



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## 1. CONSULTATION PROCESS

The Telecommunications Radiocommunications and Broadcasting Regulator (TRBR) proposes to determine the submarine cable transmission capacity market as a relevant market pursuant to the power set out in Section 20 of the Telecommunications, Radiocommunications and Broadcasting Act (no 30 of 2009), (the “Act”). The Regulator also proposes to designate Interchange Limited (“Interchange”) as dominant in that market pursuant to the power set out in Section 21 of the Act.

TRBR has prepared a Discussion Paper setting out the reasons for these proposals and the way in which they would meet the criteria in the Act. The Discussion Paper is attached.

The Regulator hereby commences a public consultation on the proposals for market determination and designation of Interchange as dominant, and on the Discussion Paper.

I invite all interested stakeholders and members of the public to submit their views on the issues raised in writing. The deadline for submissions is **4:00 pm on Friday 21<sup>st</sup> April 2023**. All submission must be emailed to [consultation@trbr.vu](mailto:consultation@trbr.vu) or in hard copy delivered to the TRBR office or post office box. PO Box 3547, Port Vila, Vanuatu

It is the TRBR’s intention to publish all submissions by posting them on its website. Therefore, if any material in a submission is claimed to be confidential, a separate copy with the confidential material redacted, should also be submitted for publication.

Please contact the TRBR office on telephone number (678) 27621 should you require further clarification or information relating to this public consultation.

## 2. THE CONSULTATION PROPOSAL

1. Proposals to determine the market for submarine cable transmission capacity as a relevant market and to designate Interchange Limited (“Interchange”) as a dominant service provider within the submarine cable capacity market.

## 3. BACKGROUND

2. The *Telecommunications, Radiocommunications and Broadcasting Act (No. 30), 2009* (the Act) reflects public policy in relation to the development of the telecommunications and broadcasting markets in Vanuatu. As stated in Section 1 of the Act the objective is to facilitate development these sectors “in order to promote national social and economic development”. The Act contemplates that the prime means of development will be through market mechanisms based on competition between licensed operators who will have commercial incentives to invest in appropriate infrastructure and services.
3. Regulatory intervention is intended to be an exceptional step and is appropriate where there has been market failure or a reasonable apprehension of impending market failure. Market failure means no more than that markets are not effectively competitive and therefore cannot be relied upon to deliver the customer and end-user benefits that competitive markets are expected to provide. These include efficient delivery of modern and innovative services at lowest sustainable prices.
4. When a market has one or more dominant participants it has ceased to be effectively competitive. In those circumstances the role of the regulator is to intervene and to address, through proportionate regulation, the circumstances that are sustaining the dominance. This may take many forms, including adjustments to market structure and constraints on the behaviour of dominant participants so that they deliver services at prices that might have been expected if the market had been effectively competitive. Other forms of intervention are also available to the regulator to address abuse of a dominant position, including specific actions to encourage new competitive entrants into the relevant market.

5. As outlined in more detail below, the TRBR perceives that Interchange has a position of excessive power in the market for submarine cable transmission capacity services in Vanuatu, and, as a preliminary set of measures, is proposing to determine that as a relevant market and to designate Interchange as dominant within it. Once those preliminary measures are in place TRBR will be better enabled to make appropriate regulatory decisions and orders.

#### **4. STATUTORY PROVISION ON DETERMINATION OF RELEVANT MARKETS**

6. To designate a service provider as dominant in a market, it is first necessary to determine the boundaries of the relevant market. A service provider might be dominant in a narrowly defined market but not dominant in a more widely defined market. The initial issue is therefore to consider the boundaries of the market in question.
7. Section 20 empowers TRBR to determine relevant telecommunications markets for the purpose of the Act, having regard to several factors, namely.
  - (a) “The extent to which one telecommunications service can substitute another telecommunications service; and
  - (b) the extent to which end users will substitute one telecommunications service for another telecommunications service; and
  - (c) the extent to which a service provider not currently offering a telecommunications service may begin to offer that telecommunications service without incurring significant additional costs; and
  - (d) telecommunications services that are provided to the retail market; and
  - (e) telecommunications services that are provided to the wholesale market; and
  - (f) the geographical area served by the telecommunications service; and
  - (g) any other relevant matter
8. A Determination of a relevant market is a prerequisite to the existence of any contravention of a provision of Part 5 of the Act on Competition.

## 5. APPLICATION OF STATUTORY CONSIDERATION IN RELATION

9. The proposed market is defined by TRBR as the market for submarine cable transmission capacity services in Vanuatu. The market is for submarine cable connectivity between Vanuatu and other countries and within Vanuatu, between the various islands that constitute the country. This clarifies the geographical area of the services within the market, (Section 20(1)(f)).
10. The market is for wholesale telecommunications services. Transmission capacity is not a retail service and is not provided as such to retail customers or end users. It is provided by the cable operator and landing party to retail service operators who use the transmission as an input to provide retail services, notably internet access to mass market customers, but also private leased circuits to business customers who may need that service. This clarifies the application of Section 20(1)(d) and (e).
11. The issues covered by Section 20(1)(a), (b) and (c) relate to whether there are substitutes in the market, and whether that substitution is in terms of supply or demand. The boundaries of markets for competition analysis and regulatory purposes are set by determining the extent to which there is demand-side or supply-side substitution. When such substitution ceases or is insubstantial, the boundaries of the market have been reached.
12. In the case of international submarine cable capacity, there are no effective substitutes of either kind. Interchange has a monopoly on international cable transmission into and out of Vanuatu. No other cable operator is in a position to offer such a telecommunications service without incurring significant additional costs. Section 20(1)(c).
13. The only other international transmission service at a wholesale level licensed to provide services into and out of Vanuatu is Kacific Broadband Satellites Limited.
14. Kacific's satellite services are not targeted at the same general wholesale markets as Interchange's, and the capacity involved is relatively small. Kacific services offer only marginal competition to Interchange's submarine cable-based services and may be considered as differently focused and/or supplementary. Some customers use Kacific as a backup for high priority international communications in the event of cable service faults or other issues.

15. Within Vanuatu, retail service providers have used microwave transmission to connect between islands where the distance is within the capability of the microwave technology. However, microwave systems have limited capacity and cost efficiency relative to cable systems and, in addition, may not be able to cover longer distance connections required in some cases.
16. The costs involved prevent most end users from considering the use of satellite solutions to their communications needs, and therefore have no realistic alternative to using the services of Interchange, as delivered via their retail service provider.
17. Therefore, although there may be some, marginal level of competition between Interchange’s submarine cable-based transmission services and satellite services from Kacific and also between Interchange’s services and microwave solutions in a limited number of circumstances, TRBR concludes that the level of substitutability is small and immaterial for market analysis purposes. The proposed definition of the market in question is sound, in the opinion of TRBR. Therefore, having addressed the issues in Section 20 of the Act, TRBR proposes to determine the submarine cable transmission capacity market as a relevant market for the purposes of part V of the Act.

## **6. STATUTORY PROVISIONS ON THE DESIGNATION OF A SERVICE PROVIDER AS DOMINANT.**

18. Section 21(1) of the Act provides that “subject to the terms of any prior licence, the Regulator may designate a service provider [as] dominant within a telecommunications market if:
  - (a) The service provider’s gross revenues from the telecommunication market constitutes 40% or more of the total gross revenues of all service providers from that telecommunications market; or
  - (b) The Regulator reasonably considers that, either individually, or acting in concert with others, the service provider:
    - i. Enjoy a position of economic strength or controls a bottleneck facility in the relevant telecommunications market; and

- ii. 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 that telecommunications market.”

## 7. INTERCHANGE’S EXISTING (PRIOR) LICENCE

19. Interchange was granted a non-exclusive telecommunications licence on 22 September 2009 with permission to provide internet-related telecommunications services to end users in Vanuatu and internet-related international telecommunications services to end users in Vanuatu and to persons outside Vanuatu. The term of the licence was set as 15 years.
20. The licence was amended on 2 February 2010 to reflect that Interchange’s application for approval to construct an international submarine cable for Vanuatu had been granted. The amendment removed the words “internet-related” from the description of the services that Interchange was permitted to provide.
21. On 11 February 2015 Interchange was granted an exception pursuant to Section 14 of the Act. The exception was issued on a non-exclusive basis for a minimum of one year and otherwise until revoked by the Regulator. The exception describes Interchange as a “wholesale service provider”, and permits it to provide wholesale internet services using cable or satellite means.
22. Section 14(1) of the Act notes that “exceptions may be given by the regulator where, in the Regulator’s opinion, issuing a licence would not be efficient or necessary”. The basis of the Regulator’s opinion in this case is not recorded as part of the preliminary clauses or in the substantive clauses of the exception. Nevertheless, the exception is subject to substantially the same conditions, other than fees (for which separate provision is made), as would apply in the case of a licence permitting the supply of these services.
23. Section 14(3) of the Act provides that “an exception operates only in respect of the specific matters and circumstances described therein and must not otherwise relieve any person from any obligation or liability unless expressed or necessarily to be implied”.
24. Clause 6.1 of the exception expressly provides that the Regulator “may designate the Whole Service Provider [that is, Interchange] dominant...” However, the criteria that need to be met under the exception differ from those in Section 21(1) of the Act through omission of the 40% share of gross revenues test in Section 21(1)(a). Clause 6.1 of the exception effectively repeats



Section 21(1)(b) of the Act, but with a focus on the wholesale nature of the relevant market and service provider.

25. TRBR's interpretation, for the purposes of this Discussion Paper, is that the omission of the 40% market share test necessarily implies that the terms of a prior licence (or exception in this case) mean that if the Regulator designates Interchange as dominant it must do so on the basis of the criteria in Clause 6.1. This could be circumvented by the Regulator first amending the exception to insert a reference to the 40% market share test, and then applying that test. However, TRBR does not consider that this is necessary in the present case, and therefore does not currently intend to amend the exception in this way.

26. Clause 6.1 of Interchange's exception states:

"The Regulator may designate the Wholesale Service Provider dominant if:

(a) It owns a bottleneck facility; or

(b) The Regulator reasonable considers that, either individually or acting in concert with others,

- i. the wholesale service provider enjoys a position of economic strength or controls a bottleneck facility in the relevant telecommunications market; and
- ii. 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 that telecommunications market."

## 8. APPLICATION OF SATUTORY CONSIDERATIONS AND INTERCHANGE'S EXCEPTION

27. Given the interpretation of the exception, for the purposes of this Discussion Paper TRBR does not intend to rely on the application of the 40% market share criterion for dominance in a market as set out in Section 21(1)(a) of the Act. However, TRBR considers that the criterion would be met if it were deemed to be applicable. Interchange has more than a 40% share of the gross revenue of all service providers in the market for submarine cable transmission capacity services in Vanuatu. On the information available to TRBR, Interchange has 100% share of the revenues of all service providers in that market.
28. To determine the issue of dominance in this case, it is necessary to consider whether Section 21(1)(b) of the Act, (which is to the same effect as Clause 6.1 of the exception) applies.
29. Being the current sole supplier of submarine cable transmission capacity services to, from and within Vanuatu, Interchange enjoys a position of economic strength in the market of the kind described in the Act. Being the sole provider of submarine cable transmission capacity, it has the power to negotiate access service agreements with its wholesale customers with advantages to Interchange that in all likelihood Interchange could neither demand nor sustain in a competitive wholesale market. Such competitive advantages include maintaining higher wholesale prices than could otherwise be maintained and including requirements limiting or controlling the manner in which wholesale customers might deal with any excess capacity that may arise from the arrangements from time to time. In other words, Interchange has such economic strength in the market that it has power to behave to an appreciable extent independently of competitors and customers in the wholesale market.
30. Section 21(1)(b) also contemplates, as a separate and distinct basis for designating a service provider as dominant in a telecommunications market, whether it controls a bottleneck facility and whether that affords the power to behave to an appreciable extent independently of competitors and customers. The relevant facility in the present case is the Interchange Cable Network which connects Vanuatu with Fiji (and the Pacific cable systems at the Fiji hub) and with the Solomon Islands.
31. Section 2 of the Act defines a bottleneck facility as “a facility essential for the production of telecommunications services which, for technical reasons or due to economies of scope and scale, and the presence of sunk costs, cannot practically be duplicated by a would-be competitor”.

32. The Interchange Cable Network (ICN) is a bottleneck facility on the above definition. The ICN is the network facility which supports telecommunications cable transmission into, within and from Vanuatu. As noted earlier in discussion on the market definition, wholesale customers cannot realistically or economically substitute satellite transmission for the transmission volume provided by ICN. Nor are those customers, individually or collectively, or any other would-be competitor, able to practically duplicate the facility. Planning, deploying and commissioning an alternative submarine cable facility is a substantial task that requires time, funds and other resources. It is not practical to do that in the short term, and at best it is unclear whether it would be economic in the longer term, having regard to the total potential market that a duplicated facility might serve.

## 9. CONCLUSION

Based on the above analysis, TRBR has concluded that it should proceed to:

1. determine, pursuant to Section 20 of the Act, that the market for submarine cable transmission capacity is a relevant telecommunications market in Vanuatu; and
2. designate, pursuant to Section 20(1)(b) of the Act, Interchange Limited as dominant within the above relevant telecommunications market.

Before proceeding with final and formal decisions on these matters, TRBR will carefully consider any comments made by stakeholders and interested members of the public in written submissions received on or before **21<sup>st</sup> April 2023**.

\*\*\*\* END \*\*\*\*



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