TELECOMMUNICATIONS REGULATORY COMMISSION

DECISION REGARDING LIME BVI LIMITED'S ANTI-COMPETITIVE BEHAVIOUR RELATING TO MOBILE VOICE CALLS TO SPECIFIC CARIBBEAN DESTINATIONS

Introduction

1. This is the decision of the British Virgin Islands ("**BVI**") Telecommunications Regulatory Commission (the **"TRC**") pursuant to section 75(1)(a)(iii) of the Telecommunications Act, 2006 (the **"Act**") in respect of the TRC's investigation as to whether LIME (BVI) Limited ("**LIME BVI**") has engaged in anti-competitive conduct.

2. The relevant conduct is as follows: LIME BVI charged average retail prices to its customers for calls to LIME affiliates (mobile network operators or "**MNOs**") in other Caribbean jurisdictions[1] which were below the wholesale charges available to its competitor in the BVI, Caribbean Cellular Telephone Limited ("**CCT**"), for the termination of calls on those affiliates' networks.

3. Following a written complaint by CCT dated 14 July 2009, the TRC formally opened an investigation into LIME BVI's conduct. On 17 June 2011, the TRC issued a notice to LIME BVI (the **"Sanction Notice**") setting out the TRC's provisional findings and proposing that the TRC should take enforcement action against LIME BVI pursuant to section 75(1)(a)(iii) of the Act.

4. LIME BVI responded to the Sanction Notice in writing on 11 August 2011 (the **"Written Response**") and at an oral hearing conducted by representatives of the TRC Board on 15 August 2011 (the **"Hearing").** A supplement to the Sanction Notice was issued to LIME on 4 October 2011 (the **"Supplement"),** to which LIME responded in writing on 14 October 2011.

5. Having carefully considered the submissions of LIME BVI and advice from legal and economic experts independent of the investigation team, the TRC Board of Commissioners (the **"TRC Board")** finds that LIME BVI's All Talk Calling Plans imposed a margin squeeze on CCT during the period January 2009 to August 2010 which, had it continued, would likely have had anti-competitive effects

[1] The LIME Caribbean Mobile Network Operators or "MNOs" beyond the BVI are in Anguilla, Antigua and Barbuda, British Virgin Islands Barbados, Cayman, Dominica, Grenada, Jamaica, Montserrat, St Kitts and Nevis, St Vincent and the Grenadines, Turks and Caicos

contrary to the public interest and to have been detrimental to consumers in the BVI in the long term.

6. The TRC, therefore, orders LIME BVI under section 75(2) (g) of the Act to desist from re-offering in the BVI the All Talk Calling Plans (as defined below) to the extent that they contribute to the margin squeeze identified below. Furthermore, the TRC imposes a fine on LIME BVI under section 75(2) (b) of the Act by reason of its anti-competitive conduct in the sum of [redacted].

7. The TRC's reasons for this decision (the **"Decision")** are set out in this document and in the Supplement, save as qualified below. The Supplement is annexed to the Decision as Annex 1. The TRC takes this Decision on a more narrow basis than that outlined in the Sanction Notice, having given conscientious consideration to the submissions of LIME BVI and having examined carefully the basis for this enforcement action. This enforcement action is taken under the Act only, and not LIME BVI's Licence. The Sanction Notice is annexed to this Decision as Annex 2.

Legal framework

8. Section 6 of the Act sets out the functions of the TRC. Section 6(d) of the Act provides that "*the Commission shall… be responsible for the regulation of licensees and authorization holders and for ensuring fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services*".

9. Section 75(1)(a)(iii) of the Act provides in material part: "*The Commission may take enforcement action against a licensee or authorization holder if, "(a) in the opinion of the Commission, the licensee or authorization holder"(iii) is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including in an anti-competitive manner, or detrimental to the interest of clients, creditors or investors*".

Factual background

10. The relevant product offered by LIME BVI was a call from a LIME BVI number to a number in another LIME network in the Caribbean. From November 2008 to August 2010, LIME BVI offered an All Talk package of 6000 minutes to the other LIME Caribbean destinations for $50 a month. (From September 2010, LIME BVI offered an All Talk Plus plan, but since the TRC finds that the unlawful margin squeeze ended in August 2010, this product is not examined further.)

11. There is a distinction between such calls from the BVI to specific LIME Caribbean destinations which are included in a bundle of minutes and calls which are outside the bundle of minutes. LIME BVI customers who do not purchase the bundles or who consume more than the allowance of minutes within the bundle had at all material times to pay a per minute (“**pm**”) rate of $0.30 (day), $0.25 (evening) and $0.20 (weekend) to call other LIME numbers and $0.20 for on-net calls in the BVI.

12. This Decision is concerned only with the calls contained within the All Talk bundle (6000 minutes for $50 a month).

13. It is necessary to be a LIME BVI customer to purchase the relevant All Talk Plan.

14. The TRC calculated in the Sanction Notice that the relevant average retail price paid by LIME BVI customers to make calls to other LIME affiliate numbers in the Caribbean is [redacted] pm from January 2009 to August 2010.

15. LIME BVI has asserted that it pays an average fixed termination charge to LIME affiliates of [redacted] and an average mobile termination charge to LIME affiliates of [redacted]. LIME BVI has submitted examples of debit notes exchanged between LIME BVI and its affiliated companies to provide proof of termination payments and receipts. The TRC is not in a position to assess the validity of these receipts.

16. The TRC calculated an average termination rate of [redacted] paid by CCT to LIME BVI for termination on LIME Caribbean fixed and mobile networks based on data submitted showing total termination payments divided by total traffic. This figure was used in the Sanction Notice. In the Sanction Notice Supplement the TRC presented an average fixed termination rate of [redacted] and an average mobile termination rate of [redacted] paid by CCT to terminate on LIME Caribbean networks. LIME did not challenge these rates in their response to the Sanction Notice Supplement.

17. However, the TRC would like to clarify that the actual simple averages of the termination rates calculated by the TRC should read [redacted] for mobile termination and [redacted] for fixed termination payable by CCT and [redacted] for mobile termination and [redacted] for fixed termination for LIME BVI. The TRC originally used a combined termination rate of [redacted] for fixed and mobile termination because the termination revenue and termination traffic data was not available for fixed and mobile separately to allow more than the calculation of a simple average. In any event, these calculations were not used in

the TRC's final analysis which informs the proof of margin squeeze. The TRC used the termination rates of [redacted] for fixed termination and [redacted] for mobile termination which LIME BVI presented for the final calculation.

18. Having considered the evidence as a whole the TRC has decided to proceed on the basis that LIME BVI paid an average fixed termination rate of [redacted] and an average mobile termination rate of [redacted] to LIME affiliates. Taking total All Talk minutes, it is then possible to calculate estimated average termination payments from LIME BVI to LIME affiliates for terminating All Talk traffic. This approach was set out in the Supplement to the Sanction Notice and was not challenged in LIME BVI's response.

19. It is also possible to take total All Talk retail revenues and add relevant termination revenues to calculate total revenue accruing to the All Talk Plan. The crucial input in calculating termination revenues is incoming minutes from LIME Caribbean destinations which are terminated to All Talk customers. The TRC has requested incoming minutes on four occasions and has received the following responses:

(1) LIME BVI submitted data for the interconnection consultation which show that outgoing international traffic as a whole is [redacted] total incoming international traffic.

(2) LIME BVI submitted data following the original data request issued to LIME at the beginning of the investigation which shows that total outgoing international traffic to LIME Caribbean destinations is [redacted] incoming international traffic from LIME Caribbean destinations.

(3) LIME BVI stated in their response to the Sanction Notice and verbally at the hearing that it was reasonable to assume that outgoing traffic [redacted] incoming traffic.

(4) The TRC asked for verification of this assumption in a data request following the hearing. In response, LIME BVI submitted outgoing traffic information to LIME Caribbean destinations from All Talk and All Talk Plus customers but not incoming traffic information.

(5) The TRC then asked again for incoming minutes and received total outgoing and incoming minutes "for all destinations and for LIME

Caribbean destinations". In the data submitted, outgoing traffic is [redacted] incoming traffic.

20. Based on LIME BVI's most recent submission, the TRC makes the following assumptions: international outgoing traffic to LIME Caribbean destinations is [redacted] international incoming traffic from LIME Caribbean destinations to All Talk customers.

21. This gives a total loss of [redacted] over the period January 2009 to July 2011 and an average monthly loss of [redacted] over the period January 2009 to July 2011. However, the calculations show losses up until the end of August 2010 and positive revenues from September 2010 when the All Talk Plus plan was introduced. On this basis, average monthly losses were [redacted] from January 2009 to August 2010 and average monthly net revenue[2] from the plans was positive at [redacted] from September 2010 to July 2011. If LIME BVI was indeed paying termination charges then it was only able to do so during the period January 2009 to August 2010 by incurring a loss or through cross-subsidy rendering the All Talk Plan unprofitable in its own right.

22. The TRC does not consider it relevant to include other revenues accruing to the All Talk customers in its legal and economic assessment. For example, revenues generated by All Talk customers for calls to non All Talk destinations are not included in the plan. This is because in order to subscribe to the All Talk plan, a customer has to be an existing LIME customer either on a post-paid package or as a prepaid customer and would be making calls to non All Talk destinations regardless of the All Talk plan. In each case, the non All Talk revenues are relevant for considering the overall cost of mobile service for a subscriber not the specific cost of providing the All Talk plan. It is the incremental revenues arising directly from the All Talk plans (the All Talk subscription revenues and estimated termination revenues) which the TRC considers as relevant to the calculation.

The jurisdiction of the TRC

23. Under section 75(1)(a)(iii) of the Act:

---

[2] This is calculated as subscription and estimated termination revenue from the plans minus termination costs incurred by the plans.

(1) The Commission has a power to take enforcement action "*against a licensee or authorization holder*".

(2) The Commission may take such action where the licensee "*is carrying on or is likely to carry on business*" in a particular manner.

(3) The manner in which the business must be, or must be likely to be carried on, is "*detrimental to the public interest*". This includes the carrying on of the business in an *"anti-competitive manner*".

(4) The Commission has a broad discretion when assessing whether this is the case: the Act allows the Commission to take enforcement action where "*in the opinion of the Commission*" the test for such action is met.

24. Consistent with the TRC's letter to LIME BVI dated 25 July 2011, the enforcement action under section 75(1) (a) (iii) of the Act is taken against LIME BVI only. The fine and the order imposed under this Decision apply to LIME BVI only. It is therefore action "*against a licensee*" as required under section 75(1) of the Act.

25. The TRC has statutory authority to take this Decision for the following reasons:

(1) For the duration of the margin squeeze, LIME BVI sold to CCT wholesale termination services on its affiliates' networks on behalf of those networks. CCT has clarified that for the relevant period it only made payments directly to LIME BVI. The charges that LIME applied at both wholesale and retail levels were aspects of the manner in which it carried on business in the BVI.

(2) In any event, for the entirety of the period under investigation LIME BVI has determined the retail charge applicable in the BVI. This is an aspect of the manner in which LIME BVI carries on business in the BVI. For the reasons set out below, LIME BVI has carried on this aspect of its business in the BVI over the relevant period in an *"anti-competitive manner."*

26. As this Decision does not rely on any non-BVI legal authority in relation to the question of its statutory powers, it is unnecessary to address LIME BVI's arguments in that regard.

27. LIME BVI argues at §§48-66 of its Written Response that the product markets set out in the Sanction Notice have not been properly defined. Strict market definition is not in fact required for the purposes of enforcement action under section 75(1) (a)(iii) of the Act.

28. In any event, the TRC relies on the market definitions referred to in the Supplement. The first, in particular, is as follows (at p. 5):

> "…*"a wholesale or "access" market for voice call termination from numbers on non-LIME BVI networks in the VI to LIME MNO networks in the rest of the Caribbean." This upstream market is further defined as a separate market for termination on each LIME network. In the UK, Ofcom has stated that it defines "as separate markets each market for all calls to a given UK mobile number range for which a communications provider can determine the termination rate"* [Ofcom, Wholesale mobile voice call termination Market Review, Volume 2 – Main consultation, 1 April 2010] *and in the view of the TRC, it is appropriate to define each market for the termination of calls to LIME networks…"*

29. The second is the retail market for mobile voice telephony services in the BVI (Supplement, pp. 5-8).

30. The TRC has decided to rely on market definitions in this Decision only to the extent referred to in the Supplement.

The breach of section 75(1) (a)(iii) of the Act

31. In determining whether LIME BVI has carried on its business in the BVI in an *"anti-competitive manner"* within the meaning of section 75(1) (a)(iii) of the Act, the TRC should have regard to all relevant circumstances. These include the economic effects on competition and consumers of LIME BVI setting retail rates <u>below</u> the level of wholesale charges applied by its affiliates.

32. By setting retail rates below the level of wholesale charges applied by its affiliates, LIME BVI created or participated in a form of "margin squeeze".

33. The concept of margin squeeze has been defined by the Organisation of Economic Co-operation and Development ("**OECD**") as follows:

> "*a margin squeeze occurs when there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete. A margin squeeze can arise only when (a) an upstream firm produces an input for which there are no good economic substitutes, (b) the upstream firm sells that input to one or more downstream firms and (c) the*

upstream firm also directly competes in that downstream market against those firms."[3]

34. The key competitive concern with margin squeeze is that it limits, restricts or prevents the development of competition in the downstream market. As stated in the OECD report: "*Depending on the circumstances this may raise the price or reduce the quality or variety of products available to downstream customers. It may also undermine the success of reforms aimed at promoting competition in the downstream market*." [4]

35. In §54 of the Written Response, LIME argued that the TRC failed to properly analyse market power in this context.

36. Market power was examined at §§2.12-2.20 of the Sanction Notice. In relation to the relevant wholesale mobile voice call termination market referred to above, each LIME MNO is likely to have significant market power or "SMP". It is generally accepted that any MNO with any significant number of subscribers is dominant in the market for the termination of calls to its own network (Supplement, pp. 3-4).

37. Moreover, as was set out in the Sanction Notice at §2.17, LIME is operational (often as the incumbent) at the retail and wholesale level in many Caribbean countries. LIME as an international operator is accustomed to the concept of market power in the call termination market. LIME BVI in fact accepts (Written Response §65) that it is dominant in the market for mobile voice call termination on its network in the BVI. In all the circumstances, the TRC is able to find for the purposes of this Decision that each relevant LIME MNO is similarly dominant in the separate markets for mobile voice call termination on the different networks concerned.

38. In the present case, applying the equally efficient operator ("**EEO**") test,[5] there was a margin squeeze from January 2009 to August 2010 between the relevant average retail price paid by LIME BVI customers to make calls to other LIME affiliate numbers in the Caribbean ([redacted] pm) and the average wholesale

---

[3] OECD DAF/COMP (2009)36 Margin Squeeze, 9 September 2010, Executive Summary, page 7
[4] OECD DAF/COMP (2009)36 Margin Squeeze, 9 September 2010, Executive Summary, page 7
[5] The EEO test (Subscription revenue + termination revenue – termination costs) is a standard method of determining an anti-competitive margin squeeze

price charged to LIME BVI to terminate calls to other LIME affiliate numbers in the Caribbean ([redacted] pm). On the basis of the facts set out above, LIME BVI incurred average monthly losses of [redacted] from January 2009 to August 2010.

39. However, LIME BVI (in respect of the relevant product) earned positive average monthly revenue[6] from the plan of [redacted] from September 2010 to July 2011. Accordingly, while LIME BVI fails the EEO test from January 2009 to August 2010, there is no evidence of an anti-competitive margin squeeze under that test after August 2010.

40. In the Supplement to the Sanction Notice, the TRC sets out its "theory of harm". The theory of harm assesses what would happen if the identified anti-competitive behaviour which is manifested through a margin squeeze were to continue and sets out a counterfactual. The counterfactual is that the retail price charged by LIME BVI to its customers for the Caribbean plans is higher than the wholesale price charged to CCT and so all operators are able to offer pan-Caribbean calls and compete on the same basis. The consideration of the counterfactual highlights what would happen if the margin squeeze were not in effect and in doing so evaluates the anti-competitive effect of the margin squeeze. The theory of harm also then sets out the scope and requirement for regulatory intervention.

41. The theory of harm is that the margin squeeze practiced by LIME BVI, had it been continued, would have the effect of forcing CCT to exit the market for mobile voice telephony in the BVI, thereby leaving the BVI with a duopoly in the provision of mobile services and, as a result of the decreased competition, higher prices to customers.

42. To be clear, in this context, the TRC refers to the market for mobile subscription in the BVI. CCT's inability to offer a comparable Caribbean plan means that it cannot compete on the broader market for mobile subscription in the BVI on an equal basis with LIME BVI and Digicel BVI. This is because a consumer who wishes to make a large amount of Caribbean calls would most likely subscribe to either LIME BVI or Digicel BVI only and not to CCT.

---

[6] This is calculated as subscription and estimated termination revenue from the plans minus termination costs incurred by the plans.

43. For the reasons set out in the Supplement to the Sanction Notice, the TRC concludes that there are credible conditions in the BVI for the margin squeeze identified in the Sanction Notice, if continued, to give rise to anti-competitive effects and consumer harm over the long run. Continuation of the margin squeeze may be expected to contribute to CCT's declining market share of subscribers, falling prepaid subscribers, falling prepaid revenues and increasing losses.

44. Over time, it is realistic to suppose that CCT would be forced to exit the market or would be absorbed into a competitor's operations, leaving two mobile network operators in the BVI market. As the Supplement sets out, the magnitude of CCT's losses increases following Digicel BVI's entry into the BVI market and the launch of LIME BVI's All Talk plans to pre-empt the Digicel BVI market entry. The effect of the All Talk plans is to maintain competitive pressure on Digicel BVI to retain their Caribbean plans in the market and hence to exacerbate the losses incurred by CCT. For the duration of the margin squeeze and beyond, LIME BVI has had the largest market share of subscribers. This market share has changed much less significantly than the market shares of Digicel BVI and CCT over this period and it is this point which leads the TRC to the conclusion that LIME BVI uses the All Talk Plans to maintain its competitive position relative to Digicel BVI.

45. LIME BVI leverages its large market share as LIME BVI customers, even if they do not subscribe to the All Talk plans, have the option of subscribing to the All Talk plan. If LIME BVI subscribers did not subscribe to the All Talk plan and then wanted to make a large number of Caribbean calls, they would be likely to churn to Digicel BVI but not to CCT. In this way, LIME BVI competes effectively with Digicel BVI to the exclusion of CCT.

46. The Supplement sets out that the loss of CCT prepaid subscribers and revenues is consistent with the growth in the use of the Caribbean plans by Digicel BVI customers. The result of a continued margin squeeze would likely be to reduce competitive pressure, raising prices for consumers and slowing the rate of innovation in the BVI.

47. The application of the EEO margin squeeze test demonstrates that regardless of the previous or current financial state of CCT, CCT would not be able to compete with LIME BVI in the provision of pan-Caribbean calls. This is a particularly important point in demonstrating LIME BVI's anti-competitive behaviour and effect on the BVI market.

48. The TRC acknowledges, however, as it did in the Supplement to the Sanction Notice that the primary cause of harm is the presence of the Digicel BVI Caribbean plans which enable Digicel BVI to win market share from CCT. However the presence of the Digicel BVI Caribbean plan was brought about by the presence of the LIME BVI All Talk Plans. Furthermore, whilst only a small percentage of LIME customers are on the All Talk Plans, in the view of the TRC, the presence of the All Talk plans acts as a deterrent to LIME BVI customers moving to CCT and to Digicel BVI removing the Caribbean plans from the market as explained above.

49. In its response to the Supplement to the Sanction Notice, LIME BVI made the following relevant points (at §§3.10-3.12) which the TRC was required to address:

(1) The All Talk plan appealed to only a small proportion of customers, and it is therefore implausible to suppose that anti-competitive conduct in relation to this niche could have driven CCT entirely out of the market; the TRC has not shown otherwise. The TRC has not provided any evidence to show that it is necessary to provide a pan-Caribbean phone plan that includes an extremely large volume of bundled minutes in order to compete successfully in the BVI market.

(2) CCT's market share has been constant since initial gains made by Digicel BVI on its entry to market; and there is no evidence to suggest that CCT is losing market share to Digicel BVI at such a rate as to cause it to exit the market. In fact, CCT's largest decline in market share, from [redacted] occurred between June 2007 and January 2008 - a year before the alleged margin squeeze.

(3) The TRC's evidence shows CCT to have been loss making for a number of years, including prior to the launch of the All Talk plan. Therefore, the most likely cause of CCT's potential exit from the market is its sustained poor financial performance, rather than any restrictions on its ability to offer the same retail product as LIME BVI to call LIME destinations in the Caribbean.

(4) The "club effect" proposed by the TRC is not credible. LIME BVI does not have a strong enough position in other Caribbean markets to give rise to such an effect; and consumers are not sufficiently aware of what networks their friends and family are on to make the pan-Caribbean

plans sufficiently important to give rise to a reasonable expectation that the third BVI-only operator will be driven from the market and its assets will be purchased by one of the other incumbents.

(5) The TRC has failed to show that CCT cannot compete in the future as a result of the All Talk plans.

50. The TRC has carefully considered the relevant evidence and in the exercise of its regulatory judgement finds as follows in relation to these points:

51. As to the first point, the TRC is satisfied that the pan-Caribbean plans are sufficiently important to give rise to a reasonable expectation that the third BVI-only operator will be driven from the market and its assets will be purchased by one of the other incumbents.

52. Although the All Talk plan attracted only a small proportion of customers, for the reasons set out in the Supplement to the Sanction Notice, pan-Caribbean plans have been shown to be an important part of an MNO's product offering in the BVI. The harm caused by the All Talk plan must be viewed in terms of its competitive relationship with the more popular and more damaging Digicel BVI Caribbean plans. LIME BVI launched the All Talk plans in the BVI market originally in November 2008 prior to Digicel BVI's launch in December 2008.

53. As to the second point, the TRC takes the view that it is inconclusive: CCT could be preventing further loss in market share only by offering unsustainable and loss-making offers in the market. Furthermore, the TRC has evidence to support the loss of CCT's market share for the duration of the margin squeeze had the margin squeeze been continued. The loss of CCT market share from June 2007 to January 2008 serves to demonstrate the effect of introducing competition into the market as LIME BVI entered the market. The entry of Digicel BVI intensified this competition and caused CCT to lose further market share partly as a result of not being able to compete with the Caribbean and All Talk plans.

54. The presence of competitive forces in the market at this point demonstrates the benefit of having three operators in the market and also demonstrates what could happen if an element of the competitive force is in fact anti-competitive. If there had been no margin squeeze, the TRC acknowledges that CCT may have continued to lose market share but CCT would have done so in a situation where it could compete on the same basis as Digicel BVI and LIME BVI. Loss of market share in that context would have been due solely to some relative inefficiency rather than as a result of anti-competitive behavior.

55. As to the third point, the TRC was persuaded by CCT's case that, although making losses for reasons other than the pan-Caribbean plans, those losses have been significantly exacerbated by them. It is this exacerbating factor which creates the risk of exit. As the application of the EEO test demonstrates, even an equally efficient operator would be negatively affected in competition with the All Talk plans.

56. If the All Talk plans had not resulted in a margin squeeze (the effect of which was greatly compounded by Digicel BVI's Caribbean plans) then it can be expected that CCT would have lost market share as a result of market entry, as explained above, but would not have lost market share to the point where exit becomes inevitable. The TRC maintains the view, that in the absence of anti-competitive behaviour, CCT would have been able to adjust to the new competitive environment following the entry of LIME BVI and Digicel BVI.

57. The fourth point comes down to an assertion that the club effect is unwarranted but LIME BVI does not provide any compelling new evidence to counter the TRC's conclusions in that regard, which reflect its findings in the Supplement to the Sanction Notice. The club effect works in two dimensions. First, subscribers join the LIME BVI network in order to be able to make on-net calls to other LIME subscribers in other LIME Caribbean countries under the All Talk Plans. Second, network effects are also at work domestically in the BVI. Subscribers join the LIME BVI network to benefit from the LIME Caribbean calls and other subscribers will also join the network in order to benefit from on-net pricing to call to those LIME Caribbean customers in the BVI.

58. As to the fifth point, this Decision addresses conduct which took place between January 2009 and August 2010. That conduct has now ceased and (subject to Digicel's behavior) CCT may be able to compete effectively in the future and attract customers. The TRC's focus is the risk of exit on CCT's part created by LIME BVI's conduct during the period of the unlawful margin squeeze. The TRC is satisfied that this conduct generated the risk of such exit identified in the Supplement to the Sanction Notice.

59. It is the view of the TRC that, for the period January 2009 to August 2010, LIME BVI priced in an unlawful manner, a service in the retail market which CCT could not price at the same level or provide a comparable product (a call to another Caribbean destination which terminates on an affiliated network) at the same price. In the view of the TRC this provided an advantage to LIME BVI which was not in line with the principle of fair competition which the TRC had and has a

statutory duty to protect under the Act. It is also the view of the TRC that it was at all material times necessary to be able to offer all services, including calls to other Caribbean destinations, in order to be able to compete in the VI market on a fair basis.

60. It is not correct that in this context any anti-competitive pricing can be unlawful only where there is the possibility of recoupment, as LIME BVI contends[7]. This requirement, developed in the US case law cited by LIME BVI, would unnecessarily and inappropriately narrow the broad statutory prohibition in s. 75(1)(a)(iii) of the Act. Moreover, the TRC Board takes the view that the theory of harm set out above adequately addresses the effect on competition and ultimately consumers in the BVI.

Remedies

61. In view of the breach of section 75(1)(a)(iii) of the Act identified above, the TRC has considered it appropriate to make an order under section 75(2)(g) that LIME BVI desist from re-imposing an anti-competitive margin squeeze on CCT from the date of the order.[8]

62. The TRC has also decided to impose on LIME BVI under section 75(2)(b) a fine equivalent to 3% of the annual turnover of LIME BVI (mobile business revenues) in 2010 for breaching the prohibition on anti-competitive behaviour in section 75(1)(a)(iii) of the Act.

63. The discretion of the TRC under section 75(2)(b) is broadly defined. The TRC may '*impose a fine on the licensee or authorisation holder in such amount as it thinks fit*'. There is no further statutory guidance clarifying how this discretion will be exercised. However, the TRC remains subject to its common law duties to exercise its discretion rationally and to have regard to all relevant considerations (and no irrelevant ones) and the principles of procedural fairness: by analogy in the UK, *Royal Mail Group v Postal Services Commission* [2008] EWCA Civ 33, [31]-[38].

64. The TRC also exercises its discretion having particular regard to its general responsibility under section 6(d) of the Act to ensure fair competition among

[7] §§15-22, 72 of the Written Response
[8] This sanction is in place of that proposed in §§5.4 and 6.2 (1) and (2) of the Sanction Notice

licensees and all other operators of telecommunications networks or providers of telecommunications services.

65. In setting the appropriate fine, the TRC has considered (1) the seriousness of the anti-competitive conduct, (2) the need to deter both LIME BVI and other undertakings from engaging in anti-competitive conduct, (3) any aggravating circumstances and (4) any mitigating circumstances.

66. In assessing the gravity or seriousness of the infringement, the TRC had regard to a number of factors, including the nature of the products sold, the structure of the relevant markets, the shares of LIME affiliates in those markets, the entry conditions to those markets, and the likely effects on competitors and third parties of the infringement.

67. In the present case, the TRC takes into account the following circumstances:

(1) The fact that BVI customers wishing to call numbers on the LIME network in other Caribbean countries have no choice but to terminate their calls on the LIME affiliates networks.

(2) The exclusionary nature of the margin squeeze imposed in the downstream retail market in the BVI, which are likely to limit, restrict and prevent the development of competition in that market.

(3) The "club effect" (as described in the Supplement to the Sanction Notice) of margin squeeze within the context of termination rates in the telecommunications sector and consequent disparities between on-net and off-net prices.

(4) The territorial extent of the relevant markets in this case. The territorial extent of the Caribbean Plans was very wide.

(5) The duration of the anti-competitive conduct. This continued from January 2009 to August 2010.

(6) The significant proportion of immigrant workers from LIME destination countries in the BVI, a factor which magnifies the likely churn effect of the margin squeeze on CCT's potential and existing consumers.

(7) LIME BVI's market share in the BVI.

68. When considering deterrence, the TRC has noted that deterrence must not be aimed solely at LIME BVI, but also at other undertakings which might be

considering anti-competitive behaviour including margin squeezing. When determining the appropriate deterrent effect, the TRC regards as the main factor the size and economic power of LIME BVI, having regard to its total turnover, its typical profit margins on that turnover, and its profitability more generally.

69. As regards aggravating circumstances, the TRC has considered:

(1) the fact that LIME instigated the anti-competitive behaviour. LIME (BVI) was the first MNO in the BVI (November 2008) to launch a plan offering a large number of calls to LIME destinations across the Caribbean.

(2) LIME BVI has not denied that its senior management was involved in the setting of the relevant termination rates and the operation of the margin squeeze.

70. The TRC has not identified any mitigating factors in respect of LIME BVI's conduct. However, as the TRC acknowledged in the Supplement to the Sanction Notice, LIME BVI is no longer itself operating a margin squeeze with respect to its All Talk packages. For this reason, the TRC has modified the sanctions to be imposed upon LIME BVI outlined in the Sanction Notice. The TRC believes that whilst LIME BVI has played an instrumental role in introducing this type of plan which can result in a margin squeeze and indeed continues to exert competitive pressure on Digicel by keeping the All Talk Plans in place, LIME BVI has effectively, either by design or default, ceased such anti-competitive behaviour with respect to the All Talk plans and therefore the sanctions imposed on LIME BVI should be reduced from those proposed in the Sanction Notice.

The Decision

71. In light of the TRC's finding of breach by LIME BVI of section 75(1)(a)(iii) of the Act, the TRC hereby orders LIME BVI:

i. **under section 75(2)(g) of the Act, to desist from re-offering the All Talk Plus plan to the extent that it constitutes an anti-competitive margin squeeze on CCT; and**

ii. **under section 75(2)(b) of the Act, to pay to the TRC a fine of [redacted], equivalent to 3% of the annual turnover of LIME BVI (mobile business revenues) in 2010 within thirty (30) days of the date herein.**

72. LIME BVI shall comply with the order outlined in §71 above **<u>within thirty (30) days of the date herein</u>**. The fine of [redacted] should be paid as a lump sum within 30 days of the order. After the expiry of that period, interest shall automatically be payable at the base interest rate applied by the Development Bank of the VI on the first day of the month on which this Decision is adopted, plus 3.5%. An additional per diem rate of 1% of the fine will be imposed if LIME BVI fails to address the other aspects of the order.