

available between the two fixed points. However, capacity could be reserved or shared through the associated network depending on the nature of the leased line. Leased lines can be used for providing voice services, other analogue services, and/or data services either directly to End-Users (e.g., private networks for large companies) or to other Electronic Communications Service providers who would then use the Leased Lines in question as an input for the provision of services to their own customers. Leased Lines may be categorized as follows:

- (a) High-speed Leased Lines—1 Mb/s or faster;
- (b) Low-speed Leased Lines—less than 1 Mb/s;

“**Mobile Virtual Network Operator (MVNO)**” refers to a wireless Electronic Communications Services provider that does not hold rights to the radio spectrum or own wireless network infrastructure over which the MVNO provides services to its customers;

“**New Retail Service**” refers to any stand-alone, or bundled, service that customers would perceive as a new or materially different offering as compared with services already available on the market, such as a new broadband speed or a service offering a new functionality, as determined by the Authority in the case of any doubt;

“**Non-Discriminatory**” means not unreasonably discriminatory. Cognate expressions shall be construed accordingly. When used in reference to the provision of Retail services to End-Users and Wholesale services to other Communications Providers, it includes the requirements to:

- (a) apply equivalent terms and conditions in equivalent circumstances to End-Users or to other Communications Providers; and
- (b) in the case of Wholesale services, to provide facilities, services and information to others under the same conditions and of the same quality as it provides for its own internal purposes or to those of its own divisions, subsidiaries, partners and Affiliates;

“**Operator**” means a Communications Provider as defined under Section 2 of the ECA;

“**Predatory Pricing**” may occur when services are provided by an Operator with SMP at prices below cost so as to foreclose, or be likely to foreclose, actual or potential competitors;

“**Price Squeeze**” also sometimes referred to as a “margin squeeze”, may occur when a vertically integrated Operator with SMP in an upstream market charges a price for the product from the upstream market which, compared with the price it charges in the downstream market, would prevent an equally efficient competitor from trading profitably in that downstream market on a lasting basis;

“**Public Switched Telephone Network (PSTN)**” refers to a public circuit-switched telephone network;

“**RAA**” means the Regulatory Authority Act 2011;

“**Reference Access and Interconnection Offer (RAIO)**” refers to an offer to provide Access and Interconnection services and facilities that includes a description of the Access and Interconnection services and facilities being offered, setting out the particular components according to market needs and all of the terms and conditions for Access and Interconnection to be satisfied by an entity wishing to enter into an Access and Interconnection agreement.

“**Replicability**” means the ability of a reasonably efficient competitor to replicate a Retail offering using a Wholesale service. Testing for Replicability involves:

- (a) assessing whether the relevant Wholesale service allows for replication of the Retail service from a technical point of view; and
- (b) whether the margin between the Wholesale and Retail product is sufficient so that there is no Price Squeeze;

“**Retail Minus**” involves establishing a Wholesale price for a product or service by deducting the Avoidable Cost of a retail service from the Retail Price. This methodology ensures that the Wholesale price, relative to that product or service's Retail price is such that there is a sufficient margin for a Wholesale customer using that product or service as an input to recover Retail costs and still make a profit on the provision of Retail service;

“**SMP**” means Significant Market Power as defined under Section 2 of the ECA;

“**SMP Product**” refers to a product, or service, offered by an Operator that possesses SMP in the relevant market to which the product or service belongs;

“**Tying**” or “**Tie**” refers to the practice of linking one good or service to another, such that customers seeking to purchase one must also purchase the other; and

“**Wholesale Line Rental and Local Calling Service (WLRLC)**” refers to a service bundle consisting of local access and calling services made available to other Operators on a Wholesale basis. Essentially it is a total service resale product.

## 2 INTERPRETATION

2. For the purpose of interpreting this General Determination:

- (a) unless the context otherwise requires, words or expressions shall have the meaning assigned to them herein, the ECA, RAA and Interpretation Act 1951;
- (b) where there is any conflict between the provisions of this General Determination and the ECA or RAA, the provisions of the ECA or RAA, as the case may be, shall prevail;
- (c) terms defined herein and in the ECA and RAA have been capitalised;
- (d) headings and titles used herein are for reference only and shall not affect the interpretation or construction of this General Determination;
- (e) references to any law or statutory instrument include any modification, re-enactment or legislative provisions substituted for the same;
- (f) a document referred to herein shall be incorporated into and form part of this General Determination and a reference to a document is to a document as modified from time to time;
- (g) expressions cognate with those used herein shall be construed accordingly;
- (h) use of the word “include” or “including” is to be construed as being without limitation; and
- (i) words importing the singular shall include the plural and vice versa, and words importing the whole shall be treated as including a reference to any part unless explicitly limited.

3. This General Determination shall be construed by reference to the Consultation Documents and Final Decision issued in the Public Consultation entitled “Obligations for Operators with Significant Market Power,” Matter RM01/13. Where there is any conflict between the Consultation Documents, the provisions of the most recent Consultation Document shall prevail. Where there is any conflict between the Consultation Documents and the Final Decision, the provisions of the Final Decision shall prevail. Where there is any conflict between the Final Decision and this General Determination, the provisions of this General Determination shall prevail.

## 3 LEGISLATIVE BACKGROUND AND PURPOSE

4. Pursuant to, and in accordance with, ECA Sections 22(1), 23(4) and 74(b)(I) and RAA Sections 59(2), 62(1), 70(1), and 72(4), the Authority conducted and concluded its Public Consultation concerning market definition and Significant Market Power Determination with the issuance of its “Market Review Process — Market Definition and Significant Market Power General Determination”, Matter: MR01/13, issued on 29 April 2013.

5. Having concluded that Public Consultation, the Regulatory Authority is required by ECA Section 23(4)(c) to conduct a public consultation for the purposes of “deciding which obligations, if any, should be imposed in respect of each relevant market characterised by SMP in order to promote or preserve effective competition, in accordance with section 24.”

6. ECA Section 21 sets out the principles and objectives that the Authority must seek to satisfy when determining whether to impose remedies on one or more SMP Operators in a market, which are:

- (a) develop or maintain effective and sustainable competition for the benefit of consumers with regard to price, innovation and choice;
- (b) promote investment in the electronic communications sector;
- (c) establish *ex ante* remedies that are effective but proportionate, taking into account the costs of compliance and the ultimate benefits to consumers;
- (d) establish *ex ante* remedies that apply on a technology-neutral and service neutral basis whenever feasible; and
- (e) rely on market forces and withdraw, reduce or limit *ex ante* remedies in circumstances where the Authority concludes that markets are effectively competitive or likely to become so within a reasonable period of time, taking into account actual and expected market circumstances.

7. ECA Section 24(4) instructs the Authority that any obligations imposed in accordance with Section 24 shall be Proportionate and justified in light of the relevant circumstances and the purposes and objectives set out in Sections 5 and 21 and shall, in the case of any access obligations, take account of:

- (a) the technical and economic feasibility of using or installing competing facilities, taking into account the type of Interconnection or access involved;
- (b) the feasibility of providing access in relation to available capacity;
- (c) relevant investment risks incurred by an operator designated as having SMP; and
- (d) the ability of the Communications Provider with SMP to impede the development of effective competition through its subsidiaries, partners and Affiliates.

8. ECA Section 24(1)(a)-(n) provides a list of *Ex Ante* Remedies that the Authority may choose to apply to designated SMP Operators. ECA Section 24(1)(o) gives the Authority the ability to select other remedies as necessary to promote or preserve effective competition in a relevant market or markets.

9. ECA Section 24(6) states that the burden of proof for demonstrating that a remedy should not be imposed, or should be modified or withdrawn, shall rest with the Communications Provider that is designated as having SMP in the relevant market.

10. ECA Section 24 provides the ECA's comprehensive guidance concerning the imposition of *Ex Ante* Remedies on Operators found to possess SMP.

11. ECA Section 74(b)(ii) directs the Authority to, following a public consultation, issue decisions and orders specifying any applicable *Ex Ante* Remedies in accordance with Section 24 no later than 240 calendar days following the date of commencement of Part 12 of the ECA. Section 74(b) further provides that the Authority shall undertake this task notwithstanding the process as set out in RAA Section 72.

12. RAA Section 13(r) grants the Authority the power to adopt remedies to deter anti-competitive conduct by Sectoral Providers in any relevant market.

13. RAA Section 59(1) provides that the Authority, without prejudice to its authority to impose obligations on Sectoral Providers pursuant to Section 85, may impose *Ex Ante* Remedies on a Sectoral Provider with SMP, when authorized to do so by sectoral legislation.

14. In accordance with RAA Section 70(1), the Authority published a Consultation Document on 17 May 2013, entitled “Obligations for Operators with Significant Market Power”. This consultation document set out the proposed remedies to be imposed on Communications Provider(s) designated as having Significant Market Power in our Consultation Summary, Final Decision, Order and General Determination: Market Review Process (Part A) – Market Definitions and Market Review Process (Part B) – Significant Market Power, Matter: MR01/13, issued on 29 April 2013.

15. A second consultation document, the “Further Consultation: Obligations for Operators with Significant Market Power – Final Draft General Determination”, was issued on 15 July 2013, and additional comments on the modified set of proposed remedies contained therein were invited by the Authority.

16. This Public Consultation was closed on 25 July 2013. In accordance with RAA Section 72(4), the Authority published a Consultation Summary, Final Decision, Order and General Determination in the Public Consultation on 7 Aug 2013, setting out its conclusions regarding the issues raised during the Public Consultation process.

17. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:

- (a) the *Ex Ante* Remedies provided in Section 4, below, shall be imposed upon those Operators designated by the Authority as having SMP in one or more of the relevant markets previously identified by the Authority;
- (b) the *Ex Ante* Remedies provided in Section 5 below, shall be imposed upon those SMP Operators upon whom the Authority has imposed an obligation to provide Wholesale Access services as determined in Section 4.2.1, below; and
- (c) the *Ex Ante* Remedies provided in Section 6 shall be imposed on members of the KeyTech Group on a provisional basis pending completion of the Authority's separate review of the potential competitive impact of horizontal and/or vertical leveraging by KeyTech Group members with SMP into adjacent markets, which shall consider the continued need, if any, for the imposition of these and any additional or enhanced remedies on some or all Members of the KeyTech Group (“KeyTech Review”).

## 4 MAIN PROVISIONS

### 4.1 Determinations concerning Retail market remedies

18. Pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, the Authority hereby determines that:

#### 4.1.1 Remedies applicable to all Retail markets

19. SMP Operators shall be required to continue to offer existing Retail products in relevant markets on a component basis, as well as existing bundles (e.g., the voice plus ADSL bundles marketed by BTC) at prices that do not increase at a rate greater than the price capped rates established in Section 4.1.2, below.

#### 4.1.2 Remedies concerning the imposition of Retail price caps

20. Retail price caps shall be imposed on those relevant markets, services, and SMP Operators depicted in Table 1.

**Table 1: Relevant markets and SMP Operators subject to Retail price cap remedies<sup>1</sup>**

Market No.	Relevant Markets	SMP Operator(s)
1	A national market (excluding Southside) for the supply of Retail fixed narrowband access lines and local calls to residential customers	BTC
2	A market for the supply of Retail fixed narrowband access lines and local calls to business customers outside of Southside and the City of Hamilton and contiguous suburbs	BTC
3	A national market (excluding Southside) for the supply of Retail fixed Broadband Access Services and ISP Services to residential customers	BTC, BCV
4	A market for the supply of Retail fixed Broadband Access Services and ISP Services to business customers outside of Southside and the City of Hamilton and contiguous suburbs	BTC
6	A market for the Retail supply of low-speed Retail Leased Lines in the City of Hamilton and contiguous suburbs	BTC

<sup>1</sup>The markets depicted in this table do not constitute the entire list of relevant Retail markets appearing in the table at Appendix—B of the Further Consultation Document. The markets depicted here are only those relevant Retail markets that have had Retail price caps imposed upon them.

Market No.	Relevant Markets	SMP Operator(s)
7	A market for the Retail supply of low-speed Retail Leased Lines outside of the City of Hamilton and contiguous suburbs (excluding Southside)	BTC
8	A market for the Retail supply of high-speed Retail Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs	BTC
9	A national market for the supply of Retail Subscription Television Services (excluding Southside)	BCV

21. Excepting the price caps imposed on Market Nos. 3 and 4—Retail fixed Broadband Access and ISP Services, and Market No. 9—Retail Subscription Television Services, in all other instances where a price cap is imposed on an Operator, the following price cap formula shall be utilized:

$$PCI_t = PCI_{t-1} * (1 + CPI + Y), \text{ where};$$

$$CPI = \text{Consumer Price Index (rate of inflation)}; 2$$

$$Y = 2\%;$$

PCI<sub>t</sub> is the price cap index for the current year; and

PCI<sub>t-1</sub> is the price cap index for the prior year.

22. An SMP Operator upon whom a price cap has been imposed shall:

- (a) make an annual filing demonstrating that it has abided by the terms of the price cap for that year. In making this filing, the Operator must show that the weighted average of the prices for price capped goods and/or services comports with the price cap terms;<sup>3</sup>
- (b) show that the quantities used in the weighting are those from a fixed base year.<sup>4</sup> The base year is set at 2012 and the weights to be used in the price cap calculation are the quantities of goods purchased from the SMP Operator in 2012. The Authority may at some point in the future alter the base year to a year other than 2012 if it considers this necessary; and

<sup>2</sup>As measured by the Consumer Price Index (“CPI”) published by the Bermuda Department of Statistics based on the most recent full calendar year (January-December).

<sup>3</sup>The percentage change in prices would be calculated using logarithms. For example, if the price for a service changed from \$26 to \$28, this would be reported as a 7.4108% = ln(28 / 26) change in price (where ln refers to the natural logarithm function).

<sup>4</sup> Using a fixed base year weights means that changes in the weighted average price over time reflect only changes in prices rather than changes in weights.

(c) show that carry over effects are not included. Regardless of prior years' adjustments, an Operator shall only be permitted to raise its prices by the annual inflation rate plus 2% adjustment factor in any one year.<sup>5</sup>

23. Where we use the term “annual price increase”, we are referring to the price changes that may occur in the calendar year, January to December. In a calendar year, the price of the basket of goods may not increase by more than (CPI + Y). An SMP Operator can file for rate changes, where those are appropriate, only after it has obtained a Satisfactory Compliance Notice as set out in ECA Section 73(5)(a).

24. If an Operator does not implement a price change at the start of the calendar year, its composite rate may go up by more than CPI + Y, as long as the following two conditions are satisfied:

- (a) the annualized rate increase for the basket must be no greater than CPI + Y; and
- (b) the price increase for the shorter period of time may be no greater than 25% of the increase permitted on an annual basis.<sup>6</sup>

25. The annual inflation rate plus 2% adjustment factor shall remain in place until the next market review is completed, unless an SMP Operator is able to demonstrate that the price capped price would not enable it to recover the costs of providing the product or service whose price is capped.

#### 4.1.2.1 Remedies concerning the application of the Retail price cap to Market Nos. 3 and 4—Retail fixed Broadband Access Services and ISP Services

26. The application of the price cap to Market Nos. 3 and 4—Retail fixed Broadband Access Services and ISP Services shall be done such that:

- (a) the price per Mb/s cannot increase (unless there is an affirmative showing that prices are not recovering historical costs); and
- (b) the price cap shall be applied to the price per Mb/s for each broadband access speed offered.

27. At the end of each 12 month period BTC and BCV must submit a report to the Authority showing any changes in their Retail Broadband prices and how those compare to the price cap.

#### 4.1.2.2 Remedies concerning the application of the Retail price cap to Market No. 9—Retail Subscription Television Services

28. The application of the price cap to Market No. 9—Subscription Television Services shall utilize the same price cap formula set out at paragraph 20 except that the Y

<sup>5</sup>For example, suppose that a firm with SMP could have raised its prices by inflation plus 2% rate of 4% in 2013, but decided to lower them by 5% instead. Now further suppose that in 2014 market conditions have changed and the firm would like to raise its prices by 9% to make up for 2013. The firm would not be permitted to implement the 9% carry over price increase. The firm would only be permitted to raise their prices in 2014 by the change in annual CPI plus 2% adjustment factor.

<sup>6</sup>For example, if CPI + Y is 4%, and if an increase in prices is not implemented until July 1st, the rate of increase is limited to five percent (4% + .25 \* 4%).

shall be set to 0% and there shall be no adjustment for inflation. This means that for Subscription Television Services the relevant price cap is:

$$PCI_t = PCI_{t-1}$$

29. BCV can petition the Authority if it considers that a greater price increase is required in order to achieve a reasonable return on