



ICT Decision 2010-3

Grand Cayman, 4 March 2010

Decision on LIME's Application to Reconsider the 14 January 2010 Interim Directive on the Use of Deep Packet Inspection and Similar Technologies

Summary

The Authority determines that LIME's request for reconsideration of the 14 January 2010 interim directive on the use of deep packet inspection and similar technologies does not satisfy the requirements of section 78 of the ICTA Law. Further, the Authority determines that LIME has not identified any flaw in the procedural or substantive approach used by the Authority in arriving at the interim directive and therefore that it should not be reviewed under the Authority's residual power to reconsider decisions not covered by subsection 78(1).

(Note: This summary is provided for the convenience of the reader and does not constitute part of the Decision. For details and reasons for the conclusions, the reader is referred to the various parts of the Decision.)

THE APPLICATION

1. In a letter dated 4 February 2010, Cable and Wireless (Cayman) Limited ("LIME") requested that the Information and Communications Technology Authority ("ICTA" or "Authority") reconsider its 14 January 2010 interim directive on the use of deep packet inspection and similar technologies (the "Decision"). The Decision directed the licensees not to install or implement deep packet inspection and similar technologies ("DPI") on a public network, but allowed Digicel Cayman Limited ("Digicel") and WestTel Limited ("WestTel") to continue using their pre-existing DPI technologies, pending a final determination in the CD 2009-4 proceeding.
2. LIME's letter noted that its request for reconsideration was made pursuant to the inherent jurisdiction of the Authority under the Information and Communications Technology Authority Law (2006 Revision) ("ICTA Law") to reconsider a decision or determination which is made under an error of law or fact.

3. According to LIME, the Authority erred in fact by concluding that there was a lack of empirical evidence that LIME would suffer harm as a result of the temporary embargo on the installation of new DPI systems. LIME noted that, in a situation where LIME is not authorized to use DPI and two of its competitors are allowed to do so, there is “by implication evidence of the competitive imbalance being suffered by LIME and the financial harm being caused to LIME’s business by not being able to implement DPI on its network”. LIME stated that this fact, by itself, should suffice as evidence of the harm it has suffered and continues to suffer. Notwithstanding the above, LIME provided to the Authority a confidential estimate of the bandwidth cost per month that is incurred by LIME due to the absence of DPI on its network.
4. In LIME’s view, the Decision also erred in law as it was both irrational and unreasonable. LIME argued that, in the absence of a determination on the legality of DPI, and in light of the fact that LIME’s competitors are benefitting from the use of DPI on their networks, the response of a rational and reasonable regulator should be to take immediate action to redress the competitive imbalances in the market and to allow all service providers to install and use DPI.
5. LIME further submitted that the Decision gave the appearance that the Authority is biased against LIME. According to LIME, a fair minded and informed observer would query whether it was appropriate for the Authority to prohibit the installation and use of DPI by LIME while allowing Digicel and WestTel to continue using DPI, pending a final determination in this proceeding.

PROCESS

6. A call for comments on LIME’s request for reconsideration was issued by the Authority on 5 February 2010. The Authority invited parties to file comments on LIME’s applications and requested parties to address:
 - whether the Authority has jurisdiction, under section 78 of the Law or otherwise, to reconsider the Decision; and
 - assuming that the Authority has jurisdiction, whether the Decision should be confirmed, reversed or modified, and for what reason(s).
7. The 5 February 2010 procedures established by the Authority allowed for the parties to file comments on the LIME request by 15 February 2010 and for LIME to file reply comments by 19 February 2010. However, the Authority did not receive any comment and reply comment on this request.

LEGISLATIVE AND REGULATORY FRAMEWORK

8. In reaching a decision on LIME’s reconsideration request, the Authority is guided by the ICTA Law and, in particular, by section 78. The relevant portions of the ICTA Law are as follows:

78. (1) *This section shall apply to the following decisions of the Authority -*
- (a) a decision not to grant a licence;*
 - (b) a decision to revoke a licence;*
 - (c) a decision to modify a licence under section 31(4);*
 - (d) a decision to suspend a licence under section 32(1);*
 - (e) a decision that a section 36 prohibition has been infringed;*
 - (f) a decision that a section 40 prohibition has been infringed;*
 - (g) with regard to an individual exemption under Part IV-*
 - (i) a decision to grant or refuse an individual exemption;*
 - (ii) a decision to impose any condition or obligation and a decision on the type of condition or obligation where such a condition or obligation has been imposed;*
 - (iii) a decision of the date and duration of the individual exemption and as to the period fixed for such exemption;*
 - (iv) a decision to extend or not to extend the period for which an individual exemption has effect; or*
 - (v) a decision on the duration of the extension referred to in subparagraph (iv);*
 - (h) a decision to cancel an exemption;*
 - (i) a decision to impose a penalty in accordance with Part IV and a decision as to the amount of such penalty;*
 - (j) a decision to give a direction under section 47, 48 or 50;*
 - (k) a decision in relation to a pre-contract dispute under section 67; and*
 - (l) such other decision as may be prescribed.*

(...)

(3) Where-

- (a) a licensee;*
- (b) an applicant for a licence;*
- (c) party to an agreement in respect of which the Authority has made a decision under Part IV; or*
- (d) a person in respect of whose conduct the Authority has made a decision under Part IV,*

is aggrieved by a decision specified in subsection (1) ("the original decision"), he may, within fourteen days of the receipt of the decision and written reasons therefore, apply in the prescribed manner to the Authority for a reconsideration of that decision.

(4) The Authority shall, under subsection (3), confirm, modify or reverse the decision, or any part thereof, specified in subsection (1), and render its determination within a reasonable period of time not to exceed twenty-eight days.

(5) Where the original decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.

(6) Where an application is made under subsection (2) -

- (a) the Authority may, on application by the aggrieved person, order that the decision shall not take effect until a determination is made under subsection (3); and*
- (b) the Court shall not hear an appeal under section 80 in relation to a reconsideration under subsection (3) until the Authority has made a determination under subsection (3).*

AUTHORITY ANALYSIS AND DETERMINATION

9. As a general rule, the Authority derives its powers from its enabling statutes. Further, in accordance with well-established administrative law principles, the Authority has certain residual powers which are not explicitly mentioned in its enabling statutes, but which may be regarded as incidental or consequential to its statutory powers. The courts have recognized, for example, that an administrative tribunal may, in exceptional circumstances, reconsider a decision in order to correct an accidental mistake, set aside a decision obtained by fraud, or review a decision where facts subsequently discovered have revealed a miscarriage of justice. In the absence of such special circumstances, a tribunal's decision is irrevocable, unless the statute in question provides otherwise.¹ This exceptional power was referred to by the Authority in previous decisions, including ICT Decision 2006-2, ICT Decision 2007-2, ICT Decision 2008-3, ICT Decision 2009-1 and ICT Decision 2010-2.
10. In order to avail itself of the opportunity to apply for reconsideration, LIME must demonstrate that the Decision falls within the scope of subsection 78(1) of the ICTA Law. If the decision is not enumerated in subsection 78(1) of the ICTA Law, the Authority considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to a proceeding at first instance before it, it should decline to entertain an application for reconsideration of a matter that falls outside the list of subject areas enumerated in section 78(1).
11. In the present case, LIME did not in its letter of 4 February 2010 argue that the disclosure request falls within the scope of subsection 78(1) of the ICTA Law. Instead LIME argued that request for reconsideration was made pursuant to the "inherent jurisdiction of the Authority" under the ICTA Law "to reconsider a decision or determination which is made under an error of law or fact". LIME's letter does not provide any further details on this inherent jurisdiction, nor does it provide any statutory and jurisprudential explanation as to why its request falls within the scope of this inherent jurisdiction. Whilst LIME's letter cites case law in support of its argument that the Decision was irrational, unreasonable and indicative of bias against LIME, the case law mentioned by LIME appears to suggest that these flaws (assuming they are present) would be sufficient grounds for judicial review. The case law cited in LIME's letter does not suggest that these flaws give rise to an inherent jurisdiction for an administrative tribunal such as the Authority to reconsider its determinations where the enabling statute does not explicitly allow for such reconsiderations.
12. In the absence of any legal justification for this inherent jurisdiction, the Authority is left with no other option but to presume that LIME intends to have its request for reconsideration considered pursuant to the Authority's residual power to reconsider decisions not covered by subsection 78(1), outlined in paragraphs 9 and 10 above.

¹ Sir William Wade and Christopher Forsyth, *Administrative Law*, Ninth Edition, Oxford University Press, 2004, pp. 230 and 938.

Accordingly, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in the proceeding that led to the Decision, the Authority should decline LIME's request for reconsideration.

13. The Authority notes that LIME's request for reconsideration does not identify any fundamental flaw to the procedural approach adopted by the Authority in the proceeding that led to the Decision.
14. With respect to the substantive approach adopted in the Decision, the Authority notes that, although LIME disagrees with the conclusion reached by the Authority, it does not identify any particular flaw with the analytical approach adopted by the Authority in reaching this conclusion. Despite LIME's assertion to the contrary, the Authority specifically recognized the possibility of competitive imbalance and harm for LIME as a result of this interim measure. However, the Authority determined that these negative factors are outweighed by the public interest in maintaining the embargo upon the installation of new DPI systems prior to the final determination in these proceedings.

CONCLUSION

15. In light of the above, the Authority determines that LIME's reconsideration request does not satisfy the requirements of section 78 of the ICTA Law. Further, the Authority determines that LIME has not identified any flaw in the procedural or substantive approach used by the Authority in arriving at the Decision and therefore the Decision should not be considered under the Authority's residual power to reconsider decisions not covered by subsection 78(1). LIME's reconsideration request is therefore denied.