

Mena Telecom
Response to Telecommunications Regulatory Authority Draft
Competition Guidelines Consultation
Dated 4 November 2008

29 January 2009

Introduction

Menatelecom is an OLO that has been operating in the Bahraini telecommunications market since 2003. On the 23rd of November 2008, menatelecom launched the only nation-wide WiMAX network in the world, in Bahrain. Since then, the level of subscriber uptake has demonstrated that menatelecom's innovative services can bring a truly competitive dimension to the market. Menatelecom has, however, struggled during the majority of 2008 with matters relating to anti-competitive behaviour generally demonstrated in the market that have stopped it (menatelecom) from rising (as soon as it could have or would have liked) to the challenge of developing yet more pioneering products for the Bahraini market independent of the dominance of the incumbent. Menatelecom would hope that the TRA appreciates this limitation and develops competition guidelines that give greater impetus to the competitive licenced operators, and limits the forceful hold of the incumbent on the market. Menatelecom anticipates that the TRA appreciates that there are able and willing licenced operators to rival the incumbent in bringing innovation to the market, though in order to overcome the handicap the incumbent places on the market (decades of prosperity through monopoly), the TRA's support is crucial. Menatelecom views that there is a direct link between regulator intervention in anti-competitive and abuse of dominance cases, and a mature, developed and innovative market.

Having gone through the Draft Guidelines, menatelecom has chosen to comment on those areas it feels are directly related to its contribution to the Bahraini telecommunications market and, as such, has not therefore commented on every aspect of the consultation. On the areas it has commented, however, menatelecom feels very strongly.

If the TRA would like to discuss this Consultation response further with menatelecom, then it should contact:

Eman Ahmed
NBB Tower, 9th Floor

Government Avenue, Manama
Kingdom of Bahrain
Telephone: 17 203002
Fax: 17 200023
Eman.ahmed@menatelecom.com

From the Draft Regulation:

4.2 Elements required to establish a Breach of Section 65

108 – TRA will also need to establish the materiality of the resulting impact on competition...For this purpose, TRA will take into account factors including, but not limited to:

- **The duration of the alleged breach (i.e., TRA may generally not be inclined to investigate alleged anti-competitive behaviour related to single day promotions, for example)**

Menatelecom comment:

Menatelecom views that the provision at section 108 is too restrictive to enable the TRA to have a more realistic macro view of market activity in relation to Section 65 of the Law. If the TRA will generally not be inclined to investigate anti-competitive behaviour related to single day promotions, then menatelecom believes that TRA is impliedly, and ultimately effectively encouraging abuse of dominance through anti-competitive single day promotions as an alternative to other anti-competitive activities. By publishing guidelines that expressly state that the TRA will generally not investigate single day promotions (even if anti-competitive), TRA is opening the door to a myriad of anti-competitive single day promotional activity that could effectively (in totality) freeze competition. While menatelecom understands that there may be single day promotional activity (that could be anti-competitive) which (given resource limitations or other reasons) the TRA would overlook, to expressly state such generality, menatelecom believes, is shortsighted. Menatelcom believes this is wrong in two respects. Firstly, if TRA demonstrates complacency in this regard, the frequency of single day promotions can effectively be same as a long-term anti-competitive promotion. Secondly, depending on the type of single day promotion, the impact of an ‘explosive’ or ‘extremely special’ single promotion, at times, can demonstrate abuse of dominance in the same way as a

long term anti-competitive promotion. At any rate, TRA has always demonstrated its own discretion pertaining to whether or not to investigate cases of alleged anti-competitive conduct on the basis of materiality. Therefore, the addition of the provision is not necessary and is more detrimental to both the TRA and the market (by opening the door, the TRA will in the long-run be faced with more cases of anti-competitive behaviour to consider).

Menatelecom views that 2008 has seen many examples of anti-competitive conduct and abuse of dominance on the part of the incumbent. Further, with the progression of the telecommunications market, much of the complaints have evolved from simple provisioning complaints to more serious obstacles to independent international capacity access for example (or prevention to bring world class voice quality of service to market). Therefore, Menatelecom is quite surprised that the TRA is taking a softer stance on anti-competitive behaviour going forward, especially in light of the fact that so many complaints from 2008 are still open. While menatelecom understands the predicament the TRA faces with the multitude of unjustified and/or baseless complaints, manatelecom believes that a better way to reduce this inefficient utilization of resource is by clarifying and breaking down activity that is or is not allowed under the Law rather than limiting the number of complaints.

From the Draft Regulation:

- **Changes in market shares over the period of the alleged breach (for example, whether previous market share trends have been reversed or new entrants have begun to lose market share)**

Menatelecom comment:

Further, menatelecom views that this provision is unreasonable as it places the onus of market analysis completely on the licenced operators. There is often a time lag between a contravention of Section 65 and changes in market trend. By the time the change is recorded, many other breaches may potentially have taken place and it is unreasonable to

expect that the licenced operator can maintain a market watch on all such activity especially given the frequency of such conduct already encountered in Bahrain. Rather, menatelecom believes that monitoring the market, and as a result uncovering abuses of dominance, is a TRA obligation. Thus, principally, menatelecom believes that complaints lodged against anti-competitive behaviour effectively help the TRA (by pointing in certain directions) identify abuses it (the TRA) should continuously be on the look out for. Of course, menatelecom appreciates that the TRA acts within the confines of the Law. However, it is not to the benefit of the industry if the TRA seeks to limit the already strict provisions of the Law even further by transferring many of the burdens of testing anti-competitive conduct on the licenced operator. Menatelecom believes it is in the interest of the market if the stricter provisions of the Draft Guidelines (that burden the complainant with excessive information gathering exercises) are removed.

From the Draft Regulation:

120 Further, TRA notes that when considering potential abuse of a dominant position, it is essential, but often difficult, to distinguish between aggressive competition and anti-competitive behaviour (e.g., whether significant price reductions constitute anti-competitive behavior or a pro-competitive response to changing market conditions). However, it should be noted that in conducting any assessment of anti-competitive behaviour, TRA considers that its role is to protect and enhance the competitive environment of Bahrain's telecommunications sector as a whole, rather than to protect the individual competitors.

Menatelecom comment:

Menatelcom agrees with the TRA that the distinction between aggressive competition and anti-competitive behaviour is often difficult. Menatelecom feels that there have been many instances where such lack of distinction has lead to problems. Therefore, menatelcom views that it would be best to address some guidelines at least, that aim to clarify this distinction at this stage. The Competition Guidelines are a natural stage at which such distinction is addressed comprehensively. We do not understand how it is

useful to the market to state that there is a complexity without addressing the complexity itself. It seems especially appropriate to address this complexity in the competition guidelines.

Further, menatelecom agrees that it is not the TRA's role (or primary objective) to protect individual competitors, but rather the communications sector as a whole. However, it is important to note that healthy competitors lead to a healthy state of competition. If the competitors are not protected, and dominance is abused, competitors will be held back and competition will stagnate. Thus competitors and competition are inextricably linked. Menatelecom does not feel that the Draft Guidelines address or completely appreciate this point. By removing some of the more extreme restrictions to complaints against alleged anti-competitive conduct, menatelecom believes that this point will impliedly be addressed.

From the Draft Regulation:

5.1 Submission

227. In order to enable TRA to identify those allegations that raise real concerns and therefore direct resources appropriately, sufficient evidence is required to support any complaint regarding alleged anti-competitive behaviour. That is, a complaint must be specific. A general reference to a potential breach of the Telecommunications Law without reference to the specific article(s) of the Telecommunications Law will not be considered adequate. A complaint will normally also not be accepted without all of the evidence required for TRA to properly assess it. For example, any allegation about anti-competitive pricing will require the submission of price and cost data. Although a complainant is unlikely to know a competitor's costs, a reasonable attempt to estimate them should be made. This could be based on the complainant own experience and/or on benchmarking.

Menatelecom comment:

Menatelecom views that the TRA is taking too much of a back-seat approach to complaints, by moving the investigative onus on the complainant. In the interest of competition development, the TRA should be investigating areas of anti-competitive behaviour on its own accord even when no complaint by a licenced operator is made. This is because the TRA is the only authority that has such discretion and, thus, such responsibility. It seems the complaints section of the Draft Guidelines is written without having regard for this principle. It is understandable that a licenced operator should endeavour to report on the above provisions, but obliging it of an operator insinuates that the TRA is washing its hands from this burden. This gives an impression quite ironic to the market as OLOs generally feel that the TRA is not doing enough in this area.

From the Draft Regulation:

5.3 Process for conducting investigations

2.3.4 When dealing with a complaint TRA will seek to keep to the following timetable:

- **Within 20 working days of receiving a complete submission, the complainant and the target operator will be informed about whether an investigation will be opened.**

Menatelecom comment:

Menatelcom appreciates that the TRA is placing a target to respond.

From the Draft Regulation:

Section B – legal basis for the complaint

Specify the basis by which you believe that Section 65 of the Telecommunications Law, or the relevant licence conditions of the target operator concerning anti-competitive conduct has been breached, covering:

- **An indication of whether the breach relates to Section 65(b)1 of the Telecommunications Law;**
- **The relevant market(s) in which the alleged breach has occurred;**
- **Dominance in the relevant market(s) by the target(s) of the complainant;**
- **A brief description of the nature of the alleged breach, citing specific abuses or breach where possible, e.g. predatory pricing; and**
- **A brief description of the effect of the alleged breach.**

Menatelecom comment:

In totality, menatelecom believes that the burden placed on licenced operators is too onerous. Licenced operators are new businesses battling an incumbent that has had the luxury of decades of prosperity in monopolistic conditions. Resources to an OLO are precious and limited, and better used towards the production of innovative services to the market. It should be the TRA's role to protect the OLOs from the dominant incumbent's potential trespasses on competition rather than place a further burden/restriction on OLOs towards better competition.

From the Draft Regulation:

Section C Details of the Complaint

- **A description of the effect of the alleged breach, including how the complainants business has been affected by the alleged activity.**

Menatelecom comment:

Menatelecom again views this too onerous a burden on licenced operators as often an anti-competitive act can have an effect of preventing competition, though not necessarily directly on an OLO's business (especially given the time lag element) but more generally on the market. Perhaps, for example, the effect on a single operator's business is immaterial while the overall impact on all OLO business (of the same anti-competitive

act) is material. TRA is restricting the provisions of the Law even further in the Draft Guidelines. By the time an OLO can meet the provisions set out here, the complaint will be meaningless. This is why a complainant's role should be to raise a concern, and endeavour to provide as much justification and/or information as is reasonable in its position, but the burden of the information gathering exercise and the investigative exercise should fall on the TRA.

From the Draft Regulation:

Section E - Other relevant information

Menatelecom comment:

The entirety of the information required in this section is unreasonable for an OLO to have to obtain. In effect, TRA is placing itself in the position of a judge without having to expend any resource to help the market investigate breaches of the law. We view that this is unfair and that the position is reversed or at least that the burden is shared.

Conclusion:

In light of the comments above, menatelecom:

1. Appreciates the limitations of the test for anti-competitive conduct under the Law;
2. Appreciates that the TRA can often become inundated with unjustified complaints and that the TRA is trying to find a solution for this inconvenience; but
3. Still considers that a the provisions of the Draft Guidelines further limit the already restricted test for anti-competitive conduct under the Law; and that the TRA can more effectively limit the number of unjustified complaints by clarifying the parameters of the complaints and setting out behaviour that does or does not constitute anti-competitive conduct, without placing greater obstacles on licenced operators or complainants that would inevitably have the effect of restricting competition given the link between competitors and competition described above.