

REPORT

Dominance in Wholesale Markets

Dominance in Wholesale Markets

A Report issued by the
Telecommunications Regulatory Authority
on the Consultation

22 January 2006

Purpose: Report on the Consultation regarding Dominance in Wholesale Markets.



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1 Introduction

1.1 PURPOSE

This document summarises the responses received by the TRA as part of the consultation process on assessing Dominance in Wholesale Markets. During the consultation process, the TRA received responses from four stakeholders: Batelco, Lightspeed Communications, ATCO Clearwire Telecom Limited and one response marked confidential.

Three of the respondents broadly welcomed the TRA's proposals, but one raised concerns about the TRA's proposed finding of dominance. These concerns centered on the negative impact that a dominance determination could have on investment and market development, on the basis of what is considered to be inconsistency with the Access Regulation adopted by the TRA on 30 April 2005. The first section of this document addresses these issues.

The TRA, having reviewed the comments received in conjunction with the Consultation issued, is satisfied that Batelco is dominant in the following relevant wholesale markets for the whole of the Kingdom of Bahrain, except the Amwaj Region:

- the wholesale market for access to customer premises (including high-bandwidth, broadband and narrowband access);
- the wholesale market for access to transmission capacity; and
- the wholesale market for access to international facilities.

In light of these findings, the TRA has accordingly issued a Determination on Dominance in the relevant wholesale markets, dated 22 January 2006.

The remainder of this document summarises and evaluates the responses the TRA received to the specific questions raised in the Consultation Document.

2 GENERAL RESPONSES TO THE CONSULTATION

2.1 CONSISTENCY WITH TELECOMMUNICATIONS LAW AND ACCESS REGULATION

One respondent pointed out what it considered to be an ambiguity in the Access Regulation that it considered resulted in it being unclear as

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regards the impact of a determination of dominance in wholesale markets. Article 3.3 of the Access Regulation states that:

*A licensed operator that has been declared by the TRA to hold a Dominant position in a relevant market **shall...** [emphasis added]*

The respondent considered that, taken on its own, this article appears to impose certain obligations (continuing to offer Access services, negotiating in good faith, and making available a Reference Access Offer) on any licensed operator declared to hold a Dominant position. However, the respondent considered that this was by no means certain, in view of:

- Article 2.1 and Article 3.1, each of which indicates that the TRA **may** [emphasis added] impose Access Obligations by way of an Access Order on a licensed operator declared to hold a Dominant position.
- The definition of an Access Obligation, i.e., an obligation imposed pursuant to Articles 3.3, 3.4 or 3.5 of the Access Regulation.

The respondent argued that there had been a drafting error in Article 3.3, and therefore the Access Obligations listed in that Article should not arise until after an Access Order is issued. The respondent further argued that if the obligations in Article 3.3 were to apply without the need for an Access Order, this would contravene Article 2.1.

The TRA is satisfied that the meaning of the Access Regulation, and, in particular, Article 3.3 is perfectly clear in stating that certain obligations shall ensue from a determination of dominance (without the need for an Access Order), while Articles 3.4 and 3.5 identify other obligations that may only be imposed by way of an Access Order.

Neither does such an interpretation contravene Article 2.1, since it simply states the role and duty of the TRA in the event of a licensed operator being declared to hold a dominant position in a relevant market. The fact that the TRA may impose Access Obligations by way of an Access Order does not contradict the parallel fact that some obligations (namely those of Article 3.3) apply immediately and automatically when an operator is declared to hold a dominant position in a relevant market.

The respondent goes on to argue, regardless of the interpretation of Article 3.3, that:

...section 3(f) of the Telecommunications Law and Article 3.7 of the Access Regulation require that the TRA cannot at this time make a dominance determination that imposes an Access Obligation requiring Batelco to prepare a Reference Access Offer.

Section 3(f) of the Telecommunications Law requires that the TRA give

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interested parties reasonable opportunity to comment on measures that will have a material effect on a particular telecommunications market. Article 7 of the Access Regulation indicates a number of factors that the TRA must take into account when considering whether to impose an Access Obligation, so as to ensure that the obligation in question is appropriate and necessary.

The TRA submits that the present consultation process constitutes the reasonable opportunity required by Section 3(f) of the Telecommunications Law, at least as regards the obligations specified in Article 3.3, since these are an immediate consequence of any declaration of dominance that the TRA may make. Should the TRA wish to impose any additional Access Obligations not covered by this Consultation, the TRA accepts that all interested parties ought to be given the opportunity to express their opinions, while Article 3.7 further requires the TRA to ensure that the proposed obligations are "no more than is appropriate and necessary". However, Article 3.7 only applies when the TRA is "considering whether to impose any Access Obligation", i.e., it only applies to those Access Obligations of Articles 3.4 and 3.5 over which the TRA has discretionary powers. The obligations of Article 3.3, including that of making available a Reference Access Offer, do not fall within this category, and the TRA does not need to consider imposing these obligations as they are an immediate consequence of any declaration of Dominance.

The respondent further suggests that (as taken directly from the respondents *Public Response Document* on the Consultation):

"It is unreasonable to require an operator to prepare a Reference Access Offer when the services to be included in that document are not known other than access services already on offer for which the operator is declared dominant".

and

*"...if the TRA intends to impose an Access Obligation to prepare a Reference Access Offer upon the (sic) making a dominance determination and without making an Access Order, the TRA must provide Batelco details of the Access Obligations the TRA will seek to impose **before** making a determination of Batelco's dominance."*

The TRA accepts that an operator can only prepare a Reference Access Offer when it knows the services that it is required to provide. However, in the absence of any additional Access Obligations being imposed by the TRA (pursuant to Articles 3.4 and 3.5 of the Access Regulation), the only access services which a Dominant operator is required to provide are

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those services that it already offers. If additional obligations were to be imposed by the TRA, these would need to be imposed by way of an Access Order, and the Dominant operator would therefore be given time to comment on these obligations before their imposition.

2.2 IMPACT ON INVESTMENT AND MARKET DEVELOPMENT

One respondent expressed concern that a dominance determination would act as a disincentive to investment in network infrastructure in Bahrain. The basis for this concern was that a "waiting period" would be created between making the dominance determination and imposing Access Obligations. The uncertainty created by this waiting period would delay or restrict investment both by the dominant player and by Access Seekers.

The TRA accepts that there will be a "waiting period" as described by this respondent, but believes that its scale and significance have been greatly exaggerated. Indeed, it could be argued that a dominance determination will actually reduce uncertainty, because it will lead to the licensed operator that has been declared dominant having to provide a Reference Access Offer (RAO). The RAO must be sent to the TRA for approval within 2 months of the operator being declared dominant (Article 5.1 of the Access Regulation), so within a short time period thereafter there will in fact be greater certainty and greater investment incentives than existed prior to the determination of dominance.

The TRA acknowledges that the potential imposition of additional Access Obligations on a dominant player does create some further uncertainty in the market. However, these obligations can only be imposed by way of an Access Order after further consultation, and only if they are demonstrably viable, feasible, efficient and in the long-term interests of end-users. The TRA does not, therefore, believe that this constitutes a significant level of investment uncertainty. Indeed, it could again be argued that these measures will increase investment certainty as they provide Access Seekers with some reassurance on the future competitive environment they will be facing.

The respondent also claimed that a dominance determination would deter operators from reaching commercial agreements on Access. Thus, a dominance determination would have a negative impact on market developments and be contrary to the interests of end-users.

The TRA considers that this view once again exaggerates the importance of the "waiting period" between the dominance determination and the publication of the RAO. It is indeed unlikely that commercial negotiations will progress during this period, but the provision to "continue to offer, and not withdraw, Access to Telecommunications networks and

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Telecommunications facilities already granted" (Article 3.3a) will ensure that there is no hiatus of service during this period. The TRA does not therefore believe that a dominance determination will have any deleterious effect on market development.

3 Comments on Specific Consultation Questions

3.1 GENERAL REMARKS

In general, three of the submissions mostly agreed with the TRA's provisional findings of dominance, whilst a fourth did not. In supporting the TRA's preliminary conclusions on dominance, one respondent noted that effective competition is unlikely unless this dominance is addressed.

The respondent suggested two possible mechanisms for addressing dominance. The first suggestion was local loop unbundling and the establishment of interconnection arrangements. The second was the establishment of fixed wireless networks. The respondent indicated a strong preference for the latter. The TRA notes these comments, and is interested in the industry's views on the optimal mechanisms for addressing dominance where found. Wireless local loop offers scope for providing competition, however, it is a matter for operators to choose to provide this service. The provision of wireless local loop services will be addressed in the TRA's Consultation on spectrum policy.

Another respondent stated that it believed the TRA had correctly separated retail and wholesale markets. However, it was concerned that any definition of retail markets on the basis of the speed of the service risks obsolescence due to technological progress. As such, it suggested including DSL co-location and unbundled local loops in the "High Bandwidth" category, possibly to take account of higher speeds of service over copper infrastructure resulting in the introduction of ADSL2+. It also recommended a periodic check on the designation and definition of services as technology changes.

The TRA would like to emphasize that the inputs listed in Table 1 of the October Consultation were not intended to be definitive or prescriptive. Table 1 was merely intended as a guide to which of the access inputs listed in Article 3.5 of the Regulation were likely to be considered relevant to each of the wholesale markets for the purposes of developing RAOs. The TRA agrees that technological changes may result in changing market definitions. The TRA intends to update the market definitions as data become available and as process allows.

One of the respondents stated that it believed Batelco to be dominant in all the wholesale markets identified in the Consultation. It also noted that there is a difference between the grades of services (i.e. Service Level Agreements) expected between the business and residential sectors. The TRA accepts that such a distinction exists, although the respondent did

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not explain whether or how this should affect the TRA's market definition. In general, the existence of differences between customer segments does not necessarily point to the existence of separate markets.

The principal points made by the respondent that disagreed with most of the provisional findings of dominance were that:

1. The approach to market definition and the assessment of dominance should be entirely separate. The TRA should not, for example, treat two distinct economic markets as though they were one, just because the finding of dominance and/or the relevant access inputs are the same in each;
2. The TRA should look beyond the current state of competition in each market and take account of the prospects for market entry when assessing dominance;
3. The definition of product markets should distinguish between business and residential customer segments;
4. The definition of geographic markets should distinguish between business and residential customer segments;
5. The definition of geographic markets should distinguish between the Amwaj region and the remainder of the Kingdom; and
6. Batelco is not dominant in any of the markets identified by the TRA. Even if the TRA finds Batelco to be dominant, regulatory intervention is not warranted.

The first of these issues is considered in Section 3.2 below. The TRA does not consider the issue to be particularly important in the overall context of this consultation, because the approach in question was adopted only for convenience and does not affect any of the conclusions on substance.

The second issue arises in a number of the markets discussed in the respondent's submission. As the October Consultation made clear, the issue is an important one: it is well recognized in competition and anti-trust analysis that prospects for future competitive entry are important to understanding whether any incumbent holds a dominant position. We consider below whether future competitive entry is likely to act as an effective constraint on market power in each context in which the question arises.

The third and fourth issues are specific examples of the general point raised in the first issue. They are considered in Section 3.2 below.

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The fifth issue raises an important question about geographic market definition. It is relevant to understanding whether or not any operator holds a dominant position in the Amwaj region, although it does not affect the analysis of markets outside the Amwaj region. The issue is considered in detail in Section 3.2 below.

The TRA considers the sixth point as partly a legal matter and partly a policy matter. The relevant legal issues were discussed in Section 2. In section 3.4 we briefly cover some of the policy issues, such as whether additional Access Orders are required beyond the obligations automatically triggered by a finding of dominance, although we note that a full consideration of such issues is beyond the scope of the current consultation.

Notwithstanding comments that various markets are competitive or prospectively competitive, other operators argued that serious access issues continue to hinder the development of telecommunications markets in the Kingdom of Bahrain. One operator in particular noted that it had endured substantial difficulties in obtaining access on fair and reasonable terms to parts of Batelco's infrastructure, including access to ducts, dark fiber, high bandwidth transmission capacity and Internet connectivity.

Below, the TRA analyses the comments it has received on each of the questions raised in the October Consultation and responds accordingly.

3.2 CONSULTATION ISSUE 1

The TRA invites comment on its approach to defining retail markets and the relevant geographic market for the purpose of analyzing wholesale markets for the presence of dominance.

There was no disagreement with the approach towards defining retail markets for the purpose of analyzing wholesale markets.

One respondent argued that the TRA had paid insufficiently close attention to the differences in supply of services in different geographical areas. In particular, it noted that Amwaj has a monopoly on the local access network as regards its development on the island.

The respondent also argued that the market entry potential in business districts such as Manama and Seef means that different supply-side market conditions exist there as compared to predominantly residential

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areas. It believed that the barriers to entry in these business districts are significantly lower than in residential areas because of higher density of potential subscribers and the higher revenue that can typically be earned from providing services to business subscribers. For these reasons, the respondent argued that separate geographical markets should be defined for business districts and predominantly residential areas.

With regard to the argument that market definition should be split into business and residential districts, the TRA considered this issue in the October Consultation. The Consultation noted that while business districts do indeed have different future prospects for the development of competition, there is insufficient evidence of differences today to justify defining them as separate markets.

A respondent further argued that the market definition methodology should take account of likely competitive developments over a period of 1-2 years. In this regard, the TRA observes that there is little evidence from other countries of regulators having had cause to separate business and residential markets due to widespread competition developing in such a short time period following liberalization. For example, despite strong pressure from BT in the UK, Ofcom has so far seen no need to define markets differently according to geography or customer segment.

Given the nascent state of competition in Bahrain, the TRA sees no grounds for defining markets differently according to speculation as to how competition might or might not develop. However, the Authority recognizes that there may be grounds for revising this view in the future once further evidence becomes available. Furthermore, given the small population and geographic scale of the country, defining markets differently according to geography and/or customer segment would present significant practical difficulties, potentially leading to an overly costly and cumbersome regulatory framework.

The TRA, however, accepts the argument that conditions of supply differ between the Amwaj region and the rest of the Kingdom to an extent that warrants treating them as separate geographic markets. Furthermore, the TRA accepts that Batelco does not enjoy a position of dominance in the Amwaj region. At this stage, the TRA does not propose to assess the Amwaj region for the existence of dominance given the embryonic state of the market. However, its approach to the Amwaj region and other development areas may change as market circumstances develop.

The same respondent commented extensively on the market definition methodology proposed by the TRA. In particular, it argued that the TRA is incorrect in blurring market definitions where there is “uniformity of competitive conditions in the supply of services”. It observes that “products in separate markets are in separate markets” and that “present commonality of competition problems in separate markets” does not and

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cannot justify blurring the boundaries of those markets when considering regulatory intervention. Two main reasons were offered by the respondent in support of this position.

The first reason is that the TRA's approach allegedly fails to take account of present differences in demand side conditions (particularly those that might exist between business and residential districts) that might lead to a different conclusion on market definition.

The second reason is that such a market definition fails to take account of future differences in market conditions. The respondent argues that defining markets without reference to future predictable developments would "distort normal market development and investment in alternative infrastructure". According to this line of reasoning, such considerations require the TRA to define separate markets for business and residential districts. The respondent argues that there are predictable changes in the demand side conditions in different markets to come in the next one or two years. For example, higher demand on particular international routes (e.g., to the Philippines) would make competitive market entry on those routes highly probable in the next one or two years.

The TRA is unconvinced by these arguments that the methodology for defining markets needs to be changed. The TRA accepts the point that analyzing markets only according to the "uniformity in conditions of supply" is a potentially misleading terminology. The phrase was intended to incorporate uniformity in both the supply and the demand sides. To ensure that this meaning is clear, the TRA proposes to change its terminology to refer to "uniformity in market conditions" when assessing markets. The TRA does not, however, believe there are any circumstances in which it has ignored conditions of demand to a material degree in determining the markets to be assessed.

With regard to the second point, namely that the TRA must take account of predictable future developments in competition, the TRA accepts this argument. However, the argument has nothing to do with the blurring or otherwise of the TRA's market definitions, which is the context in which this issue is raised.

The role of future competitive entry in limiting Batelco's market power and potentially changing market definitions is a recurring theme in one of the submissions. The prospects for market power and, to some extent, market definitions to be circumvented by future entry are issues frequently encountered in competition analysis, and the TRA intends to take full account of them where necessary. However, if market definitions for today are to be based on future developments in competition, such developments must indeed be predictable and based on clear evidence of the projected evolution of investment on market shares, so that conditions in the proposed market become sufficiently distinct to justify

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separate treatment. The TRA is unaware of any sufficiently robust forecasts that would allow it to subdivide geographic regions with any accuracy for the purposes of market definition.

A significant drawback of defining markets on the basis of projected developments of competition is that the delineation based on such forecasted future developments might be wrong. It may be that the actual development of competition bears little or no relation to any categorization made in advance by the TRA. Indeed, the pattern of development of competition may bear little relation to any geographic segmentation at all. If, as is likely, competition fails to develop exactly according to a market segmentation made in advance by the TRA, customers would suffer unduly if they belonged in a category in which competition did not develop as far or as fast as had been forecast.

The TRA disagrees with the argument that the treatment of markets for regulatory purposes should be conducted in isolation from “the commonality of competition problems”. The reason for this is that an approach to market definition that ignores such commonality would in all likelihood give rise to a very large number of markets, perhaps even going down to the level of individual telephone numbers or buildings.

Since the primary purpose of regulation is to provide a predictable and manageable framework for the development of competition, the TRA is satisfied such an approach would be overly resource-intensive, impractical and burdensome. Therefore, the TRA concludes that, as a practical matter, it is essential to take account of the commonality of market conditions when assessing markets for the presence of dominance. This practical problem in defining markets is broadly understood by regulators throughout the world, and the inclusion of markets in broad categories with similar market and competitive conditions is a well-established practice.

3.3 CONSULTATION ISSUE 2

The TRA invites comment on the wholesale markets that it proposes to define.

With a few exceptions there was broad agreement on the wholesale markets that the TRA proposed to define.

One respondent was concerned that the formulations of the markets as they currently stand may be too limiting as they are focused on facilities rather than services. In particular, the respondent notes that the provision of co-location and hosting services was not explicitly

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considered. The TRA is of the view that the markets defined are service- rather than facility-specific. Table 1 in the October Consultation lists the relevant access inputs from Article 3.5 of the Regulation that fall within each wholesale market. It is not intended to provide a definitive or exhaustive list of the facilities that may be used as an input to each wholesale market.

One respondent also asked the TRA to declare Batelco dominant in markets covering the provision of hosting, co-location, directory assistance services and directory information databases. The TRA notes that the inclusion or otherwise of a particular service pursuant to a finding of dominance is beyond the scope of the current consultation.

Another respondent provided a table with its proposed market definitions. The main differences from the TRA's proposals were the distinction between different geographic segments (business/residential districts), customer segments (business/residential customers), the separate treatment of the Amwaj region and the distinction between low and high demand routes for international voice. The respondent also disagreed with the specific terminology "access to customer premises [for particular retail services]", although it was unclear exactly what its objection was or what it proposed as an alternative.

The TRA has considered the potential treatment of business and residential districts as separate markets in its discussion of responses to Consultation Issue 1. With regard to the separate treatment of the Amwaj region, as indicated in its consideration of responses to Consultation Issue 1, the TRA accepts this argument. The treatment of low and high demand routes for international voice is dealt with in the consideration under Consultation Issue 7 below.

Here, the TRA considered the argument that markets should be defined according to business/residential customer segments. This issue was considered in Section 2.3.1 of the October Consultation. The TRA set out the view that business and residential customer segments may in fact belong in separate markets because of limited demand and supply-side substitution between them. However, the TRA also raised the issue that, in this context, setting the correct market definition is not an end in itself but a means towards assessing dominance for the purposes of determining remedies. With this in mind, so long as the access inputs and competitive conditions for the markets under consideration are similar, the TRA proposed to treat them as if they fall under the same market.

The objections to this approach were discussed above under Consultation Issue 1. As with business/residential geographic markets, the respondent argued that material differences in the degree of competition between business and residential customer segments will develop very quickly, and therefore they should be defined as separate markets. The

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TRA is satisfied that the same reasoning that applied in the issue of the treatment of business and residential geographic markets also applies when considering business and residential customer segments. Therefore, the TRA will not redefine the markets to distinguish between business and residential customer segments at the present time. However, the TRA will keep this matter under review as competition develops.

3.4 CONSULTATION ISSUE 3

The TRA invites comment on its preliminary conclusion that Batelco is dominant in the wholesale market for access to customer premises (high bandwidth).

Of the four consultation responses received, only one indicated disagreement with the proposed position that Batelco is dominant in the wholesale market for access to customer premises (high bandwidth).

The respondent that disagreed argued other licensed operators could profitably deploy their own network and facilities to service the high-revenue customers clustered in the business districts, which, it argued, was in keeping with international experience following deregulation. As a result, it argued, such alternative networks, having been deployed, could also service residential users. Accordingly, the respondent argued that Batelco is not dominant in the market. Furthermore, the respondent argued that even if the TRA found Batelco to be dominant, it did not believe that regulatory intervention was required.

The TRA is unconvinced by these arguments. As argued above, whilst the TRA must take account of prospects for competitive entry in assessing the existence of dominance in a market, it would not be reasonable to do so on the basis of speculation as to how competition might or might not develop. This is particularly important where substantial infrastructure investments are needed or additional obstacles remain. Therefore, the TRA is satisfied that Batelco enjoys a position of dominance in the wholesale market for access to customer premises (high bandwidth).

In response to the argument that the TRA should resist regulatory action even if dominance is found, the TRA's view is that this would only hold if it were convinced that the dominant party was not able to abuse its dominant position. The TRA is not aware of evidence suggesting that the incentives or constraints facing a dominant supplier in the markets under consideration are any different from those existing in other markets. Hence, the TRA is not persuaded by the respondent's argument that

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regulatory intervention is not required in markets where a position of dominance is found to exist.

However, it should be noted that a finding of dominance carries with it only a small number of consequent obligations (those in Article 3.3 of the Access Regulation), chief among them being the requirement to publish a Reference Access Offer. The TRA has not at this stage formed a view as to whether additional Access Obligations may be imposed by means of an Access Order.

3.5 CONSULTATION ISSUE 4

The TRA invites comment on its preliminary conclusion that Batelco is dominant in the wholesale market for access to customer premises (broadband).

Of the four consultation responses received, only one response indicated disagreement with the proposed position that Batelco is dominant in the wholesale market for access to customer premises (broadband).

One respondent argued that the high likelihood of market entry means that Batelco is not dominant in the markets for wholesale inputs used to provide broadband data/internet access to business and residential customers in business districts. Furthermore, the respondent argued that even if the TRA does find Batelco to hold dominance, its position does not warrant regulatory intervention.

The TRA believes that the issues here are not substantively different from those considered in the context of Consultation Issue 3 above. Hence, the TRA is satisfied that Batelco enjoys a dominant position in the wholesale market for access to customer premises (broadband).

3.6 CONSULTATION ISSUE 5

The TRA invites comment on its preliminary conclusion that Batelco is dominant in the wholesale market for access to customer premises (narrowband).

Of the four consultation responses received, only one indicated disagreement with the proposed position that Batelco is dominant in the wholesale market for access to customer premises (narrowband).

The respondent that disagreed argued that Batelco should not be found dominant in business districts because of the strong prospect of market

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entry. Again, it argued that even if the TRA finds dominance, Batelco's position does not warrant regulatory intervention.

The respondent argued that, owing to declining demand, narrowband services will be of little significance in Bahrain within two years, which in its view suggests that regulatory intervention is not necessary.

The TRA is satisfied that (with one exception) the issues here are not substantively different from those considered in the context of Consultation Issue 3 above. Hence, the TRA is not persuaded of the need to revise its preliminary position that Batelco enjoys a dominant position in the wholesale market for access to customer premises (narrowband).

The respondent raises an important point in referring to the declining market for narrowband internet dial-up¹. The TRA should, where possible, forebear from regulatory action where the cost of doing so outweighs the benefit. As a result of the decline in demand for narrowband internet dial-up, for many users the benefits of competition and choice introduced by regulatory action in narrowband internet dial-up services will endure for a limited time only. However, the TRA is satisfied that there is not currently sufficient evidence to persuade it to forebear from regulatory action where a position of dominance is found, because there are at least three classes of user who will in all likelihood not benefit from the process of substitution in favour of broadband. Such users include:

- those who require occasional Internet use only, for whom broadband would not be necessary;
- those who inhabit areas that for technical reasons are unlikely to benefit from broadband; and
- those who are unable to afford a broadband subscription.

The TRA is satisfied that these three classes of user form a group sufficiently large for the benefits of competition and choice introduced through regulatory action to outweigh the cost of regulation.

¹ Note that, although the respondent does not specifically state this, we assume it to be referring to narrowband internet dial-up rather than narrowband services as a whole. Other narrowband services such as voice origination and termination are not subject to the same process of substitution by broadband services and in any case are covered separately by the Interconnection Regulations.

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3.7 CONSULTATION ISSUE 6

The TRA invites comment on its preliminary conclusion that Batelco is dominant in the wholesale market for access to transmission capacity and facilities.

Of the four consultation responses received, only one indicated disagreement with the proposed position that Batelco is dominant in the wholesale market for access to transmission capacity and facilities.

One respondent expressed particular concern about difficulties in obtaining access to procuring and establishing backhaul and other fixed transmission facilities. Another respondent was also concerned that the only access services listed in Article 3.5 of the Access Regulation that relate directly to the transmission facilities market are leased lines and dark fibre. The respondent was equally concerned that dark fibre, ducts and SDH transmission capacity were not mentioned in the October Consultation. On the other hand, the TRA notes a different respondent's particular concern that the imposition of an Access Obligation to provide access to dark fibre has no international precedent and would be especially damaging to investor confidence in next-generation network access.

In responding to these concerns, the TRA re-iterates that neither the list of Access Services in Article 3.5 of the Regulation, nor the list of wholesale inputs in Table 1 of the Consultation document, was intended to be prescriptive or exhaustive. The TRA has at this time formed a preliminary view relating to services and facilities contained in these two lists that a dominant supplier has the obligation to supply. After any dominant operator has prepared its Reference Access Offer the TRA will be clearer as to the need to update these lists. The TRA re-iterates that any further Access Obligations will only be imposed by way of an Access Order, and after due consultation with the industry.

One respondent argued that Batelco is not dominant in the wholesale market for access to transmission capacity and facilities. It argued that, as a result of the relatively flat terrain and high urban density in Bahrain, there is a strong likelihood that alternative network facilities could be deployed in parts of Bahrain in the next two years, particularly in business districts. It also noted that four other operators have been licensed to provide national fixed services.

The TRA is aware that this market might see the rapid development of

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competition in some areas. However, the TRA believes that the issues here are not substantively different from those considered in the context of Consultation Issue 3 above. Respondents make reference to substantial difficulties in negotiating access in this market, which supports the view that it would be premature to conclude that no dominant position exists. Hence, the TRA is satisfied that Batelco enjoys a dominant position in the wholesale market for access to transmission facilities and services.

3.8 CONSULTATION ISSUE 7

The TRA invites comment on its preliminary conclusion that Batelco is dominant in the wholesale market for access to international facilities.

One respondent disagreed with the TRA's assessment of dominance in the wholesale market for access to international facilities. It noted that Batelco's wholesale IDD service was the subject of a dispute between Batelco and MTC-Vodafone (MTC-VB), which the TRA determined in January 2005. In support of its view, the respondent presented data which it claimed indicated that competition is already effective in this market, at least on the most heavily used international routes.

As a result of these considerations, the respondent disagreed with the TRA's conclusion that Batelco is currently the only provider of access to international outbound call termination facilities.

It also argued that the TRA needs to define a separate market for regional hubbing. It noted the existence of regional hubs in the UAE, Qatar, Kuwait and Egypt. In this context, it argued that the TRA's analysis fails to take account of the imminent arrival in Bahrain of the FLAG Falcon cable, which will account for a sizable proportion of international cable capacity from Bahrain.

The TRA accepts the respondent's evidence that for these reasons there would be merit in defining the relevant wholesale markets so as to separate routes that exhibit differing degrees of competitive pressure, for example to take account of competitive pressure from regional hubbing activities. In this regard, the TRA also notes that none of the submissions described difficulties in gaining access to wholesale inputs required to provide international services.

However, the TRA recognizes that substantial extra data would be required in order to propose an alternative set of market definitions that distinguished between "thick" and "thin" routes. The TRA is mindful of

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the potential harm that may be caused by revising its market definitions to take account of competitive and non-competitive international routes before sufficiently reliable data becomes available. A premature revision could be particularly harmful if, as a result of inadequate data, it wrongly classed a non-competitive route as competitive, since this would be likely to impair the ability of new entrants to compete in downstream markets.

Therefore, the TRA will retain its provisional definition of a single wholesale market for access to international facilities, at least until such time as it is able to collect and analyse data on a route-by-route basis, and consult on a more narrowly defined set of markets.

The TRA accepts that by setting a broad market definition for access to international facilities it needs also to ensure that any Access Obligations that it subsequently imposes are no more onerous than outcomes that may be commercially negotiated on the more competitive routes. The TRA notes, for example, one respondent's evidence that the current retail-minus regulation applied across all of Batelco's international routes has not constrained Batelco's competitors from finding more attractive alternative sources of supply for international facilities on "thick routes".