

CONSULTATION

Telecommunications Mergers and Acquisitions Regulation

Telecommunications Mergers and Acquisitions Regulation

A Consultation issued by the Telecommunications Regulatory Authority on the Telecommunications Mergers and Acquisitions Regulation

20th June 2004

The address for responses to this document is:

The General Director,

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PO Box 10353, Manama, Kingdom of Bahrain

Alternatively, e-mail responses may be sent to the Authority's e-mail address at consult@tra.org.bh

The deadline for responses is 5pm on 18th July 2004

Purpose: To provide a framework for the treatment of mergers by the Telecommunications Regulatory Authority.



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1 Introduction

The Telecommunications Regulatory Authority (TRA) was established in 2002 under Legislative Decree No. 48 of 2002 promulgating the Telecommunications Law (“the Telecommunications Law”). One of the tasks of the TRA as set out in section 3 of the Telecommunications Law is to promote effective and fair competition among new and existing licensed operators.

With liberalization of the telecommunications sector in Bahrain, increase in investment and the entrance of new licensees, it is possible that there will be corporate reorganizations within the telecommunications industry in the Kingdom, in particular in the form of mergers, acquisitions and joint ventures. The TRA welcomes such transactions in so far as they are in line with the competition provisions of the Telecommunications Law in that they do not materially prevent, restrict or distort competition in a commercial field connected with telecommunications in the Kingdom and/or do not put in jeopardy the other areas that the TRA is entrusted with, i.e. does not endanger the interest of subscribers and users, in particular in terms of tariffs, availability and provision of services and quality of service, as well as the Kingdom as a whole.

Why the need for a Telecommunications Mergers and Acquisitions Regulation?

Most mergers, acquisitions and joint ventures (hereafter for simplicity the word ‘merger’ alone may be used, but is meant to refer interchangeably to mergers, acquisitions and joint ventures) do not raise competition concerns, and reflect normal commercial activities which are part of the efficient operation of the economy. They can provide licensees and other companies with efficiencies such as economies of scale, synergies and the spreading of risk. Nevertheless, experience in jurisdictions with competition law shows that, on occasion, mergers may cause lasting damage to the competitive environment of a particular market or industry. In such cases, a merger, acquisition or joint venture should not be allowed to proceed and cause damage to competition within the telecommunications industry in Bahrain, or only allowed to proceed in a revised manner which does not harm the competitive environment. Equally a pro-competitive merger should in the long term promote the interests of consumers, however, there may be cases where a transaction raises consumer protection issues in the short term that need to be looked after by the regulator when examining such a transaction. In most cases such issues may be dealt with by conditions imposed on telecoms operators to the transaction in an approval decision by the regulator.

The TRA considers competition policy as a means to further economic efficiency and free trade and therefore benefit subscribers and consumers. It is of benefit to the telecommunications industry in the Kingdom of Bahrain as well as potential investors to have a clear regulatory framework, including timetable, to assist everyone concerned to make informed decisions regarding investment activity in the telecommunications industry in the Kingdom. The TRA intends to only intervene (i.e. impose conditions or outright prohibit) in mergers which have a potentially adverse effect on competition. In such cases, the TRA will only prohibit a merger from being implemented, where other remedies to deal with the competitive concerns cannot be reached or are considered by the TRA to be unsatisfactory.

When assessing such transactions, the TRA will have regard to whether the proposed merger has, or is likely to have:

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- The effect of substantially lessening competition in a telecommunications market;
- A benefit to subscribers, users or the public that outweighs any detriment to the public; and/or
- Complies with the licensee's license conditions and obligations.

This Consultation and draft Telecommunications Mergers and Acquisitions Regulation provides a guide to the approach that the TRA will take in its analysis of mergers that may raise competition concerns. Each merger will of course need to be examined in relation to the particular facts of the case and the state of the market at that time.

With the final stages of opening up the market to full competition in July 2004, it is possible that there will be mergers, acquisitions and joint ventures in the telecoms sector in Bahrain. In the interests of transparency and fairness for all concerned parties, namely the telecoms companies involved in a potential transaction, competitors and ultimately subscriber and users, the TRA proposes to introduce a mergers and acquisitions Regulation. This Regulation will set out the procedures for notification of potential mergers, acquisitions and joint ventures in the telecommunications industry in Bahrain, the TRA's treatment of such notified transactions in order to treat all potential mergers/acquisitions within the telecommunications sector in the same manner and within a set timeframe, in order to give certainty to licensees that are a party to such a merger.

The TRA has sought to balance the need for a thorough Regulation with keeping the Regulation simple and clear for all. The TRA has turned to international best practice in a number of major jurisdictions world-wide in drafting the attached draft Regulation. In particular, it has considered similar legislation in the European Union (the EC Merger Regulation), various EU countries, such as the UK, as well as the Telecommunications Regulatory Authority (OFTA) in Hong Kong as well as practices in the US and Australia. Given the nature and size of Bahrain, the TRA has sought to introduce a Regulation that is appropriate for the Kingdom. To assist licensees and interested parties, the TRA intends to issue various specific supporting Guidelines to the Telecommunications Mergers and Acquisitions Regulation in due course. These are intended to cover the following issues:

- What constitutes a merger/acquisition/joint venture for the purpose of the Telecommunications Mergers and Acquisitions Regulation (i.e. to amplify Article 1 below)
- TRA's competition analysis and assessment of efficiencies of the proposed merger

For now, the TRA sets out general Explanatory Guidelines on the draft Telecommunications Mergers and Acquisitions Regulation below and is divided into four parts. The introductory section which describes the draft Telecommunications Mergers and Acquisitions Regulation and issues such as timing for responses to this Consultation and draft Regulation, the second which sets out the Explanatory Guidelines on the draft Regulation, and which present an article-by-article summary and questions for consultation of each article of the draft Regulation. Third is the text of the draft Regulation and finally is a draft notification form to be used for notifying Qualifying Transactions to the TRA.

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Next steps

The TRA welcomes comments on this Consultation and draft Telecommunications Mergers and Acquisitions Regulation. Interested parties may answer all or any of the questions set out in this document. The TRA welcomes comments on any other issues related to this draft Telecommunications Mergers and Acquisitions Regulation which interested parties may wish to raise. The deadline for receipt of responses is 5 pm on Sunday 18th July 2004.

Following receipt of responses, the TRA will review these and issue a Report on responses received. Depending on the nature of responses received, the TRA will also issue either a final Telecommunications Mergers and Acquisitions Regulation, or, if appropriate, a further draft Regulation with a shorter consultation period, after which the TRA would review comments received and then issue a final Telecommunications Mergers and Acquisitions Regulation.

Consultation

The TRA seeks respondents' views on the following:

- *Whether the TRA should review mergers, acquisitions and joint ventures which affect the telecommunications sector in Bahrain, with a view to approving all such transactions which do not have a serious adverse affect on competition in Bahrain, in line with international best practice;*
- *Whether the fairest, most transparent means of vetting all mergers, acquisitions and joint ventures is by means of a Mergers and Acquisitions Regulation?*

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Explanatory Guidelines on the draft Telecommunications Mergers and Acquisitions Regulation

These Guidelines should be read in conjunction with the relevant article in the draft Telecommunications Mergers and Acquisitions Regulation. In particular it should be noted that some of the consultation questions below refer to aspects of the relevant article in the draft Regulation that are not mentioned in the Guidelines. The draft Regulation is set out immediately after these Guidelines.

Respondents are welcome to submit comments on any or all of the articles of the draft Regulation, there is no obligation to answer all questions posed by the TRA. Similarly, respondents are welcome to submit comments on any issues related to the draft Regulation which the TRA has not raised below.

Article 1 – Scope

The TRA has intended to capture only those Qualifying Transactions (i.e. those that meet the criteria set out in this article) which relate to the telecommunications industry in the Kingdom. The criteria for a Qualifying Transaction are similar to those used in other jurisdictions, such as Europe and Hong Kong. The TRA considers it unnecessary to use a turnover threshold in addition to those criteria already used (i.e. merger, acquisition or joint venture, involving a licensee) as the suggested criteria would be sufficient to bring transactions which could affect the telecommunications sector in Bahrain under the scope of the draft Telecommunications Mergers and Acquisitions Regulation.

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- *The TRA seeks respondents' views on the criteria used to define a Qualifying Transaction and that there is no need for a turnover threshold (as for example used in the EU).*

Article 2 – Notification

The TRA has opted for a mandatory notification procedure for Qualifying Transactions, as is the case in many jurisdictions worldwide, such as the EU and the US, in order to provide the TRA with the opportunity to assess all Qualifying Transactions and approve all those which would not have a detrimental effect on competition in the Kingdom. Although some jurisdictions, such as the EU, prescribe or prefer notification following the Parties having entered into an agreement, the TRA considers it preferable to allow Parties to notify either before or after entering into an agreement, to provide Parties with greater flexibility. The TRA considers it useful for Parties to have the opportunity to seek confidential guidance and discussions with the TRA prior to the notification of any proposed transaction, in order for Parties to obtain an understanding of any concerns the TRA may have in advance, and deal with these prior to entering into an agreement. Whilst the guidance the TRA would give during such meetings would be non-binding, it would be intended to assist the Parties

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in negotiating and drafting their agreement(s) in order to satisfy any concerns that the TRA might have. The TRA welcomes such 'pre-meetings' prior to Parties making a Notification. The TRA is also happy to receive, and discuss with the notifying Parties, a draft Notification and draft agreements.

The TRA considers it necessary to have a notification fee which goes towards the costs incurred by the TRA in processing an application for approval and making a decision on the application. The fee should be provided to the TRA with the notification form. The fee remains the same irrespective of whether the TRA deals with the Qualifying Transaction as a straightforward 'Phase 1' Qualifying Transaction, or an in-depth 'Phase 2' Qualifying Transaction.

Consultation

The TRA seeks respondents' views on the following:

- *Establishing a mandatory notification system.*
- *Whether it is useful for Parties to have the right to notify either before or after entering into an agreement;*
- *Whether it is useful for Parties to have the right to seek pre-notification meetings and guidance from the TRA;*
- *Whether it is appropriate for the TRA to introduce a notification fee, and if so whether a flat rate fee is appropriate. If not why not? Is the level of fee appropriate, if not why not?*
- *Whether the 14 day post-signing timetable is sufficient (for example, the EU used to have just one week).*

Article 3 – Procedure

In the interests of creating certainty in the business community, the TRA has provided for set deadlines in dealing with notified Qualifying Transactions. These timetables are similar to those used in other jurisdictions in the world, such as the EU. The TRA considers it useful to follow precedent in other major jurisdictions worldwide, such as the EU, in issuing an announcement of receipt of a Notification under the Telecommunications Mergers and Acquisitions Regulation so that interested third parties can make any submission if they wish in relation to the transaction. Such announcement will be high-level only, and will not contain specifics of the transaction. There is no obligation for any third parties to make comments; it is entirely up to them.

Consultation:

The TRA seeks respondents' views on the following:

- *Whether it is appropriate for the TRA to use the 2 stage procedure which is commonly used in most other jurisdictions world-wide, namely up to 30 days for straightforward 'phase 1' cases, and up to a further 90 days ('phase 2') for those Qualifying Transactions which raise serious competition concerns;*
- *Whether the duration of the phase 1 and phase 2 periods is appropriate;*
- *Whether it is appropriate for the TRA to publish an announcement of receipt of a notification of a Qualifying Transaction and its decisions;*

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- *Whether it is appropriate for third parties to have the opportunity to make comments to the TRA on a notified Qualifying Transaction;*
- *Whether it is useful for notifying Parties to have the chance to see the draft text of the TRA's decisions to be issued under Article 3, in order for the notifying Parties to have the opportunity to submit requested redactions (deletions) to the TRA, in relation to any text that the Parties consider would be detrimental to their business interests were it to be published; and*
- *Whether it is appropriate that a decision issued under Article 3 should be published in the Official Gazette.*

Article 4 – Substantive tests applied by the TRA

The main test to be applied by the TRA in assessing a Qualifying Transaction is whether it may “substantially lessen competition” in a telecommunications market. This test is commonly used by many competition authorities around the world, including the EU and OFTA, Hong Kong.

For an assessment of whether a Qualifying Transaction “has, or is likely to have, the effect of substantially lessening competition in a telecommunications market” it is necessary for the TRA to first identify the relevant market(s) and then assess whether the merger has, or is likely to have, the effect of substantially lessening competition in that market(s).

Market definition is an important first step in any competition analysis. Firms that constrain each other through the supply of close, or interchangeable substitutes are regarded as competing in the same market. Market definition therefore involves identifying such substitutes from both the demand and supply side. Market definition is not an end in itself, but simply a first stage in assessing whether a Qualifying Transaction may substantially lessen competition. The TRA will use the four factors commonly used worldwide in market definition, namely the product/service, geographic, functional (i.e. level in the production/distribution chain at which the products/services are supplied or purchased) and temporal (i.e. supply of products/services with reference to time) aspects of a market. The TRA will also consider market definition suggested by the Parties in the Notification of the Qualifying Transaction and market definition used by other telecommunication regulatory authorities worldwide, where appropriate.

The burden of proof is on the TRA to show, in any Qualifying Transaction, that it considers that competition would be substantially lessened by a merger. It is for the Parties to a Qualifying Transaction to show, and substantiate, any claims to counter any concerns that the TRA may have. The TRA will consider any such claims by the Parties, and check them to the extent possible (for example, by testing market opinion and/or undertaking economic analysis). Should the TRA reject such claims, it shall give reasons for this to the Parties and in its published decision(s) issued under Article 3.

Consultation:

The TRA seeks respondents' views on the following:

- *Whether the ‘substantial lessening of competition test’ is appropriate, if not why?*

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Article 5 – Suspension of a Qualifying Transaction

This article clarifies that Qualifying Transactions may not be implemented until the TRA has issued a decision approving the merger. This is important so as to prevent a potentially anti-competitive merger being implemented and affecting the market.

Consultation:

- *The TRA seeks respondents' views on the principle that Qualifying Transactions may not be implemented until the TRA has issued a decision approving the merger. If not why?*

Article 6 – Requests for Information

This article gives the TRA the right to obtain information relevant to its assessment of a Qualifying Transaction from the Parties or third parties. As far as the TRA is aware, this also occurs in all jurisdictions with merger control world-wide. Until the relevant information is provided to the TRA, the timetable of the TRA in assessing the Qualifying Transaction will be put on hold.

Consultation:

- *The TRA seeks respondents' views on whether the TRA should have the right to obtain information relevant to its assessment of a Qualifying Transaction from the Parties or third parties. If not why?*

Article 7 - Right to be heard

In the interests of transparency and fairness, this article gives the Parties to a Qualifying Transaction the right to respond to any concerns that the TRA may have about the merger, with a view to addressing these. This applies both during a simple Phase 1 case, and a more complex Phase 2 case which raises competition concerns. The TRA has also provided for the right to a hearing, both by the Parties to a Qualifying Transaction and interested third parties.

Consultation:

The TRA seeks respondents' views on the following:

- *Whether Parties to a Qualifying Transaction should have the right to know of the TRA's concerns regarding a merger. If not why?*
- *Whether the Parties and third Parties should have the right to request a hearing and whether this should be held privately, or on agreement between the TRA and the Party/Parties, in public.*

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Article 8 – Restrictions directly related and necessary to a Qualifying Transaction

A merger may involve restrictions which go beyond the contractual agreement itself. For example, non-compete covenants, licenses for intellectual property or purchase or supply agreements may be included. In so far as such restrictions are directly related and necessary to the Qualifying Transaction, they will be treated as ancillary restraints and will be approved in an approval decision under Article 3(1)(b) or Article 3(2)(b). However, such restrictions may form the basis of conditions or obligations attached to an approval decision issued under Article 3 if they may have a significant adverse affect on competition in the Kingdom.

Consultation:

- *The TRS seeks respondents' views on whether any ancillary restraints should be dealt with by the TRA as part of its assessment of a Qualifying Transaction (as opposed to say, such restrictions being dealt with as a separate competition investigation under Article 65 of the Telecommunications Law).*

Article 9 – Penalties

This article sets out the potential penalties that the TRA could impose in the event of failure by a Party to adhere to the terms of the Regulation and the Telecommunications Law, where relevant. Such penalties relate to the TRA's decision regarding the Qualifying Transaction (i.e. approval decision may be revoked) and, if necessary, to the licensee's license which could be amended/revoked.

Consultation:

The TRA seeks respondents' views on whether the principle of penalties for breach of the terms of the Regulation, and the Telecommunications Law is appropriate. If not, why?

Article 10 – Right of appeal

This article sets out the principle, as expressed in the Telecommunications Law, that any decision of the TRA under the Telecommunications Mergers and Acquisitions Regulation is open to appeal. The basis for such review is the arbitration Chapter of the Telecommunications Law.

Consultation:

The TRA seeks respondents' views on the following:

- *Whether the principle that any decision taken by the TRA under the Telecommunications Mergers and Acquisitions Regulation should be open to appeal is appropriate. If not why?*

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- *Whether the arbitration provisions of the Telecommunications Law are an appropriate basis for such appeal. If not why?*

Article 11 – Confidentiality

This article provides that the TRA will treat any information that it receives as part of its assessment of a Qualifying Transaction as confidential. This article also gives the right for third parties that have submitted information to the TRA as part of its assessment of a Qualifying Transaction to make a submission for confidential information to be removed before such information is provided to the Party or Parties to a Qualifying Transaction during access to the file, under Article 12, if relevant.

Consultation:

The TRA seeks respondents' views on the following:

- *Whether the principle of confidentiality as set out in Article 11 is appropriate. If not why?*
- *Whether the right for third parties to submit requested redactions of confidential information to the TRA prior to any access to the file is granted is appropriate. If not why?*

Article 12 - Access to the file

This article gives the right to the Party or Parties to a Qualifying Transaction to whom the TRA has addressed a Statement of Objections pursuant to Article 3(3) to request access to the TRA's file on the merger. This is for the purpose of enabling them to exercise their rights of defence.

Consultation:

- *The TRA seeks respondents' views on whether the principle of access to the file is appropriate. If not why?*

Article 13 – Declaration

This article sets out the date of entry into force of the Telecommunications Mergers and Acquisitions Regulation.

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Notification Form

This form is intended to be used for notifying Qualifying Transactions to the TRA. It draws upon the practise used by other regulatory authorities, such as OFTA, Hong Kong, the European Union and Ofcom, UK.

Consultation:

- *The TRA welcomes any comments on the draft Notification Form. Such comments may be submitted as stand-alone comments, or as mark-up to the draft Form.*

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Draft Telecommunications Mergers and Acquisitions Regulation

Introduction

This Regulation is issued by the Telecommunications Regulatory Authority (TRA) Bahrain under section 3(c)(1) and 65 of the Telecommunications Law. The Ownership Regulation of 29th October 2003 is subsumed into this Telecommunications Mergers and Acquisitions Regulation and will no longer apply once the Telecommunications Mergers and Acquisitions Regulation comes into force. The TRA has, with hindsight, found the Ownership Regulation to be inappropriate for a market such as Bahrain being liberalized, for example the review of the competition aspects of Qualifying Transactions is regarded by the TRA as being important, whereas the provisions of the Ownership Regulation on annual supply of information by all licensees to be unwieldy and inappropriate, and not followed by most licensees to date. Rather than enforcing an instrument that is inappropriate, the TRA considers it more appropriate to accept that the Ownership Regulation was not ideal and issue further Regulations on matters that are important to the opening up of the telecommunications industry in the Kingdom.

Definitions

“**Issued share capital**” means, with respect to any person, all shares, interests, participations or rights or other equivalent (however designated, whether voting or nonvoting, ordinary or preferred) in the equity or capital of such person, now or hereafter issued;

“**Juristic person**” means any company, corporation, limited liability company, voluntary association, partnership, joint venture, trust or other enterprise or incorporated or unincorporated organization, or government (or any agency, instrumentality or political subdivision thereof);

“**Licensee**” means a Person that has been licensed by the TRA under the Telecommunications Law;

“**Party**” or “**Parties**” means any or all of the Persons involved in a Qualifying Transaction;

“**Person**” means both juristic persons, natural persons and public authorities;

“**Qualifying Transaction**” means a merger, acquisition or joint venture which fulfils the criteria in Article 1;

“**Regulation**” means this Telecommunications Mergers and Acquisitions Regulation; and

“**Third Party**” means a Person that is not a Person involved in a Qualifying Transaction.

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Article 1 - Scope

- 1.1 This Regulation applies to mergers, acquisitions or joint ventures involving a Licensee and which involve a market within or related to the telecommunications industry.
- 1.2 A Qualifying Transaction shall be deemed to arise where a change of control on a lasting basis results from:
- (a) the merger of two or more previously independent Persons or parts of Persons at least one of which is a Licensee; or
 - (b) the acquisition by one or more Persons already controlling at least one entity, or by one or more entities, (the “**Acquiring Party**”) whether by purchase of shares or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other entities (the “**Acquired Party**”) where at least one of the Acquiring Party and the Acquired Party is a Licensee; or
 - (c) the creation of a joint venture which constitutes a Qualifying Transaction within the meaning of paragraph (b).
- 1.3 Control means, in relation to any Person, in the absence of proof to the contrary to the TRA, that such Person directly or indirectly has the ability to control or exert material influence over the Acquired Party.

Article 2 – Notification

- 2.1 All Qualifying Transactions shall be notified to the TRA prior to their implementation. It is up to the Parties to decide when to notify the TRA of a proposed transaction except that notification shall be made by the relevant Parties:
- (a) within 14 calendar days¹ of the date of the signing of an agreement, the announcement of a public bid or the acquisition of a controlling interest; or
 - (b) prior to the signing of an agreement, the announcement of a public bid or the acquisition of a controlling interest and where the Parties concerned demonstrate to the TRA their good faith intention to enter into the agreement, or in the case of a public bid, where they have publicly announced an intention to make such a bid.

¹ Time starts to run on the day of signing an agreement. For example, if an agreement for a Qualifying Transaction is entered into on 1st January, the Notification must be made to the TRA, within usual business hours (currently 8am – 4pm but less during Ramadan), on 14th January in order to be within the prescribed period.

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- 2.2 The Parties may approach the TRA for an informal discussion or confidential guidance as to a proposed Qualifying Transaction at any time prior to notification. The Parties should treat any advice given by the TRA as confidential and should not reveal to any other party that advice has been requested or given. Any view expressed by the TRA prior to notification shall not be binding on the TRA or the Parties.
- 2.3 A Qualifying Transaction which consists of a merger under Article 1(2)(a) or joint venture under Article 1(2)(c) shall be notified jointly by the Parties, which means that both Parties must sign the signature page of the notification. An acquisition under Article 1(2)(b) shall be notified by the Acquiring Party.
- 2.4 Notification shall be made on the Notification Form attached to this Regulation.
- 2.5 A notification fee of BD 500 shall be payable to the TRA at the time the completed Notification Form is submitted.
- 2.6 To be complete, the notification must be signed by a duly authorized representative of the notifying Party or Parties, have all supporting documents and proof of payment of fee to the TRA bank account attached. A notification must be made in one original (i.e. with the signature of the duly authorized representative(s)) with four (4) copies attached.

Article 3 – Procedure

- 3.1 The TRA shall examine the notification as soon as it is received and shall publish an announcement on its website as soon as possible following receipt of a notification, that it has received a notification under the Regulation. Such announcement will be a high-level description of the notified transaction and shall state that interested third parties have 14 calendar days from the date of the announcement to make any submission to the TRA that it wishes about the transaction.
- 3.2 The TRA will assess the notified Qualifying Transaction according to the criteria set out in Article 4 below, and within 30 calendar days of receipt of notification² shall issue one of the following decisions:
- (a) A decision that the merger, acquisition or joint venture notified does not fall within the scope of the Regulation (i.e. one of the criteria of Article 1 is not met). In such a case the BD 500 notification fee will not be refunded to the parties; or
 - (b) Where a Qualifying Transaction does not raise serious doubts as to its compatibility with competition in Bahrain, a decision declaring the Qualifying Transaction compatible with competition in Bahrain. Such a decision shall be

² Time starts to run on the date of receipt of notification. So if a notification is received on 1st January, the decision has to be issued on or before 30th January.

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deemed to cover restrictions directly related and necessary to the implementation of the merger, acquisition or joint venture if expressly stated and clearly asked for; or

- (c) Where a Qualifying Transaction raises serious doubts as to its compatibility with competition in Bahrain, a decision initiating a Phase 2 investigation shall be made.

Should the TRA fail to issue one of the above decisions within 30 calendar days of receipt of notification, the Qualifying Transaction shall be deemed to be approved.

- 3.3 A Phase 2 investigation may last for up to 90 days from the date of a decision taken under Article 3(2)(c) above. Within 30 days of the opening of the Phase 2 investigation, the TRA shall provide the Parties to the Qualifying Transaction with its objections (“Statement of Objections”) to the Qualifying Transaction, with a time limit for the Parties to respond, which shall not exceed 30 days from the date of the TRA’s Statement of Objections.
- 3.4 During the Phase 2 period, the Parties may make commitments to the TRA with a view to removing the serious doubts of the TRA. Such commitments must be submitted within 60 days of the opening of the Phase 2 investigation. Where the TRA finds that as a result of the commitments given a Qualifying Transaction no longer raises serious doubts within the meaning of Article 3(2)(c) it shall make a decision declaring the Qualifying Transaction compatible with competition in Bahrain pursuant to Article 3(2)(b).
- 3.5 At the end of the 90 day period from the Article 3(2)(c) decision, the TRA shall issue a further decision. This shall either:
 - (a) Prohibit the Qualifying Transaction if the TRA’s serious doubts as to the compatibility of the Qualifying Transaction with competition in the Kingdom have not been removed; or
 - (b) Declare the Qualifying Transaction compatible with competition in Bahrain. Such decision may include conditions and obligations intended to ensure that the Parties concerned comply with the commitments they have entered into with the TRA; or
 - (c) Declare that the Qualifying Transaction has been abandoned by the Parties.
- 3.6 If the TRA issues an Article 3(2)(b) or Article 3(5)(b) decision approving the Qualifying Transaction, such approval is deemed to cover any restrictions directly related and necessary to the implementation of the Qualifying Transaction. Such ancillary restraints shall be identified and expressly approved by the TRA in the decision.
- 3.7 All decisions issued in accordance with Article 3 shall be published by the TRA on its website, along with a press release. Decisions issued under Article 3 shall also be published

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in the Official Gazette as soon as possible. Such decisions may also be discussed in the TRA's Annual Report. The TRA shall give the notifying Parties a copy of any draft decision to be issued under Article 3, in order that the notifying Party or Parties may submit requested redactions of business secrets or other confidential information disclosure of which would be seriously detrimental to that Party's business interests should such information become known by other Persons. A time limit shall be set by the TRA for the submission of such redactions.

Article 4 – Substantive tests applied by the TRA

- 4.1 The competition test to be applied by the TRA when assessing whether a Qualifying Transaction is compatible with competition in Bahrain is whether the Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition in a telecommunications market.
- 4.2 In assessing a Qualifying Transaction the TRA shall have regard to its duties and powers under section 3(b)(1) and (2) of the Telecommunications Law so far as their application is consistent with the application of Article 4(1).
- 4.3 In assessing whether a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition in a telecommunications market the TRA shall take into account:
 - (a) The market position of the Parties to the Qualifying Transaction, in particular, but not exclusively, as evidenced by market shares.
 - (b) The need to maintain and develop effective competition within the telecommunications industry in the Kingdom in view of the structure of competition in the market(s) concerned and actual or potential competition in the Kingdom from third parties.

Article 5 - Suspension of a Qualifying Transaction

- 5.1 A Qualifying Transaction shall not be implemented before its notification to the TRA and until it has been declared compatible with competition pursuant to a decision approving the Qualifying Transaction by the TRA under Article 3(2)(b) or Article 3(5)(b).
- 5.2 Article 5(1) shall not prevent the implementation of a public bid or series of transactions in securities, including those convertible into other securities admitted to trading on the Bahraini or any other stock exchange, by which control within the meaning of Article 1 is acquired, provided that the Acquiring Party does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of the securities in question.

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- 5.3 The TRA may take measures appropriate to remedy, mitigate or prevent the substantial lessening of competition in a telecommunications market where a Qualifying Transaction has been implemented in contravention of this Article 5.

Article 6 - Requests for Information

- 6.1 In order for the TRA to carry out the duties assigned to it in this Regulation, the TRA may require the Parties, as well as other Licensees to provide all relevant information during any stage of the TRA's investigation of a Qualifying Transaction.
- 6.2 Such requests for information shall be made by simple letter, setting out the legal basis for the request, the information required and the deadline by which responses shall be submitted as well as the penalties for supplying incorrect or misleading or incomplete information, or late information. The TRA may also, if necessary, send requests for information to non-Licensees both within the Kingdom and abroad.
- 6.3 In relation to the TRA's timetables for assessing a Qualifying Transaction set out in Article 3, time will be put 'on hold' for the duration between a request for information being sent to a Party and the day that a complete response is received by the TRA.

Article 7 - Right to be heard

- 7.1 The TRA shall ensure at all stages of its assessment of a notified Qualifying Transaction that the Parties shall have the right to make known their views on any objections the TRA may have to the Qualifying Transaction.
- 7.2 In relation to Phase 1, the TRA will inform the notifying Party or Parties in writing of its concerns at least 10 days prior to either the issuance of an Article 3(2)(b) decision if the TRA is intending to attach conditions or an Article 3(2)(c) decision in order that they may submit commitments to the TRA with a view to removing the TRA's concerns. The TRA may provide suggested commitments it would seek from the Parties to remove its concerns as well as a timetable for receipt of such commitments in order to assess these prior to issuing a decision under Article 3(2).
- 7.3 In relation to Phase 2, the TRA will inform the notifying Party or Parties in writing of its concerns at least 30 days prior to either the issuance of an Article 3(5)(b) decision if the TRA is intending to attach conditions or an Article 3(5)(a) decision in order that they may submit commitments to the TRA with a view to removing the TRA's concerns. The TRA may provide suggested commitments it would seek from the Parties to remove its concerns as well as a timetable for receipt of such commitments in order to assess these prior to issuing a decision under Article 3(5).
- 7.4 Interested third parties shall have the right to submit comments on a notified Qualifying Transaction to the TRA. Such third parties may request a meeting with the TRA, which the TRA should seek to grant where it deems necessary.

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- 7.5 If requested by either the Parties, interested third parties, or the TRA, the TRA can hold a hearing. Such hearing would give the notifying Party or Parties the right to make their case and address any concerns of the TRA, and where appropriate, the right of interested third parties to make their case also. Parties could have consultants (lawyers or others) present. Such hearing would not be open to the public and would be open only to the notifying Party or Parties, and where requested by interested third parties, by such interested third party or parties on invitation by the TRA. Such hearing would be held no later than 30 days after the Article 3(2)(c) decision.

Article 8 - Restrictions directly related and necessary to a Qualifying Transaction

- 8.1 If the agreement(s) contain any potential restrictions on competition, which are however deemed by the Parties to be directly related and necessary to the implementation of the Qualifying Transaction, it is for the Parties to explain in the notification why such restrictions are necessary.
- 8.2 If the TRA issues an Article 3(2)(b) or 3(5)(b) decision approving the Qualifying Transaction, such approval is deemed to cover any such restrictions as ancillary restraints to the transaction. Such ancillary restraints shall be identified and expressly approved by the TRA in the decision.

Article 9 - Penalties

- 9.1 The TRA may impose the following penalties in order to ensure adherence to this Regulation:
- 9.2 Where a Qualifying Transaction has been implemented prior to the issuance of a TRA clearance decision under Article 3(2)(b) or Article 3(5)(b), or where a Qualifying Transaction that has been prohibited by the TRA by means of an Article 3(5)(a) decision has been implemented, or where a condition attached to an Article 3(2)(b) or Article 3(5)(b) decision has been breached, the TRA may:
- (a) require the Parties to dissolve the Qualifying Transaction, in particular through the dissolution of the merger, acquisition or joint venture, or the disposal of all the shares or assets acquired, in order to restore the position of the Parties and competition in the relevant market prior to implementation. Where it is impossible to restore the situation existing prior to implementation of the Qualifying Transaction through dissolution of the Qualifying Transaction, the TRA may take any other action it deems necessary to achieve such restoration as far as possible;
 - (b) order any other appropriate measures necessary in order to dissolve the Qualifying Transaction or take other measures necessary to remedy the breach of compliance with a condition attached to an Article 3(2)(b) or Article 3(5)(b) decision as necessary;

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- (c) The TRA may revoke the decision as set out in Article 3(6), in which case the TRA would issue an Article 3(6) decision revoking its previous clearance decision.

9.3 The TRA may impose fines of up to ten per cent (10 %) of the combined turnover of the Parties where a Qualifying Transaction effects anti-competitive changes in market structure as defined under section 65(b)(3) of the Telecommunications Law and where, either intentionally or negligently, the Parties also:

- (a) Failed to notify a Qualifying Transaction prior to its implementation in accordance with Article 1 unless they have requested and received express written authorization from the TRA;
- (b) Implemented a Qualifying Transaction in breach of Article 5;
- (c) Implemented a Qualifying Transaction declared incompatible with competition in the Kingdom by a decision issued under Article 3(5)(a); and
- (d) Failed to comply with a condition or obligation imposed by the TRA pursuant to a decision issued under Article 3(2)(b) or Article 3(5)(b).

The above list is non-exhaustive and provides examples of potential breaches.

9.4 In fixing the amount of any fine, the TRA will have due regard to the nature, gravity and duration of the infringement. The TRA may not fine the Parties under Article 9(3) if a determination has been or will be made against them under the Telecommunications Law as a result of their participation in the Qualifying Transaction.

9.5 If the TRA considers that a Qualifying Transaction effects anti-competitive changes in market structure as defined under section 65(b)(3) of the Telecommunications Law, the TRA may issue an order of amendment to or revocation of the license(s) of any relevant Licensee in accordance with the provisions of the relevant license(s) and/or section 35 of the Telecommunications Law.

9.6 Decisions taken under this Article shall be of an administrative and not criminal law nature.

Article 10 – Right of appeal

10.1 Any decision taken by the TRA under Article 3 [or Article 9] is subject to appeal by means of the provisions of Chapter XVI of the Telecommunications Law on arbitration.

Article 11 - Confidentiality

11.1 The TRA shall treat all information submitted to it as a result of this Regulation with the strictest of confidence and shall only use such information for the purposes of assessing the

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relevant Qualifying Transaction. This provision also applies to any information that comes to the TRA as a result of responses to Article 6 requests for information and any other investigations, meetings or hearings.

- 11.2 If access to the file is granted in accordance with Article 12, any Person that has submitted information to the TRA in relation to the Qualifying Transaction will be contacted to submit requested redactions of business secrets or other confidential information disclosure of which would be seriously detrimental to that Person's business interests should such information become known by other Persons. A time limit shall be set by the TRA for the submission of such redactions.

Article 12 - Access to the file

- 12.1 If so requested, the TRA shall grant access to the file to the Party or Parties to whom the TRA has addressed a Statement of Objections pursuant to Article 3(3) for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the Statement of Objections.
- 12.2 The right of access to the file shall not extend to business secrets or other confidential or privileged information or to internal documents of the TRA. Documents obtained through access to the file shall only be used for the purpose of responding to the Statement of Objections.

Article 13 – Entry into force

- 13.1 This Regulation shall enter into force on [], on which date the Ownership Regulation will automatically be revoked.

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Telecommunications Mergers and Acquisitions Regulation – Notification Form

NOTIFICATION FORM
RELATING TO THE
NOTIFICATION OF A QUALIFYING TRANSACTION
PURSUANT TO THE TELECOMMUNICATIONS MERGER REGULATION ISSUED BY THE
TELECOMMUNICATIONS REGULATORY AUTHORITY

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SECTION 1

Description of the Qualifying Transaction

- 1.1. Provide an executive summary of the Qualifying Transaction, specifying the parties to the Qualifying Transaction, the nature of the Qualifying Transaction (for example, merger, acquisition, joint venture), the areas of activity of the notifying parties, the market(s) on which the Qualifying Transaction will have an impact and the strategic and economic rationale for the Qualifying Transaction.
- 1.2. Provide a summary (up to 300 words) of the information provided under Section 1.1. It is intended that this summary will be published on the TRA's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets. If Parties wish, this may be the same text as to Section 1.1 above.

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SECTION 2

Information about the Parties

2.1. Information on notifying Party (or Parties)

Give details of:

- 2.1.1. name and address of Party;
- 2.1.2. nature of the Party's business;
- 2.1.3. name, address, telephone number, mobile number, fax number and e-mail address of, and position held by, the appropriate contact person; and
- 2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, TRA decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.2. Information on other parties ⁽²⁾ to the Qualifying Transaction

For each party to the Qualifying Transaction (except the notifying party or parties) give details of:

- 2.2.1. name and address of Party;
- 2.2.2. nature of Party's business;
- 2.2.3. name, address, telephone number, mobile number, fax number and e-mail address of, and position held by, the appropriate contact person; and
- 2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, TRA decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.3. Appointment of representatives

Where notifications are signed by representatives of Parties, such representatives must produce written proof that they are authorised to act. The written proof must contain the name and position of the persons granting such authority.

⁽²⁾ This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

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Provide the following contact details of information of any representatives who have been authorised to act for any of the parties to the Qualifying Transaction, indicating whom they represent:

- 2.3.1. name of representative;
- 2.3.2. address of representative;
- 2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted;
and
- 2.3.4. an address of the representative for service (which should be in Bahrain) to which correspondence may be sent and documents delivered. Such address may include embassies, lawyers or accountant's offices, if the appropriate organisation has agreed with the Parties to act as representative. If the address is outside of Bahrain, the TRA is not responsible for ensuring receipt of documents.

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SECTION 3

Details of the Qualifying Transaction

- 3.1. Describe the nature of the Qualifying Transaction being notified. In doing so state:
- (a) whether the proposed Qualifying Transaction is a merger, an acquisition of sole or joint control, a joint venture within the meaning of Article 1 of the Telecommunications Mergers and Acquisitions Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 1 of the Regulation;
 - (b) whether the whole or parts of Parties are subject to the Qualifying Transaction;
 - (c) a brief explanation of the economic and financial structure of the Qualifying Transaction;
 - (d) whether any public offer for the securities of one party by another party has the support of the former's supervisory boards of management or other bodies legally representing that party;
 - (e) the proposed or expected date of any major events designed to bring about the implementation of the Qualifying Transaction (other than a decision approving the Qualifying Transaction under Article 3;
 - (f) the proposed structure of ownership and control after the completion of the Qualifying Transaction;
 - (g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support; and
 - (h) the economic sectors involved in the Qualifying Transaction.
- 3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be);
- 3.3. For each of the Parties to the Qualifying Transaction provide the following data for the last financial year:
- 3.3.1. world-wide turnover;
 - 3.3.2. Bahraini turnover;
- 3.4. In case the transaction concerns the acquisition of joint control of a joint venture, provide the following information:
- 3.4.1. the turnover of the joint venture and/or the turnover of the contributed activities to the joint venture; and/or

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- 3.4.2. the total value of assets transferred to the joint venture.
- 3.5. Describe the economic rationale of the Qualifying Transaction.

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SECTION 4

Ownership and control

For each of the parties to the Qualifying Transaction provide a list of all Parties belonging to the same group.

This list must include:

- 4.1. all Parties or persons controlling these parties, directly or indirectly;
- 4.2. all Parties active in any reportable market that are controlled, directly or indirectly:
 - (a) by these parties;
 - (b) by any other Party identified in 4.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organisation charts or diagrams to show the structure of ownership and control of the Parties.

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SECTION 5

Supporting documentation

Notifying parties must provide the following:

- 5.1. copies of the final or most recent versions of all documents bringing about the Qualifying Transaction, whether by agreement between the Parties to the Qualifying Transaction, acquisition of a controlling interest or a public bid; and
- 5.2. copies of the most recent annual reports and accounts of all the Parties to the Qualifying Transaction, for the last three (3) financial years if available.

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SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the Qualifying Transaction must be assessed.

The notifying Party or Parties must provide the data requested having regard to the following definitions:

I. Relevant product markets

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases). See also the list of criteria in Article 4 of the Regulation.

II. Relevant geographic markets

The relevant geographic market comprises the area in which the Parties concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the Parties' market shares between neighbouring geographic areas, or substantial price differences.

III. Relevant markets

For purposes of information required in this Notification, relevant markets consist of all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions, on the basis of which:

- (a) two or more of the parties to the Qualifying Transaction are engaged in business activities in the same relevant market (horizontal relationships);
- (b) one or more of the parties to the Qualifying Transaction are engaged in business activities in a product market, which is upstream or downstream of a market in which

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any other party to the Qualifying Transaction is engaged, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the Qualifying Transaction (vertical relationships).

- 6.1. Identify all relevant markets.

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SECTION 7

Information on markets

For each relevant market described in Section 6, for the year preceding the operation, provide the following: ⁽³⁾

- 6.2. an estimate of the total size of the market(s) in terms of sales value (in BD and US\$) and volume (units) ⁽⁴⁾. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;
- 6.3. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the Qualifying Transaction. Indicate if there have been significant changes to the sales and market shares for the last three financial years; and
- 6.4. for horizontal and vertical relationships, an estimate of the market share in value (and where appropriate, volume) of the three largest competitors (indicating the basis for the estimates). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for these competitors.

³ In the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain relevant markets.

⁴ The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.

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Declaration

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying Parties, signed by duly authorized representative(s) of each Party:

The notifying Party or Parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 9 of the Telecommunications Mergers and Acquisitions Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of: