هيئة تنظيم الاتصالات
Telecommunications Regulatory Authority

Dominance designation for termination services on individual mobile networks

Determination

1 February 2010

Ref: MCD/02/10/010

Public version [✂ redacted]

Purpose: To define and determine whether a licensed operator or operators is/are dominant in the mobile termination services market.

DETERMINATION

HAVING REGARD TO THE LEGISLATIVE DECREE NO. 48 OF 2002 PROMULGATING THE TELECOMMUNICATIONS LAW, THE METHODOLOGY FOR THE DEFINITION OF THE TELECOMMUNICATIONS MARKETS, APPROVED BY THE DETERMINATION OF THE TELECOMMUNICATION REGULATORY AUTHORITY OF THE KINGDOM OF BAHRAIN ISSUED ON 19 APRIL 2003, THE METHODOLOGY FOR DETERMINING MARKET POWER, APPROVED BY THE DETERMINATION OF THE TELECOMMUNICATIONS REGULATORY AUTHORITY OF THE KINGDOM OF BAHRAIN ISSUED ON 19 APRIL 2003, THE COMPETITION GUIDELINES, ALL RELEVANT EVIDENCE AND THE SUBMISSIONS MADE BY INTERESTED PARTIES, THE TELECOMMUNICATIONS REGULATORY AUTHORITY OF THE KINGDOM OF BAHRAIN HEREBY MAKES THE FOLLOWING DETERMINATION:

1. For the reasons set out in the Annex to this Determination the Telecommunications Regulatory Authority of the Kingdom of Bahrain ("TRA") has identified and defined the following relevant markets:

   - wholesale market for termination services on Bahrain Communications Company B.S.C ("Batelco") mobile network in the Kingdom of Bahrain;
   - wholesale market for termination services on MTC-Vodafone Bahrain B.S.C ("Zain") mobile network in the Kingdom of Bahrain.

2. Termination services are interconnection services. They include voice calls, Short Messaging Services ("SMS") and Multimedia Messaging Services ("MMS") termination.

3. For the reasons set out in the Annexe to this Determination, TRA has identified and determines that:

   - Batelco is dominant in the wholesale market for termination services on its own mobile network;
   - Zain is dominant in the wholesale market for termination services on its own mobile network;

4. This Determination will be reviewed when conditions, as determined by TRA, warrant it.

5. This Determination is without prejudice to TRA's powers under the Telecommunications Law, promulgated by the Legislative Decree No.48 of 2002, the Methodology for the Definition of Telecommunications Markets, approved by the Determination of TRA issued on 19 April 2003, the Methodology for Determining Market Power, approved by the Determination of TRA issued on 19 April 2003, the Competition Guidelines, the Access Regulation, approved by TRA Regulation No. 1 of 2005, and the outcome of any on-going or future investigation, consultation or other regulatory process or measure carried out pursuant to such powers, all or any of which may result in the application of different terms and/or findings than those of this Determination, including the determination and definition of new markets and the designation of dominance.

6. This Determination shall come into effect from the date of its issuance.

7. As operators declared dominant, both Batelco and Zain shall comply with the obligations set out in Article 57(b) of the Telecommunications Law. In particular, Batelco is required to continue to provide its Reference Interconnection Offer, Zain is required to prepare a Reference Interconnection Offer with tariffs and terms which are fair and reasonable and non-discriminatory.

8. This Determination supersedes the Determination of Dominance in Interconnection Markets issued by TRA on 9 August 2003 as it relates to mobile services.

For the Telecommunications Regulatory Authority

Dr Mohammed Al Amer
Acting General Director - Chairman
1 February 2010

Reasoning for the Determination of dominance in termination services on individual mobile networks

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List of Acronyms

BD	Bahraini Dinar
CAT	Competition Appeal Tribunal of the United Kingdom
CPP	Calling Party Pays
EC	European Commission
ERG	European Regulators Group
FTM	Fixed to Mobile
GSM	Global System for Mobile communications
MGA	Modified Greenfield Approach
MNO	Mobile Network Operator
MMS	Multimedia Messaging Service
MTM	Mobile to mobile
MTR	Mobile termination rates
OLO	Other licensed operator
RPP	Receiving Party Pays
SMS	Short Message Service
SSNIP	Small but substantial increase in price
TRA	Telecommunications Regulatory Authority of the Kingdom of Bahrain

1 Introduction

1. This Determination sets out the underlying reasoning and reasons for the adopted market definition and dominance findings. A separate Statement defines the position of the Telecommunications Regulatory Authority ("TRA") on the regulation of mobile termination services.

Purpose of this Determination

2. The purpose of this determination is to define the wholesale market for voice call, Short Messaging Service ("SMS"), Multimedia Messaging Service ("MMS") termination services on mobile networks and to assess whether any existing mobile network operator(s) ("MNOs") is/are dominant in these markets.

3. A dominance designation provides the legal basis whereby regulatory obligations deemed necessary and/or mandated by the provisions of the Telecommunications Law promulgated by the Legislative Decree No.48 of 2002 (the "Telecommunications Law") can be defined and implemented.

4. The process for the delivery of services and the market failure that arises in the context of voice call termination are similar for SMS and MMS termination.[1] Therefore, for ease of reference TRA refers mostly to voice call termination in the discussion.

Background to this Determination

5. By virtue of the Determination of Dominance in Interconnection Markets issued by TRA the 9 August 2003 (the "2003 Dominance Designation"),[2] Batelco termination rates are regulated. As a designated dominant operator, Batelco submits for approval its rates for the services listed in paragraph 2 above through the reference offer cycle. At present rates are based on Batelco's top-down long-run incremental cost ("LRIC") model.

6. At the time the 2003 Dominance Determination was issued, Zain had not rolled out its mobile network consequently the equivalent services provided by Zain are currently unregulated and left to commercial negotiations.

7. TRA considers that it is timely to consider whether Batelco and Zain are dominant in termination markets and to evaluate the differential treatment between them, given the significant growth of Zain since its entry (Zain has now a market share of [40%-50%]), and at a time when further entry into the mobile market by Saudi Telecom Corporation ("STC") is about to occur. This will provide additional visibility to existing MNOs and the third MNO with regards to the regulation of mobile termination rates ("MTRs"). The mobile market has changed dramatically since the 2003 Dominance Determination. Back then Batelco had a 100% market share whereas the two MNOs are now of roughly equal size. Those changes need to be reflected in the regulatory framework so that mobile termination services of dominant operators are available at cost-based rates to all licensed operators. At present, the MTRs of Zain applicable to OLOs are between 21% and 36% higher than those paid to Zain by Batelco.

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1 See e.g. European Commission, Public Consultation on a Draft Commission Recommendation on Relevant Product and Services Market within the electronic communications sector susceptible to ex ante regulation in accordance with the Directive 202/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, *Commission Staff Working Document*, 28 June 2006.

2 TRA, *Determination of Dominance in Interconnection Markets*, 9 August 2003.

8. TRA issued for consultation a draft of this Determination on 25 November 2008 (Ref MCD/11/08/092). TRA received responses from Batelco, Lightspeed Communications W.L.L. ("Lightspeed") and Zain. The full responses are available on the TRA website.

9. For the sake of clarity, this Annex largely reproduces the text included in the Draft Determination, with minor amendments and updates where appropriate, before summarising and addressing the comments received on the Draft Determination.

The significance of mobile termination rates

10. Mobile services represent approximately 50% of the total revenues of the telecommunications sector in Bahrain; total revenues stood at BD303M in 2008.[3]

11. By mid 2009, there was about 1.4M reported mobile subscribers, of which about 84% are prepaid subscribers.

12. In order to provide retail mobile services, MNOs need various inputs. One such input is termination services. Termination services are interconnection services. Wholesale call termination on a mobile network is the service that allows the customer of a mobile network to call a customer of another mobile network. It is a wholesale service because it is sold and purchased by MNOs rather than retail customers. Without termination, customers of an operator would only be able to reach customers of the same network. In other words, termination is necessary for a communication between two customers of different networks (i.e. an "off-net" communication) but not for a communications between subscribers that belong to the same mobile operator (i.e. an "on-net" communication).

13. Wholesale termination on mobile networks is also relevant for customers of fixed networks calling customers of mobile networks as well as for off-net SMS and MMS. Hence, it also purchased by fixed operators for terminating fixed originated calls on mobile networks.

14. Termination rates often represent a significant proportion of the cost of calls. In 2008, the termination rate of Batelco represented about 47% of the price of a 3 minute fixed-to-mobile ("FTM") call from the Batelco fixed network. Hence, other things being equal, high termination rates translate into higher retail prices to consumers for off-net mobile communications and for FTM calls.

15. Termination rates may also affect competitive dynamics between MNOs via their impact on Mobile-to-Mobile ("MTM") rates and on the retail pricing strategies deployed (e.g. high off-net rates or bundled free on-net minutes in post-paid packages) by MNOs.

2 Analytical framework for the definition of relevant markets and the assessment of dominance

16. To determine whether a licensed operator or operators are dominant in a relevant market, TRA adopts a three-step process:

- Definition of the relevant market;
- Analysis of competition in the relevant market; and
- Identification of dominant operator or operators, if any.

[3] See TRA, Telecommunications Services Indicators, June 2009, available at http://www.tra.org.bh/en/pdf/Telecommunications%20Markets%20Indicators%20Report%202008.pdf

17. At each step TRA relies on well-established economic principles and tests to define markets, such as the hypothetical monopoly test,[4] to assess demand- and supply-side substitution. It looks at relevant factors to determine the level of competition, such as barriers to entry and expansion, and market shares.

18. Throughout the three-step process, TRA applies an analytical framework consistent with the Telecommunications Law, the relevant Determinations by TRA, its Competition Guidelines and international best practices.[5] The tools and principles employed by TRA are similar to those employed by other regulators and competition authorities, including the European Commission ("EC") and national telecommunications regulatory authorities of the European Union.[6]

19. To arrive at its conclusions, TRA has considered relevant facts and information.

3 Identification and determination of the relevant markets

20. A relevant market is a defined set of products or services and a defined geographic areas in which competition occurs. It includes all goods or services that are considered to be close substitutes. These goods or services therefore compete directly with each other and the potential demand- or supply-side substitution between them constrains their prices to the competitive level.

21. The definition of markets necessitates identifying substitutable products and competitive constraints on the price setting behaviour of firms. Typically this is done by applying the hypothetical monopoly test, i.e. the Small but Significant Non-transitory Increase in Price ("SSNIP") test. The market definition starts with the smallest set of services under consideration and seeks to analyse the effect of a small but significant and non-transitory increase in prices on consumers of the services to assess whether additional services can be considered substitutable and must therefore be included in the same market. The SSNIP test is a particularly useful analytical tool to analyse substitution.

22. There are three main dimensions of market definition pertinent in the case of termination services on mobile networks:

- The product dimension of the goods or services supplied which refers to the characteristics of the product from a supply-side and demand-side perspective;
- The functional dimension which refers to the level in the production, distribution or value chain in which the goods or services are supplied; and
- The geographic dimension which refers to the geographic scope in which the goods or services are supplied.

23. Before analysing these three dimensions it is useful to refer to the retail markets associated with wholesale termination on mobile networks. There are three downstream markets, as previously defined in the Determination of Significant Market Power in certain retail markets of 3 June 2008,[7] relevant to wholesale termination on mobile networks:

[4] The hypothetical monopoly test is also commonly referred to as the SSNIP test, i.e. the Small but Significant and Non-transitory Increase in Price.

[5] The relevant Determinations are: TRA, Methodology for Determining Market Power, A Determination issued on 19 April 2003; and TRA, Methodology for the Definition of Telecommunications Markets, A Determination issued on 19 April 2003. See also TRA's Competition Guidelines.

[6] Cf. for example, European Commission, Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C 165/03.

[7] TRA, 2008, Determination of Significant Market Power in Certain Relevant Retail Markets, 3 June

- the retail market for mobile services (excluding mobile originated international calls);
- the retail market for fixed originated domestic calls for residential customers; and
- the retail market for fixed originated domestic calls for non-residential customers.

Product dimension

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24. Wholesale termination on mobile networks is a derived demand from retail services. Consistent with the market definition principles set out above, the identification of the relevant market begins with the smallest service or set of services possible. In this case this is wholesale voice call termination to an individual subscriber of a mobile network.

25. As explained above mobile termination is a wholesale service provided by MNO A which operates a mobile network to a distinct operator B. Operator B can be either a fixed or mobile operator. Wholesale termination is necessary for a communication between two customers of different networks (i.e. an “off-net” communication) but not for communications between subscribers that belong to the same mobile operator (i.e. an “on-net” communication) in which case equivalent termination is self-supplied.

26. Whilst it may appear that wholesale voice call termination to an individual subscriber represents the correct market definition, TRA is of the view that it is appropriate to aggregate call termination to all the subscribers of a specific MNO. Termination to a subscriber or a number is not substitutable to termination to another subscriber or number but is offered in a homogenous manner and is subject to a common pricing constraint. On this basis, TRA takes the view that the relevant market includes termination to all the subscribers of a MNO.

27. Demand-side substitution needs to be analysed at two levels:

    - Demand substitution by another wholesale service; and
    - Demand substitution in a relevant retail downstream market(s) that is linked to the wholesale service.

28. TRA considers that there are no effective demand-side wholesale substitution services for termination on individual mobile networks at the wholesale level. Faced with a SSNIP, the buyer of termination services (Operator A in the example above), that is the operator whose customer is calling a subscriber of Operator B, cannot substitute wholesale call termination services supplied by Operator B by an equivalent service from another operator. Termination is a bottleneck.

29. Similarly, TRA is of the view that potential demand substitution at the downstream level does not warrant a widening of the market definition. An increase in termination charges could trigger a decision by other operators, fixed or mobile, to increase their retail prices for calls to the mobile operator considered. Hence, to determine whether there is substitution at the retail level, it is necessary to examine the behaviour of retail customers. Two main substitution scenarios can be envisaged:

    - Substitution by a call to a fixed number;
    - Substitution by an SMS or equivalent messaging services; and
    - Substitution by a call to a mobile number of another MNO.

30. TRA considers that a call to a fixed number is not substitutable to a call to a mobile number as the ability to be called, regardless of the location, is the defining feature of mobile services. Immediacy of contact is indeed an important feature of calls to mobile.

31. Likewise, TRA considers that a call to a mobile cannot be substituted by an SMS. By definition, SMS are written short messages that do not allow a real time dialogue between the called and calling parties; SMS are sent only after messages have been

composed. SMS may be delivered in real time but this is not guaranteed. Hence, TRA is of the view that SMS do not provide a competitive constraint on voice call termination rates.

32. TRA is of the view that substitution by a call to a mobile number of another MNO does not justify an enlargement of the market definition. Multiple connections (i.e. consumers connected to both Batelco and Zain) could act as a constraint if there were insufficiently high number and the concerns of consumers with the impact of high MTRs would lead them to give a different number to people to use when calling them. However, according to TRA Residential Survey of July 2007, only 11% of consumers have more than one connection.[8] Further, TRA considers that it is unlikely that multiple connections will act as a constraint since the primary reason for having two numbers is to separate personal from business calls (see TRA Residential Survey). The minimisation of cost of incoming calls does not appear to be an important consideration. Consumers also appear unconcerned with the cost of calling them as suggested by overseas research.

33. At the retail level, customers buy voice calls, SMS and MMS as a bundle or cluster of services. The question therefore arises as to whether it is appropriate to define a single termination market for calls, SMS and MMS per MNO (and thereby mirror the retail market definition adopted in the Significant Market Power Determination of 3 June 2008) or individual termination markets per MNO for each service. The cluster market definition adopted in the Significant Market Power Determination includes services that are not substitutable from the demand side, but that are bought by consumers as a bundle. TRA notes that the market failure associated with termination is the same for voice calls, SMS, or MMS, namely that there is a lack of competitive pressure to keep cost down and an incentive to raise termination rates above the competitive level). TRA considers that for the purpose of this determination it is appropriate to consider a single market for mobile termination services per operator.

34. Turning to supply-side substitution, TRA is of the view that there are no substitution possibilities over the relevant time horizon. Faced with an increase in the termination rate above the competitive level by an operator, no other established operator or new entrant could offer this service (i.e. termination of calls for example, to the subscribers of that operator). This is the case as presently only the terminating operator is able to locate the called party, identify the number and terminate the call to that number.

35. An alternative market definition would be to include termination in the wider cluster of retail mobile services referred to at paragraph 23 above. This approach has been proposed by certain incumbent MNOs in Europe. Such a wide cluster market definition for all mobile services might be justified if mobile subscribers bought a bundle of services comprising termination and other retail services; and if the price of termination within a bundle was constrained because an increase in that price would lead customers to switch operator.

36. In this configuration a MNO would not be able to increase the termination rate while keeping other prices constant without losing customers. However, this supposes, among other things, that subscribers take into account the price of incoming calls when choosing their network and this does not appear to be the case especially given the Calling Party Pay ("CPP") principle. In effect the CPP principle in place in Bahrain (and throughout Europe and Australasia notably) creates a disconnection or decoupling between the party paying for the call (i.e. the party that pays for termination via his originating operator) and the party that chooses his MNO (i.e. the operator that sets the termination charge). In principle, whilst it is possible that the termination rate (via the price of incoming calls) is a factor affecting which MNO a consumer may chose, in practice the price of incoming calls is not a determining factor as evidenced by overseas research.[9] Consumers are unlikely to switch operator in response to an increase in termination rates and are relatively unconcerned about the cost to others of calling them.

[8] The survey is available at http://www.tra.org.bh/en/pdf/Residential_module_findings_presentation.pdf

[9] See references and surveys mentioned in Ofcom, Mobile Termination Rates, Statement, March 2007, page 22.

37. In line with European regulators and the EC in its latest Recommendation on Relevant Market,[10] TRA does not consider that a single market definition comprising both mobile retail and termination services is appropriate.

38. Overall, for the reasons indicated above, TRA considers there are no demand-side and supply-side substitution possibilities for termination services on individual mobile networks. Termination constitutes an enduring bottleneck as all calls, SMS and MMS to the subscribers of a MNO must necessarily go through its network. Accordingly, TRA is of the view that the relevant product markets are termination services on individual mobile networks.

<u>Summary of responses received</u>

39. Based on demand-side substitution at the wholesale level and the fact that certain OLOs currently use Batelco's fixed network as a transit operator to terminate traffic on Zain's network, Zain is of the view that the relevant product market should be widened. More specifically, Zain argues that the wholesale market for termination services on Zain's network should include the wholesale transit services over Batelco's fixed line network used to terminate calls on Zain's mobile network. Zain is of the view that this is a flaw in the market definition that directly affects the finding of dominance as the constraints derived from wholesale transit services are not properly taken into account as a result.

40. Batelco does not agree with the proposed market definition and requests TRA to remove SMS and MMS termination from the relevant market on the basis that it is not part of the 2007 EC Recommendation on relevant markets. Batelco does not explain further its position. It also requests the removal of paragraph 4.3 (2) on page 11 of the Determination of Dominance in Interconnection Markets issued by TRA on 9 August 2003.

<u>TRA analysis and conclusion</u>

41. TRA disagrees with Zain in so far as when an operator uses Batelco has a transit operator, that transit operator is still required to purchase termination services from Zain. Batelco, when terminating a call onto Zain network as a transit operator, charges the OLO for transit and for the termination it has to purchase from Zain. There is no substitute for termination services on Zain's mobile network. This conclusion is in line with international best practice. The competitive constraints mentioned by Zain can be adequately taken into account at the competition analysis stage. TRA also notes that even if the relevant market was defined along the lines advocated by Zain, it would not alter the conclusion of the dominance analysis because termination on Zain's network is a bottleneck.

42. TRA notes that Batelco has not articulated why SMS and MMS should be removed from the relevant market in light of TRA's reasoning. TRA therefore concludes that there is no reason to modify the product market definition on that basis. TRA also considers that it is not necessary to remove the paragraph mentioned by Batelco as the present Determination explicitly states at paragraph 8 that: "This Determination supersedes the Determination of Dominance in Interconnection Markets issued by TRA on 9 August 2003 as it relates to mobile services".

43. Based on the comments received, TRA remains of the view that the relevant product markets are termination services (voice, SMS and MMS) on individual mobile networks.

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[10] See EC, Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Second edition) Brussels, C(2007) 5406 rev 1. For decisions by regulators, see for example, Ofcom, Mobile Termination Rates, Statement, March 2007 or Arcep, Décision 2007-0810, 4 octobre 2007.

Functional dimension

The Draft Determination

44. As explained above, termination services on mobile networks are supplied by an MNO to other operators. They are an input into the production process for the supply of services to retail customers. The relevant functional dimension of the market definition is therefore the wholesale level.

Summary of responses received

45. Zain concurs with TRA's view.

TRA analysis and conclusion

46. Based on the comments received, TRA remains of the view that the relevant functional dimension of the market definition is the wholesale level.

Geographic dimension

The Draft Determination

47. The geographic scope of the Mobile Telecommunications Services licenses of the MNOs is the Kingdom of Bahrain. Competitive conditions in mobile services are homogenous throughout the country. Accordingly, TRA considers the geographic dimension of the markets to be the national.

Summary of responses received

48. Zain concurs with TRA's view.

TRA analysis and conclusion

49. Based on the comments received, TRA remains of the view that the geographic dimension of the markets is national.

Conclusion on the relevant markets

50. For the reasons set out above, TRA considers that the relevant markets are:

- the wholesale market for termination services on Batelco mobile network;
- the wholesale market for termination services on Zain mobile network.

51. Termination services include voice calls, SMS and MMS termination. The final relevant markets are the same as those defined in the Draft Determination.

4 Identification and determination of dominance in the relevant markets

52. Having defined the relevant markets, the next step consists of analysing the extent of competition. The Telecommunications Law provides the following definition of "dominant position":

"the Licensee's position of economic power that enables it to prevent the existence and continuation of effective competition in the relevant market though the ability of the Licensee to act independently – to a material extent – of competitors, subscribers and users"

53. As outlined in TRA's Determination on the Methodology for Determining Market Power ("Market Power Determination") and TRA's Competition Guidelines,[11] a large number of factors, ranging from market shares, profitability, barriers to entry and expansion, technological advantages, economies of scale and scope, to control of infrastructure not easily duplicable, and countervailing buyer power can be considered to assess dominance. Naturally the (most) relevant factors to be considered depend of the characteristics of the market analysed.

54. Given the characteristics of the markets under consideration, the most determinant factors are: market share, barriers to entry including the control of infrastructure not easily duplicable, and countervailing buyer power.

<u>The Draft Determination</u>

Market share

55. The network of the calling party must use the network of the terminating MNO. Each MNO has therefore a 100% market share and has therefore a monopoly in each relevant market. Consequently, there is a strong presumption of monopoly power. There are no (existing or forthcoming) substitution possibilities to terminate a call to a called party.

Barriers to entry and expansion

56. The CPP principle gives rise to the termination monopoly problem (see above paragraphs 36 and 71). Termination is an enduring bottleneck characterised by the absence of potential competition. Since a call can only be terminated using the receiving subscriber's host network this infrastructure cannot be duplicated to offer a substitutable service. The monopoly problem is caused by virtue of the fact that the subscriber is connected to a network and only that network can be used to terminate the call. Consequently the relevant markets display absolute barriers to entry.

Countervailing buyer power ("CBP")

57. Consideration of the two preceding elements point to a dominant position of Batelco and Zain in their respective termination markets. Another relevant element to be taken into account is CBP. CBP could limit the ability of providers of termination services to raise prices above the competitive level and hence to behave independently of buyers and ultimately of consumers. In other words, it may constrain the market power of providers of termination services.

58. CBP is not an absolute concept but refers to the relative strength of the buyer in negotiations with prospective sellers.[12] For CBP to be effective, buyers must be able to exert a sufficiently strong influence on the seller preventing the later to behave independently of its competitors and consumers to an appreciable extent. In doing so, CBP can prevent excessive prices and constrain prices at a level consistent with effective competition. Hence it can benefit the buyers of termination services and ultimately retail customers. More generally the conditions conducive to CBP include:[13]

- The buyer has alternative choices;
- The buyer is well informed, especially about alternative sources of supply;

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[11] See reference in footnote 5 above.

[12] Cf. e.g. Ofcom, Mobile Termination Statement, 27 March 2007, paragraph 4:44.

[13] See TRA, 2008, Draft Competition Guidelines, 4 November, paragraph 93.

- The buyer could switch to alternative sources of supply without incurring significant costs;
- The buyer could produce the input itself or sponsor new entry by another supplier;
- The buyer is an important outlet for the seller and therefore the seller would be prepared to negotiate.

59. With the exception of the second and last conditions above, none apply to MTRs.

60. CBP could be exercised at two levels:

- directly at the wholesale level; or
- indirectly at the retail level.

61. In response to a threat of unilateral increase of MTRs, a buyer of termination could increase the charge for termination on its network to that MNO with a view to neutralise the impact of the increase. Whether this is effective at preventing higher termination rates depends on the impact of higher MTRs on the profitability of MNOs and on whether a retaliatory increase in termination rates is feasible.

62. If traffic flows between MNOs are broadly symmetrical, then the increase in termination rates is neutral on their profitability and is therefore not a credible threat which can constrain the termination rate of a terminating MNO. Furthermore, consumers may suffer from higher termination rates as they are likely to be passed through to retail rates.

63. By contrast, if traffic flows are unbalanced between MNOs, i.e. there is a net and substantial payment from operator A (say the small network) to operator B (say the large network), then the threat to respond to a higher termination rate is likely to be credible, and hence to constrain operator A. Operator A would incur a net cost from a higher bilateral termination rate. However, the reverse does not hold and operator B will not be constrained.

64. [✂]

65. When negotiations involve different termination services, say between an MNO and a fixed operator, the ability of the fixed operator to exercise buyer power is limited. It is actually non-existent if the fixed operator has its termination charges on its fixed network regulated, as is presently the case for Batelco. In fact the fixed operator is in this case constrained by regulation from increasing its termination rate.

66. Another potential response to a threat of unilateral increase of MTRs would be to increase retail rates for calls to the MNO which is threatening to increase its MTRs with a view to maintain its margin per call and to discourage the increase in MTRs. This response may to, a certain extent, constrain the behaviour of smaller MNOs. However, for MNOs of roughly similar sizes, this strategy is unlikely to be effective. In fact, ultimately it may impact negatively the competitiveness of the responding MNO which will have higher retail rates compared to its rival.

67. More generally, CBP at the wholesale level is only achievable when the buyer has credible retaliation mechanisms to constrain a MNO. One such possible mechanism would be for an operator to threaten not to buy termination services. However, this threat could be effective only at the negotiation stage and prior to the launch of services. Once interconnected, the operator is committed to enable its customers to reach the customers of other operators. A reversal of interconnection policy would involve significant transaction costs and carry risks to the operator that could lose customers to networks who can reach more subscribers. Further, in practice this would not apply given the existing legal framework. Article 57 of the Telecommunications Law gives public telecommunications operators, the right to interconnection with any other public telecommunications operators.

68. Thus, for the reasons above, TRA does not consider that CBP exercised at the wholesale level would be sufficient to prevent Batelco and Zain from behaving independently of each other, of subscribers and users.

69. CBP could also be exerted indirectly at the retail level by the client of the operator providing termination services. Here the argument is that a consumer could constrain the termination charge set by its network. However, TRA considers that because of the CPP principle in place, the behaviour of a customer of an operator supplying termination services would be unlikely to lead to indirect CBP.

70. In fact, under the CPP principle, there is a disconnect or decoupling between the party that makes the call (the calling party) and the party that chooses the network which charges the network of the calling party of making a call (see paragraph 36 above). This allows the terminating operator to raise its prices without a constraint from either party to the call.

71. Under the CPP principle, only outgoing calls are billed to the client whilst received calls are free (with the exception of international roaming). Termination rates are determined by the terminating operator but are paid by the operator of the calling party. However it is the calling party that selects his MNO and bases his decision on elements that affect him directly, such as the retail communications rates he pays to his MNO and not wholesale MTRs payable by his MNO to the called party's MNO. This is a disconnect or decoupling that arises under the CPP principle. Contrary to countries where the receiving party pays ("RPP") principle is in place, the price of incoming calls is not a determining factor in the decision to select a particular operator. Under CPP, the called party has no incentive to respond to the termination price set by his MNO. The called party is largely non-sensitive to the price of termination (and may often be unaware of the existence of this wholesale service). In this sense, the incentives of an operator to keep termination rates at the competitive level are limited.

72. Only a terminating MNO can terminate calls to its subscribers and has therefore a monopoly for terminating traffic on its own network. TRA does not anticipate either any changes to the current CPP arrangements or technological developments that could overcome the termination monopoly problem in the short and medium term.

Summary and conclusions on dominance

73. The monopolistic structure of the relevant markets, combined with an absolute barrier to entry provides a strong presumption of dominance of each MNO in their respective termination markets.

74. TRA considers that in the absence of regulation the potential CBP of the other MNO (Batelco/Zain) or fixed operators is not sufficient to prevent the terminating MNO (Batelco/Zain) from behaving independently of its competitors, subscribers and ultimately of users such that prices are constrained. Hence, CBP does not overcome the presumption of dominance based on the consideration of market shares and barriers to entry.

75. Therefore, for the reasons set out above, TRA is of the view that:

- Batelco is dominant in the wholesale market for termination services on its mobile network;
- Zain is dominant in the wholesale market for termination services on its mobile network.

<u>Summary of responses received</u>

76. Zain made the following points, which in its opinion, affect the finding of dominance:

77. First, Zain considers that wholesale transit services offered by Batelco directly “discipline Zain Bahrain’s ability to price-discriminate against new entrants wishing to terminate calls on its mobile market”. According to Zain, demand-side substitution between wholesale transit services over Batelco’s fixed network and wholesale termination on Zain’s mobile network considerably constrains Zain’s ability to act independently and to a material extent of competitors, subscribers and users. Zain argues that any attempt to price discriminate against a new entrant would be constrained by the price of the wholesale transit services of Batelco, currently set at 2.1 fils. To illustrate this point, Zain points out that MTRs charged by Zain to Batelco are set at 6.626 fils per minute whereas the MTRs charged by Zain to OLOs directly interconnected to Zain is [✂].

78. Second, Zain is of the view that TRA has improperly applied the “Modified Greenfield Approach” (“MGA”) used by the EC, regulators and referred to in TRA’s Competition Guidelines. More specifically, it is of the view that the dominance analysis should be conducted assuming that the regulation applicable to Batelco’s termination services applies, although Zain does not articulate what would be the effect of this treatment.

79. Third, Zain believes that TRA has not adequately taken into account Batelco’s CBP. Zain contends that given Batelco’s position in the market as a fixed and mobile operator and its vertical integration, Batelco has a significant effect on the bargaining power of Zain. In its submission, Zain did not articulate how the vertical integration of Batelco will affect Batelco’s bargaining power and ultimately the outcome of the competition analysis. Zain considers that TRA’s conclusion at paragraph 64 of the Draft Determination does not comport with the actual conditions of the Bahraini market and requests TRA to reassess its finding that, absent regulation, CBP is insufficient to constrain Zain from unilaterally imposing excessive MTRs. Zain is of the view that the current level and the evolution of MTRs over the last four years demonstrate that Zain “has not had the ability to act unilaterally and impose above cost MTRs”.

80. Fourth, and linked to the preceding two points, Zain argues that TRA should take into account in its analysis of Batelco’s CBP the “impact of Batelco’s ability to again avail itself of the dispute resolution mechanism contained in Article 57(g) of the Telecommunications Law”. To support this view, Zain makes reference to a case (dating back to 2005) involving H3G, a new mobile entrant in the United Kingdom before the Competition Appeal Tribunal (“CAT”) in which, according to Zain, a decision by Ofcom was struck down because it did not take into account the potential impact of dispute resolution mechanisms on CBP.

81. Batelco agrees with the methodology applied but considered that a strict application of the methodology would lead to the designation of STC. For the sake of clarify, Batelco also requests express exclusion of mobile value-added services and 3G services (for example video calls).

<u>TRA analysis and conclusion</u>

82. With respect to Zain first point, TRA disagrees with Zain that the availability of transit services from Batelco removes Zain’s ability to behave independently of its competitors, subscribers and users. As indicated in the Statement, TRA accepts that the transit services constrain the extent to which MNOs can price discriminate against a new entrant. However, this does not imply, as suggested by Zain, that the transit services offered by Batelco constrain the ability of Zain to behave independently. The two are different. To offer a transit service to OLOs that enable termination on Zain’s network, Batelco must purchase termination services from Zain; termination on Zain’s mobile network is a bottleneck. Transit services do not undermine Zain’s ability to increase or set above cost MTRs for example. Thus, for the reasons set out above in the analysis of CBP of the Draft Determination and assuming in the reasoning that Batelco’s MTR are regulated, Zain’s ability to behave independently is not removed by the transit services provided by Batelco. Further, the price discrimination exercised by Zain between the MTRs applicable to OLOs that interconnect directly with Zain and those applicable to

Batelco supports the view that Zain is in fact able to behave independently as it charges higher rates to OLOs than to Batelco. Assuming for illustrative purposes that the MTRs between Batelco and Zain are set at a level which represents efficient cost, Zain applies currently a mark-up of [✂] above cost for MTRs applicable to OLOs which directly interconnect to Zain.

83. Regarding Zain's second point, TRA concurs with Zain that under the MGA, the analysis should assume that the regulation of Batelco's MTRs remains in place. However, this does not alter the conclusion that Zain is dominant in its mobile termination services market. To the contrary, the regulation of Batelco termination rates (both for fixed and mobile) limits Batelco's CBP in so far as regulation restricts Batelco's ability to exercise any CBP it may have. For instance, Batelco could not retaliate to an increase (or the threat of an increase) in Zain MTRs by increasing its own termination rates.

84. For the reasons set out in the Draft Determination, in paragraphs 82,83,85-87 TRA considers that it has appropriately considered CBP. The current level and evolution of Zain's MTRs applicable to Batelco over the last few years have been governed by a multi-year commercial agreement signed early 2006. Thus it cannot be inferred from the evaluation of MTRs that Zain has not had the ability to modify its MTRs.

85. TRA disagrees with Zain's fourth point and notes that in a subsequent judgement involving H3G which, inter alia, considered whether the dispute resolution powers of Ofcom should be taken into account, the CAT unambiguously concluded that they should not.[14] The CAT stated that:[15]

> "the exercise of OFCOM's dispute resolution powers is a form of regulation which has the effect of curbing H3G's exercise of market power even though that may not be its sole or even main aim. [...] The fact that a company with a large market share is constrained in its pricing decisions by the threat of ex post regulation of one sort or other does not mean that the company is not dominant"

86. Speaking of dispute resolution as a regulatory provision, the CAT further indicated that:[16]

> "[a] regulatory provision which, if used, would have an effect on the freedom of an operator to act independently of its customers cannot be allowed to provide an a priori answer to the question whether that operator does or does not have SMP".

87. In fact, if the dispute resolution provisions or other forms of ex-post regulation, such as the anti-competitive provisions of Article 65 of the Telecommunications Law were taken into account and it was concluded, as implied by Zain, that they curb market power, then their mere existence would imply that it would be virtually impossible for TRA to make a finding of dominance or SMP in any markets. This cannot be consistent with the intent of the Telecommunications Law.

88. Turning to Batelco's submission, TRA remains of the view that STC should remain outside the scope of this Determination for the time being. This approach is consistent with the treatment of Zain in 2003. Subsequent to the initial Interconnection Dominance Determination of 2003 Zain remained unregulated for a certain period until an adjustment to the regulatory framework was necessary. TRA is of the view that a similar approach is appropriate for STC. TRA notably notes that since STC has yet to launch services there is no wholesale market for termination on its network. Consequently STC cannot be designated as a dominant operator.

89. With regards to Batelco's other point, TRA considers that the wording of the Determination is sufficiently clear: the scope of the market include voice, SMS, and MMS termination.

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[14] See CAT [2008] 11, notably at paragraph 122.

[15] See CAT [2008] 11, paragraph 122.

[16] See CAT [2008] 11, paragraph 66.

90. Therefore, for the reasons set out above, TRA remains of the view that:

- Batelco is dominant in the wholesale market for termination services on its mobile network;
- Zain is dominant in the wholesale market for termination services on its mobile network.