

**Lightspeed submission in Response to the
TRA Consultation
"Draft Competition Guidelines"**

**Issued by the Telecommunications Regulatory
Authority of the Kingdom of Bahrain
4 November 2008**

Introduction

Lightspeed welcomes the opportunity to respond to the "Draft Competition Guidelines" issued by the TRA 4 November 2008, hereinafter referred to as the "Consultation Paper".

Lightspeed particularly appreciates the comprehensive Consultation Paper issued by the TRA, corresponding to the best international practice and adapted to the Bahraini telecommunications market. Such an approach to competition safeguards regulation will ensure that a solid legal and economic basis is used for current and future analysis of anti-competitive practices in the market.

Lightspeed sees that the Consultation Paper focused more on international practice rather than listing actual cases and solutions from the Bahraini telecommunications market.

In principle Lightspeed believes that in the absence of a Competition Law in Bahrain, the Consultation Paper will provide more legal certainty to the telecommunications sector in Bahrain and will help in expediting legal dispute resolution. There is currently a lack of effective competition in services offered within the retail and wholesale markets and other downstream markets that rely on essential inputs by the dominant operator, including those for broadband, internet and mobile services. This lack of effective competition is contrary to the best interests of end users and the TRA's goals of maximizing the take up of broadband. The lack of effective competition in the retail market and associated downstream markets is attributable to dominant operator's abuse of dominance in the wholesale market and its ability to use that dominance to constrain pricing flexibility and prevent other operators and new entrants from competing effectively.

Lightspeed stresses that the provisions contained in these Guidelines should not only be advisory; they should impose binding legal obligations on the TRA and on all licensees in the Bahraini market. It is our view that these Guidelines should clarify the procedures that TRA will generally use, and the standards that TRA will generally apply in safeguarding competition in the telecommunications sector.

Lightspeed strongly believes that the Draft Competition Guidelines should be a first step towards the issuance of binding Competition Safeguard Instructions that adhere to the current market situations and address all market entry obstacles and anti competitive violations to ensure the establishment of effective competition in the Bahraini Telecommunications market.

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General Comments:

1- Lightspeed welcomes and supports the TRA approach in the introduction of the draft Competition Guidelines. Lightspeed supports a regulatory approach that ensures a solid legal and economic basis for current and future analysis of anti-competitive practices in the market. A regulatory framework of Competition Guidelines that seeks to enhance legal certainty, by combining ex-ante regulation, which clearly remains very necessary in Bahrain, with a framework that allows fast and efficient interventions against abuses by dominant operators.

Indeed, International experience demonstrates that the best means to control anti-competitive practices and to ensure effective competition is to combine strong ex-ante regulation with strong ex-post control of abuses of dominant position. The use of both instruments together is the only way to ensure the establishment of effective competition in the Bahraini telecommunications market.

2- The TRA by issuing these Guidelines should look forward to establishing a new regulatory framework that would provide a harmonized approach for the regulation of the telecom sector in Bahrain that will result in sustainable effective competition, innovative and advanced services and provide consumer benefits

Given the absence of a general competition law in Bahrain, the need for Competition Guidelines in the Bahraini market is necessary at this critical stage of the competition development. Anti-competitive behavior can have a serious impact on the telecommunications sector, in deterring competitive entry, blocking investment, and denying consumers the benefits of liberalization. Lightspeed therefore emphasizes that the TRA should continue to retain the application of ex ante regulation on dominant operators in the market and continue to supervise and monitor the market carefully to ensure that no dominant operator is preventing the establishment of effective competition in any of the market segments.

3- Lightspeed urges the TRA to strictly apply section 65 of the Bahraini Telecommunications law and other provisions in the law than enhance

the establishment of effective competition in the market together with the proposed Competition Guidelines. It is important to emphasize that the main focus of the TRA should be to ensure that to the extent that a dominant operator retains, or has any reasonable possibility of regaining significant market power in a market, the TRA generally will continue to impose ex ante regulations that will be necessary to deter anti-competitive conduct.

4- Lightspeed strongly believes that the TRA should initiate action against any anti competitive practices performed by a dominant operator in a period that does not exceed two weeks after the start of the anti-competitive conduct. To ensure the effectiveness of the Competition Guidelines, the TRA should create and adopt an escalation procedure regarding dominant operator anti-competitive practices as part of the competition guidelines. Escalation procedure is normally initiated by other operators in the market but should also be initiated by TRA upon detecting dominant operator anti-competitive practice in the market.

5- Lightspeed while supporting the TRA in its approach stated in sections 2 and 3 of this Consultation Paper, emphasizes that once a market is defined by the TRA, it must be analyzed to assess the degree of competition on that market in a manner consistent with the SMP determination issued earlier by the TRA. The TRA should then intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive as a result of such undertakings being in a dominant position. Where market analysis reveals that competition on the market is not effective, the TRA designates one or more operators as having SMP on that market, at this stage, appropriate ex ante remedies must be applied.

6- Lightspeed urges the TRA to confirm that market share is the most solid and objective element of information available today, and for the foreseeable future, and should therefore be the cornerstone of any market analysis to be conducted. If market shares are not changing, this constitutes clear evidence that competition is not flourishing.

7- Lightspeed stresses that the local access network still remains uncompetitive with the dominant operator being the dominant incumbent carrier. Any removal or failure to impose additional restrictions or compliance requirements which could be used to allow the dominant operator to cross subsidize or abuse its position to the detriment of competitors, customers and the market should be resisted, and will not be in the best interests of a transparent market and competition. The TRA should not expect local network competition to become effective in the near future and should take regulatory action to

safeguard the interests of service providers and end-users in the interim. It is clear that the dominant operator has successfully maintained its high market share even with ex ante regulations imposed, and so any relaxation would significantly damage the early stages of competition.

Specific Comments

1- Lightspeed comments on point 4 of the Introduction, page 4 of the Consultation Paper:

"These guidelines build upon TRA's previous determinations on defining relevant markets and market power assessment and also take into account the provisions in the Telecommunications Law, as promulgated by the Legislative Decree No. 48 of 2002, ("Telecommunications Law") and the experience of TRA with respect to market definition and competition analysis. However, it should be noted that these guidelines do not legally bind TRA. Whilst TRA would anticipate following the principles outlined here in assessing competition, there may be differences in how individual cases or allegations of anti-competitive behavior are assessed and TRA reserves the right to consider other factors not listed in these guidelines. In addition, TRA may, in some cases, consider it unnecessary to assess all factors listed in the guidelines (for example related to market definition or the assessment of market power). Rather, TRA will have regard, in all cases, to the most relevant factors in relation to that case."

Comment:

Lightspeed stresses that the main goal of these Competition Guidelines should be mainly to ensure the establishment of effective competition in the Bahraini market. The proper way of doing same is to develop binding Competition Safeguard Instructions that prevents dominant operators from conducting any form of anti competitive practices and ensures that new entrants and small and medium market players are not financially damaged by anti competitive behaviors.

To simply state that these Guidelines will not be binding on the TRA is not enough. We believe that the legal basis for issuing these Guidelines is binding pursuant to section 65 of the Telecommunications law. The TRA should therefore interrupt and enforce these Guidelines to the best interest of new entrants and small operators to ensure that same will be able to compete in the future. Failing to do so will lessen the effect and the importance of issuing these Guidelines.

2- Section 4.2, Article 108 (Elements required to establish a Breach of Section 65)

In establishing that a breach occurred pursuant to section 65 and that the conduct has had the effect of materially preventing, restricting or distorting competition. Lightspeed stresses that the proposed tests should only be referred to as an intellectual framework for the analysis. In practice, the TRA should follow an open approach, relying on empirical

evidence wherever feasible. The analysis of the empirical evidence should take into account information and opinions provided by competitors and by the customers, as well as evidence of behavior patterns that occurred in the past in broadly similar circumstances. The TRA should take into account the characteristics, the price and the intended use of a product, the barriers to entry and switching costs, and any existing regulatory obligations that have an effect of structuring the market.

3- Comments on possible forms of anti competitive conduct.

Lightspeed supports and agrees with the list of abusive practices proposed in the Consultation Paper. We believe that the main role of the TRA is to carefully monitor prices and services offered by the dominant operator in the market and to ensure that no acts are conducted to hinder the establishment of effective competition in the market.

Following are some of our comments regarding this section of the Consultation Paper.

a- Excessive pricing

Lightspeed agrees with the proposed definition of Excessive Pricing and believes that evidence required to prove or deny such an abuse should be on the dominant operator. The dominant operator should solely carry the burden of proof hence most of the data required as evidence is in its possession.

b- Predatory Pricing

Lightspeed agrees with the Predatory Pricing definition stated in the Consultation Paper yet we strongly believe that the burden of proof in principle should be on the dominant operator in the market. It is important to set a specific timeframe to ensure that any act suspected of falling under such a definition should be stopped until investigations and market tests are completed. This should be the case for all suspected violations.

Such an approach will ensure more legal certainty and alleviate any detrimental delay in the treatment of a predatory pricing case.

c- Margin Squeeze

Lightspeed agrees with the TRA definition of a Margin Squeeze and would like to add that a margin squeeze occurs when a dominant operator

supplies an “upstream” product A which is itself (or is closely related to) a component of a “downstream” product A+B (product B is supplied by the dominant operator) only to itself: those who compete against A+B will supply their own alternative to B).

The implicit charge by the dominant operator to itself for B (i.e. the difference between the prices at which it supplies A+B and A only) is so low that a reasonably efficient competitor cannot profitably compete against A+B.

With regard to the issue of how to assess the costs of an efficient operator, it is assumed to be impractical to obtain the actual costs of an efficient competitor. Competitors may not naturally have prepared their accounting records on a basis, or to a standard necessary to support a margin squeeze calculation. Furthermore, it will be difficult for the TRA to assess whether or not a particular competitor is efficient, at least without a major time-consuming exercise involving all of them.

Therefore, the natural course is to take the dominant’s costs as a proxy for efficient entrant costs, although some adjustments may be necessary. To the extent that the incumbent is inefficient, the margin squeeze calculation favors the entrants.

Lightspeed emphasizes that margin squeezes are very frequent in telecommunications, as international and Bahraini experience shows. Instead of listing examples in the UK, Lightspeed would have preferred that the TRA lists examples from the Bahraini market and to show how cases were resolved.

We strongly believe that any best international practice should be adapted to local market conditions and should give solutions to current market problems.

For this reason, we urge the TRA to investigate rapidly and to give more details on this type of abuse. The TRA should note that any insufficient or negative margin between wholesale charges and retail prices for a given product would constitute a presumption of anticompetitive practice unless objectively justified by the dominant operator. The TRA should also underline that such practices would be investigated as a matter of priority. Again any presumption of anti competitive practice should be sufficient reason to instruct the dominant operator to stop such practices until the TRA concludes its investigation.

In the same context, regulation on enforcement and sanctions to be issued by the TRA should empower, clearly and unambiguously, the TRA

to obtain, without delay, cost data of an alleged dominant operator. This should particularly be the case in a margin squeeze investigation.

The TRA should deal more clearly with the economies of scale and scope and recognize that the assessment of the relative efficiency of the operators is complex in the presence of such economies of scale and scope. Regulation should ensure that upstream economies of scale and scope equally benefit the dominant operator and the operators to which this dominant operator provides wholesale inputs. To guarantee consistency with such a regulatory objective, the Competition Guidelines should recognize that economies of scale should not allow a dominant operator to invoke wholesale economies of scale and scope to justify a margin squeeze.

d- Bundling or tying

Lightspeed stresses that the market segmentation issued earlier by the TRA reveals the dominance of the dominant operator in all markets. The incumbent operator as a dominant operator has multiple opportunities to protect and extend its market power through anti-competitive practices. They may bundle a product on which they are dominant with products on newly emerging markets and thereby capture these new markets. Such anti competitive practices discourage potential new entrants to enter the market or raise rival's costs or burden entrants to the point where they become less competitive or they may have the effect of forcing small operators to exit the market altogether, even though they often offer better products.

Lightspeed agrees with the general approach put forward by the TRA, but notes that tying and bundling is a frequent abusive practice in the telecommunication sector. Thus, we urge the TRA to be much more specific on positive and negative competitive effects of bundling in order to increase legal certainty and protect new and small entrants in the market.

Following are some of the issues not sufficiently addressed in the Consultation Paper:

-Leveraging of market power from one market to another within the same corporate group

Although the TRA made provisions to safeguard against licensees affiliated with any party with market power from leveraging on such an advantage to restrict competition in the telecoms market by engaging in price squeezes, cross-subsidization and unreasonable discrimination,

bundling can still be used strategically to diminish competition or significantly reduce/limit the ability of competitors in a particular market to efficiently compete in the long run. Very often, short term bundling promotions become de facto long-term exclusive arrangements. Such subtle yet potent erosion of market competition will be detrimental to the overall market.

- Collective dominance of corporate group through frequent bundling

Unrestricted bundling of services within the same corporate group promotes leveraging of market power from one market to another. Although they may be separate entities in legal form, yet they would have subtly established and strengthened the corporate group's overall market presence as a single corporate brand. The resulting collective dominance will limit and stifle the ability of competitors to compete in the market.

- Bundling of services in new and developing markets

Lightspeed would urge the TRA to consider not just the current but also future implications of bundling of telecommunications with non-telecommunication services, particularly for new and developing services, such as wireless broadband and 3G services. Unmonitored bundling of services will increase entry barrier and stifle competition in new and developing markets before it can even fully developed.

e- Refusal to Supply

Lightspeed agrees with the general approach, but notes that the TRA should note that when there is no possibility to bypass a wholesale product and when the related retail market is not competitive, any refusal of access is anticompetitive unless there are objective and exceptional justifications. The TRA concentrate in particular on refusal of access to infrastructures deployed under noncompetitive conditions because, in this case, compulsory access would not undermine investment incentives.

f- Delaying tactics

Lightspeed and in light of its experience in the Bahrain market would like to add the following point. Delaying tactics refers to situations where the SMP undertaking may have incentives to delay the provision of its (essential) wholesale input to its downstream competitors.

The TRA should specify the time frame within which the network has to be opened to independent retail undertakings. A time frame might also be set through a mandatory service level agreement.

Regarding new wholesale products which allow the supply of new retail products, there is the danger that the dominant operator will gain a first mover advantage by supplying the wholesale product to its retail competitors at a later point in time as to its retail affiliate.

Lightspeed emphasizes that there is also the danger that the SMP undertaking offers a wholesale product which is of limited use for its competitors. Although, regulatory intervention is possible in such cases, it might be time-consuming and the SMP operator may nevertheless be able to achieve a first mover advantage. Furthermore, in some cases, a sensible wholesale product might not even exist or if it existed would not be demanded by other undertakings even at a cost-based price. A solution to these problems could be to *ex ante* require the SMP undertaking to meet all reasonable requests for access within a reasonable period of time.

4 - The process of lodging a complaint and how TRA will assess such complaints:

Comment:

a- Lightspeed finds the term sufficient evidence mentioned in Article 227/page 62 ambiguous and vague and accordingly seeks more clarification regarding this term. It is important to stress that the burden of proof should be on the dominant operator. The dominant operator, obtaining mostly all of the data required in such cases, should be obligated to provide all evidence needed and requested. Failing to do so should be considered an abuse of dominance by the TRA.

b- Article 232/page 63 states that the TRA will involve the target operator in order to investigate a complaint....; our comment is:

Lightspeed has submitted, more than once, many complaints before the TRA. The subject of these complaints was the dominant operator's anti-competitive practices and abuse of dominance. Our question is: had the TRA followed this process mentioned in the Consultation?

Again, we strongly believe that it would be much more convincing, if the TRA mentioned practical examples where these show the actions conducted by the TRA and the processes followed by the TRA against the

target operator so as to guarantee the establishment of effective competition in the market.

c- Article 234/page 64:

Lightspeed strongly disagrees with the proposed timeframe of 20 days to establish whether an investigation should be opened or not. We believe that such a period is too long. Such a period will ensure that small and new entrants are financially damaged and will lose their market positions until action would be taken by the TRA. We stress that time is of essence in such cases and a requirement of prompt and efficient intervention by the TRA to respond to anti competitive behaviors in the market is a must to ensure that new entrants and small operators would have an equal and fair chance to compete in the market. We therefore believe that the TRA should take action immediately regarding opening the investigation or not in a period -not to exceed- 5 working days maximum.