

Mena Telecom
Response to Telecommunications Regulatory Authority
Consultation on Retail Tariff Notification Framework
Dated 31 May 2009

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Introduction

Mena Telecom is a licensed telecommunications operator in the Kingdom of Bahrain; it competes directly with products and services that will become subject to the Retail Tariff Notification Framework if and when it is finalized. Mena Telecom is a relatively new operator that has fast developed a record for efficiency, innovation and sensitivity to subscriber needs in the short time that it has been operational. Mena Telecom champions the cause of market competition and prides itself for being a force that has brought increased market activity with its arrival. As such, Mena Telecom is highly concerned with the introduction of greater flexibility to Significant Market Power (SMP) operators that Mena Telecom believes are currently conducting business in ways that potentially distort competition. In fact, we believe that the ex ante tests for anti-competitive behaviour under the Telecommunications Law are extremely burdensome to undergo by the Regulator and that the remedies often become pointless given the time lag between an action and its potential remedy; this is another reason why we believe the 'ex ante' territory should be tread with caution. We carry reservations towards the proposed shift to 'ex-ante' retail tariff controls mainly because we believe that its application in this jurisdiction will carry numerous complications whose remedies will become difficult to apply given the current constraints the Telecommunications Regulatory Authority (TRA) works under.

The response below contains Mena Telecom comments on the TRA's:

- Consultation on Retail Tariff Notification Framework
- Retail Tariff Notification Regulation
- Retail Tariff Notification Guidelines
- Determination of Retail Tariff Notification Form
- Determination of Notification Rules Applicable to Retail Telecommunications Markets

At the outset, it is important to note that Mena Telecom believes the Retail Tariff Notification methodology as a whole to be highly assumptive and subjective in its application thereby allowing large ambit for manipulation. There is great scope for activity that will considerably stagnate the market in ways that the methodology does not seem to have considered. Mena Telecom has highlighted its most important concerns below.

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

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Consultation on Retail Tariff Notification Framework (LAU/0509/118)

- *At 21: The notification process acts as a self-compliance tool which focuses on practices that are likely to be incompatible with the development of competition. This includes ensuring that retail offers can be technically and economically replicated using appropriately defined and priced wholesale products where appropriate.*

Mena Telecom believes that the underlying premise, that the wholesale market is the avenue in which the SMP Operator can stifle the market, is flawed. In fact, there are many other ways that an SMP Operator can replicate a technical and economic product at wholesale but prevent competition by monopolizing on other inputs. An example of such behaviour is Batelco's continued restrictions on the market to gain access to independent international capacity to the only international cables leaving Bahrain. Under the TRA's premise of equivalence, even if Batelco introduces equivalence at the wholesale level for potential price changes, operators that are not wholesalers cannot replicate based on a reasonably efficient business model because the transmission costs remain high for all operators but Batelco.

Mena Telecom requests that the assumption of areas to address with regards to the ability of an SMP Operator to distort competition is widened to all potential areas rather than just the wholesale market.

Retail Tariff Notification Regulation

- *At Article 2 – Notification Process 2.1 (a): tariffs for new Licensed Retail Services, including bundles of services comprising of at least one service offered in a market in which the Notifying Operator has SMP.*

Mena Telecom believes that the introduction of bundled products should be exempted from the proposed Notification Framework, and should remain in the current regulatory approval regime. This is because most other operators cannot prima facie replicate the potential bundles of a large SMP operator. Even if some other operators can replicate a bundle, the fact that there are other that cannot means that there is no underlying protection to those new market entrants that cannot, regardless of their investments and the benefits they bring to the market. Such a policy will leave many OLOs open to large risks and will certainly discourage potential investors in this market (which may otherwise bring great benefits to subscribers and to the economy).

By maintaining the tariff approval regime for the introduction of bundled services, bundled packages are not altogether restricted (when for the long-term benefit of subscribers) but the TRA can take a more balanced attitude to their approval.

- *At 2.3 (a): Where the Notifying Operator needs to submit a corresponding wholesale product for TRA approval to ensure replicability of the telecommunications service relating to the Notified Tariff by other operators at a retail level.*

This is another example of the flawed assumption that lack of replication at the wholesale level is the only barrier to competition. In order for the proposed Notification Framework to be successful, all barriers to competition must be removed, including the monopolization of the international capacity access market.

- *At 2.3 (b): Where the volume of information provided by the Notifying Operator is unusually large and TRA therefore requires more time to review this information in sufficient detail.*

Mena Telecom finds that this provision is counter-productive as it encourages smaller submissions (even at the expense of potentially missing out information) in order to speed up the review.

- *At 2.3 (c): Where the Notified Tariff is unusually complex and TRA therefore requires more time to analyse the information provided and the compliance of the Notified Tariff with the Regulation.*

In line with the comment at 2.3 (b), it is likely that this provision will encourage SMP operators to simplify their submission and potentially withhold information in order to speed up the TRA's analysis.

- *At 3.4: No margin squeezing: The Notifying Operator may not set a Retail Tariff such that, at the time of its introduction the difference between the retail*

price and the price of the relevant corresponding wholesale input(s) is such that, based on currently available information, an equally efficient downstream competitor could not reasonably be expected to sustain a competing product.

We find that the terms ‘equally efficient downstream competitor’ and ‘reasonably be expected’ are highly subjective making it difficult to show whether they are features or factors of a proposed price change situation. We find that this form of subjectivity is present throughout the Consultation documents and that subjectivity is counter-productive to efficiency in the methodology. We carry deep concerns that if the subjective elements of the methodology are not clarified scientifically, large scope for manipulation will remain and the TRA will leave little room for itself to remedy breaches and protect the market, leading to fostered and long-term competition.

- ***At Article 6 – Enforcement:***

- 6.1 Where a Controlled Tariff has been implemented in breach of this Regulation, TRA may issue an order under this Article to the Notifying Operator to:*

- (a) cease the implementation of the Controlled Tariff;*
 - (b) take any other appropriate measures necessary in order to withdraw the Controlled Tariff or take other measures necessary to rectify the breach of compliance with an Undertaking; and/or*
 - (c) take any other appropriate action, including refraining from taking particular actions, necessary in order to restore the situation existing prior to the implementation of the Controlled Tariff. Where it is impossible to restore the situation existing prior to the implementation of the Controlled Tariff, TRA may order the Notifying Operator to take any action or prohibit the Notifying Operator from taking any action or to cease from continuing any such action, that TRA deems necessary to achieve such restoration as far as possible.*

In light of the freedoms to be given to SMP operators envisaged in this Consultation, Mena Telecom believes that the enforcement of the Regulation and penalties for breach should be far more strict and severe so as to ensure true compliance.

Retail Tariff Notification Guidelines (LAU/0509/120)

- *At 8: On the examples of non-price terms that are expected to have an impact on the effective price and/or cost of a service:*
 - *Quality of service (which would affect the cost of providing the service);*

Mena Telecom believes that it must be clarified that the cost shifting change in the quality of service must be a tangible measure in order to make the methodology more scientific and less subjective.

- *At the table showing Rules Applicable / Tests required by market – based on the current SMP Determination issued by TRA 3 June 2003*

Mena Telecom seeks clarification as to why predatory pricing rules are not applied to the Domestic Calls market.

- *At Example 2 – Fixed line access:*
 - *Therefore the two products are being sold at different tariffs, the size of the difference does not seem justified. The difference in the cost of provision, given the differing non-price terms, is significantly smaller than the difference in prices. In addition, no resulting increase in demand is proposed.*

The example implies that an operator may be able to launch a disproportionate price change (that does not reflect true costs) on the *proposal* of a resulting shift in demand. This implication makes the provisions rather subjective and allows for a significant degree of manipulation by an SMP operator.

- *At 50: An assessment must be made about whether a reasonably efficient, hypothetical non-integrated competitor would, under the notified retail tariff, be able to earn a positive margin on its retail service. The margin is calculated as the difference between the notified effective retail price and the end-to-end retail costs incurred in offering the service. These include the effective wholesale price (or proposed price) of the necessary existing (or proposed) input(s) plus the other costs that are incurred in providing the retail service, including operating costs, depreciation and a required return on capital. For the purpose of this test, the downstream costs of the integrated SMP operator will serve as a proxy for the downstream costs incurred by the non-integrated competitor.*

Mena Telecom finds that this provision is another example of the subjective assumptions making up the proposed methodology. We find that ‘reasonably efficient’ and ‘require return on capital’ are very difficult to demonstrate if not defined with any level of clarity.

Further, ‘a positive margin’ can range from any figure above zero to infinity. Leaving this provision open allows SMP operators to justify competitor margins

to unacceptably small figures, while staying well within the scope of the proposed Regulation.

Finally, Mena Telecom strongly disagrees with the usage of the downstream costs of the integrated SMP as a proxy for the downstream costs incurred by the non-integrated competitor. Such usage is a gross misrepresentation of reality. The non-integrated competitor is most likely, in reality, to be a relatively new market entrant. Its depreciation costs for example would largely vary from the depreciation costs of an incumbent (the realistic most likely SMP operator) that has been in operation for decades. The transmission costs again vary to a significant extent. In Bahrain, this is mainly because Batelco has monopolized access to the Flag cable. It would be unfair to make such assumption and will come to the ultimate detriment of the competitors and the subscribers and competitors will seek to exit such market with potential new ones discouraged from entry. It is understandable that the TRA seeks to encourage the movement of the downstream costs of a non-integrated competitor towards those of an integrated SMP. However, the assumption that the costs are equal when they vary vastly will not push such movement; rather it will, in the long-run, severely hinder competition.

- *Example (1) – Broadband*

The example at page 15 again makes the assumption that if wholesale equivalence is achieved, a level competitive playing field is maintained. It is important that the Regulation considers the other factors that de-stabilise the competitive playing field; such as restrictions on independent international capacity.

- *At the net margin formulae at page 16*

Mena Telecom disagrees with the assumption of the same cost base for non-integrated competitors as integrated SMPs because the opex and depreciation costs of the non-integrated competitors are vastly different to the integrated SMP. In the example of Bahrain, the variance in the opex (transmission cost) is Batelco's monopoly over access to the Flag cable. Maintaining such assumption would be neither fair nor reasonable.

Further, the assumption in the formulae that the Net Margin must be equal to or greater than zero allows for price changes which will only reasonably allow a competitor to gain minute margins, under the Regulation. We believe that the Net Margin figure should be set at a number well over zero (and should be in line with acceptable commercial margins for similar products and services).

Mena Telecom also conveys its deep concern that the Regulation only assumes price equivalence in the wholesale market as the test for acceptable practice. The issue of other equivalent terms (such as time to market) is left completely unaddressed. For example, equivalent services at equivalent prices may be introduced on the wholesale level, but time to delivery could be months, thus putting the competitor at a significant disadvantage over the SMP operator. This concern is real and is a problem that many OLOs face today.

- *At 57: The price of a service may not be set below the cost of provision, where such price would weaken or drive out a rival or deter new entry into the market. Although initially consumers would face lower prices, in the long run prices would increase above the competitive level due to a lack of competitive pressure on the predatory company.*

We find that the term ‘weaken or drive out a rival or deter new entry into the market’ is highly subjective. The proposed Regulation, as it stands, makes the Regulator’s job very difficult when a complaint is launched and an investigation is initiated. Lack of clarity leads to envisaged delays when problems arise. This will come to the detriment of the other operators and ultimately of the subscribers.

- *At 60: If the tariff does not exceed cost, a written justification for this, with supporting evidence in relation to:*
 - *A short-term demand or supply shock;*
 - *The existence of significant network effects – a new service therefore may be priced below cost in order to encourage uptake which benefits all users; or*
 - *The existence of dynamic effects – a new service therefore may be priced below cost in order to expand the scale of production and so achieve scale economies. This would lower costs which would then lead to prices being above cost.*

The above exclusions are based on forecasted uptake. Such forecast can easily be manipulated. We believe this provision is too wide a scope and the potentially detriments that may come about (aggressive forecasting ultimately leading to predatory pricing) outweigh the potential benefits.

- *At Figure 4: Decision tree – does a bundle create anti-competitive concerns?*

Where the bundling is mixed and the incremental prices of the products in the bundle are not lower than the incremental costs, the Regulation holds that there are no a priori anti-competitive concerns. We find that this provision is too lenient as it assumes that price is the only competitive factor, and disregards the factor of convenience. If an SMP operator is the only operator that can bundle a certain combination of packages making it convenient in a way that no other operator can, then this should be taken in to consideration as it may drive out or distort competition in the long-run.

- *At scenario 2:*
 - *The services can all be purchased separately and the bundle is therefore mixed – the Notifying Operator should provide information about the relevant services it offers and are offered by its competitors. If the services are available in the market on a stand-alone basis as well as part of a bundle, then the bundle can be considered mixed.*

Given that the anti-competitive concern, in the context of bundling is the inability of other operators to replicate a certain mixture of products (and not the ability to sell those products as stand-alones), Mena Telecom is not certain why the

Regulation seeks to differentiate between the two scenarios. We seek further explanation at this point.

- *At 77: The tariff notification process should be followed for those agreements which exceed an annual value threshold of BHD[X]. All agreements with the same customer should be considered together for the purpose of applying this threshold.*

Mena Telecom is considered that this provision will simply encourage SMP operators to engage in multiple smaller value agreements with their customers (that will nonetheless exceed the annual value under the provision). We believe the Regulation should impose that that tariff notification process should be followed for products and/or services that exceed an annual threshold in aggregate regardless of the number of actual agreements with a customer.

Summary

On the whole, we find that the proposed Regulation, in the current form, contains many highly subjective elements. We think that these subjective elements and other specific elements will lead to greater flexibility for SMP operators at the expense of new entrants. This is mainly because lack of clarity will allow for manipulation in interpretation and related conflicts and issues will eventually become highly time and resource intensive as a result. On the other hand, the more specific elements, such as the assumption (in formulae) that the depreciation, for example, of an SMP operator is the same as that of a non-integrated competitor is quite idealistic and very far from reality. If the Regulation seeks to encourage the move towards integration and efficiency and similar cost bases for all operators, this should be done in small steps over time. The current proposed regime risks significantly disadvantaging OLOs; thus discouraging any future investments whatsoever which will come to the cost of subscribers when the SMP operator regains past monopolistic comforts. The current regime offers no safe-guards to the market as it stands. In order to re-balance the market, a number of measures could be taken including, among others, the introduction of number portability as a condition to the publication of the Notification Regulation. We also believe that in order for such protection to exist, the TRA has to impose an obligation of accounting and functional separation the SMP operator. For this purpose, functional separation shall mean a breakdown of a vertically integrated company into independent units. Accounting separation is defined as the separation of accounting records in relation to specific activities; it is available as a remedy under the European Commission's Access Directives. Our main concern and aim is the functional separation of wholesale services from retail. This would certainly guarantee OLOs receiving equivalent treatment the wholesale level.

Taking into account international precedents of regulatory efforts in the restoration of the imbalances in competition triggered by the incumbent or SMP operators influence in the market, is the case of the separation of BT Group plc in 2005 into four entities. Sweden followed pursuant in 2007 by separation of TeliaSonera's retail and wholesale services. At this moment, the principle of functional separation, which was first introduced via BT, is adopted and considered by many telecommunications regulators around the world. We strongly urge the TRA to consider implementation of such principle to promote fair and equal competition in the Kingdom if it is going to publish the Retail Prices Notification Framework.