

REPORT

Report on Telecommunications Mergers and Acquisitions Regulation

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A Report issued by the Telecommunications
Regulatory Authority

29th August 2004

REFERENCE

LAU/RP/043

Purpose: Provides analysis of responses received to the consultation on the Telecommunications Mergers and Acquisitions Regulation and the approach that the TRA has taken in relation to the Telecommunications Mergers and Acquisitions Regulation as set out in the Regulation issued on 29th August 2004.



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1 Introduction

1.1 Context

This Report and the Telecommunications Mergers and Acquisitions Regulation, currently issued in draft form for final consultation (“the Regulation”), reference LAU/RN/008 represent the outcome of the consultation process, which commenced on 20th June 2004 with the publication of the consultation on the Telecommunications Mergers and Acquisitions Regulation (“the Consultation”), reference LAU/CN/021.

Four Persons responded to the Consultation. The TRA thanks the respondents for their contributions. The respondents were: BATELCO, Cable & Wireless, Ministry of Commerce and MTC Vodafone Bahrain.

This document summarises the main responses received to the Consultation and the TRA’s approach to each issue, as set out in the Regulation.

1.2 Scope and next steps

This Report, in common with the Consultation, seeks to address matters in straightforward terms. As a Report, this document has no status other than as a means of disseminating information.

The Regulation, which is amended from the initial version included in the Consultation, which takes into account responses received to the Consultation, is open for further comments for two weeks from the date of issue, in so far as the Regulation does not reflect the conclusions reaches by this Report, or where respondent consider that there are new implications arising from the Regulation which the TRA should be aware of with a view to amending the Regulation.

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2 Analysis of responses received and TRA's approach

Articles in this section refer to those of the version of the Regulation as contained in the Consultation. Article numbers remain unchanged in the Regulation.

General comments

Two respondents questioned the need and legality for a Telecommunications Mergers and Acquisitions Regulation. The TRA, for the reasons set out in the Consultation, considers it necessary to have such a Regulation in order to fairly and efficiently regulate competition in the form of potential mergers and acquisitions in the telecommunications industry in the Kingdom of Bahrain. The legal basis for this, is provided for in the Telecommunications Law ("the Law"), section 3 (c)(1) which provides that "*the Authority shall have the power to (1) make such regulations ... as may be necessary for... the promotion of competition ... and all other matters covered by the Law or are necessary to give effect to the provisions of this Law*" and section 65 in particular. Section 65(h) provides that "*the Authority may issue regulations in connection with the maintenance and regulation of efficient competition in the telecommunication market...*". In addition, section 65(b) expressly provides that anti-competitive mergers are subject to the provisions of the Law and the TRA powers.

It should be noted that the Telecommunications Mergers and Acquisitions Regulation in no way affects the operation of the Commercial Companies Law promulgated by Legislative Decree No. 21 for 2001 and the Ministry of Commerce's powers and jurisdiction under the Commercial Companies Law.

One respondent commented that mergers should be evaluated solely on economic criteria. The TRA's view is that whilst economic criteria, as set out in Article 4, are the main criteria for assessing mergers, in line with most regulators worldwide, the TRA will also take into account its duties in section 3 of the Law. This is discussed at Article 4 below.

For clarity, the TRA has added some definitions (to the definitions section).

Article 1 - Scope

One respondent commented that the scope of the Regulation to extend to markets "related to the telecommunications industry" is overly broad and should not be covered in the Regulation.

The TRA notes this point, and has amended the wording from the contested phrase to 'affecting' the market, in order to ensure that the TRA could, if appropriate, assess mergers in markets which could have an effect on

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telecommunications market(s) in Bahrain (the words ‘in the Kingdom of Bahrain’ have been added to the text of this Article for clarity). In any event, if a company were faced with a merger where it was unclear whether the relevant product markets fell within the TRA’s jurisdiction, the company involved could contact the TRA for informal guidance at the time.

One respondent considered that further clarification on the definition of a Qualifying Transaction, and in particular the definition of a ‘change of control’, including to ‘exert material influence on’ would be useful, and would be better contained within the Regulation than accompanying Guidelines. The TRA considers that these issues are adequately defined for the purposes of the Regulation, but the TRA will consider providing further details of ‘control’ in its guidance on what constitutes a merger for the purposes of the Regulation in due course, such Guidelines will of course be available in draft form for comments prior to being formally issued. Most other regulatory authorities have dealt with such issues in a similar manner. One respondent suggested including a turnover threshold for qualifying Qualifying Transactions, which the TRA does not consider necessary as the parameters for Qualifying Transactions are sufficiently clear and restricted. Finally, one respondent questioned the need for merger control to cover the situation of a change of control to a licensee without any change to competition in Bahrain. The TRA considers, that in common with other jurisdictions, a change of control which meets the jurisdictional test of whether a transaction falls within the scope of this Regulation (i.e. constitutes a Qualifying Transaction) could have an effect on competition. For example, an acquiring party whose stated aim of a transaction is to combine separately-held entities of the acquired party could have an impact on competition in the relevant market(s). The analysis of whether a particular Qualifying Transaction which falls within the scope of the Regulation should be approved or not, will depend on the assessment under Article 4 – i.e. a case with no effect on competition, and raising no other concerns under Article 4 would be approved.

Article 2 - Notification

One respondent raised the need for a clear trigger for the obligation to notify and a time period within which the TRA must respond to a notified Qualifying Transaction, otherwise the transaction is deemed to be approved. The TRA agrees with this respondent on these points, and these provisions are set out in Articles 2.1 and 3.2 respectively. The TRA has added wording to Article 2.1(b) for clarification regarding share transactions as well as included a new Article 2.2 to cover a series of share transactions that constitute a Qualifying Transaction.

All respondents agreed that it is useful for them to be able to notify agreements either before or after signing / acquisition of shares etc, and to be able to seek

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confidential guidance from the TRA. Therefore the TRA has retained these provisions in the Regulation.

In relation to the notification fee, one respondent considered it inappropriate given the license fees, but argue that if introduced then a flat rate would be the way forward, one respondent on this point considered that the BD 500 flat fee (for either phase 1 or phase 2 cases) is appropriate, whereas another respondent considered it too high. In view of the responses, the TRA will maintain a flat fee but reduce it to BD 300.

In relation to the 14 days post-signing time limit, one respondent thought this an appropriate period, one too short (suggesting one month) and one questioned whether any time limit was appropriate, as it is in the Parties' interests to notify and obtain clearance as soon as possible. In light of the responses received, the TRA has extended the post-signing time limit to 30 days.

Article 3 – Procedure

In relation to having a 2-phase procedure, and the time-limits for both phases, three respondents commenting on this section agreed that a 2-phase procedure was advantageous and two of the respondents agreed with the durations. One respondent however considered that 90 days for phase 2 was too long. The TRA considers that a maximum of 90 days for phase 2 is reasonable, and in line with other jurisdictions (such as Australia, the EU, Hong Kong and indeed shorter than other jurisdictions such as Brazil and Canada), and points out that the 90 day period is a maximum only, subject to time possibly being put 'on hold' during Phase 2 requests for information.

As regards whether the TRA should publish an announcement of receipt of notifications and its decisions, all respondents agreed that both should be published. However, one respondent raised the issue of confidential (i.e. price sensitive) information and notification of a Qualifying Transaction not yet in the public domain. The TRA considers that confidential information would be dealt with by Parties submitting a written request for items to be excluded from publication to a draft of a decision, and notification announcements would not go into such detail (the TRA would anticipate these to be very brief, simply listing the Parties and short description of the transaction). In relation to a notification of a Qualifying Transaction not in the public domain, the Parties could seek confidential guidance from the TRA and then submit a formal notification (the announcement of which would normally be published) to the TRA once the deal is in the public domain, within 30 days after signing / acquisition of shares etc.

Two respondents commented on the right of third parties to make comments to the TRA on a notified transaction – one was in favour the other not. However the respondent against such a provision appeared to take the view that the TRA

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was suggesting opening its own analysis to public consultation. This would not be the case, rather, simply that interested third parties would have the opportunity to put forward their views on a transaction to the TRA, for the TRA to consider in its analysis. Such a procedure is common in many jurisdictions, such as Australia, Brazil, the EU, New Zealand and the UK.

All respondents considered that it was beneficial for the Parties to a Qualifying Transaction to view a draft version of a decision prior to publication in order to submit redactions to the TRA. One respondent suggested that redactions (i.e. requested items to be excluded from publication) should include all those 'detrimental' to a Party to a Qualifying Transaction (as opposed to 'seriously detrimental'). The TRA accepts this point and has deleted the word 'seriously' from Article 3.7.

One respondent raised the issue of ancillary restraints and the apparent conflict between the first and second sentences of Article 3.6 (the first stating that an approval is deemed to cover any ancillary restraints, the second that these shall be expressly approved in the decision.) The TRA has deleted the second sentence and replaced it with the words 'unless otherwise indicated in the decision' at Article 8.2. The clause dealing with ancillary restraints has been deleted from section 3.6 for clarity (unnecessary duplication as it is contained in Article 8).

At Article 3.2 in order to adhere to the strict timetables of Phase 1 and 2, the TRA has provided for the possibility for a decision to not include reasons. However in such cases, reasons would have to be issued within 10 working days of the date of the decision.

The TRA has included a new Article 3.6 to provide it with the right to revoke decisions based on incorrect information from the Party or Parties. This is in line with practise in other jurisdictions such as the EU, Germany and Japan.

Finally, at Article 3.3 the TRA has reduced the time for responses to a Statement of Objections from 30 days to 20, in order to provide the TRA with sufficient time to assess the response prior to having to issue the Party or Parties with its remaining concerns (30 days before the Phase 2 decision) for the Party or Parties to then consider whether to offer commitments.

Article 4 – Substantive tests applied by the TRA

Three persons gave comments on Article 4. Whilst these comments appeared to support the principle of the substantive test used, two respondents cited the need for clarity as to the application for the test. The TRA agrees with them and will issue Guidelines (open to consultation) on this in due course, but will not contain this information in the Regulation itself for the sake of clarity.

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One respondent suggested that the words ‘or is likely to have’ in Article 4.1 be removed, in the interests of clarity and removing uncertainty. The TRA disagrees with this and has retained the words, on the basis that it would be too restrictive to include them, which is also in line with similar approaches used in other jurisdictions.

One respondent raised the issue of consumer protection. The TRA has amended Article 4.2 in relation to when consumer protection issues may be applied.

Article 5 – Suspension of a Qualifying Transaction

Three persons gave comments on the suspension article, all agreed to it. One respondent raised the caveat that if the TRA is deemed to have approved the transaction (i.e. where the TRA fails to issue a decision within the timetable at Article 3.2), then the Parties should be free to close. The TRA agrees with this and has clarified Article 5 accordingly.

For added clarity, the TRA has added a new Article 5.4 to deal with Acquired Parties’ shares being acquired and not exercised until TRA clearance.

Article 6 – Requests for information

Three respondents gave comments on this article and all agreed to the TRA’s right to request information from the Parties to a Qualifying Transaction and third parties. Obviously the TRA would be obliged to exercise its power for requesting information (as indeed all of its powers) reasonably. One respondent noted that the TRA would not have enforceable rights in relation to the provision of information from non-licensees in particular those based outside of Bahrain. The TRA agrees, however, it would be in the Parties to the Qualifying Transaction’s interests to respond as failure to do so may risk the TRA being unable to approve a Qualifying Transaction – or having to push a case into Phase 2 - if necessary relevant information was not available to it.

One respondent raised the issue of time being put ‘on hold’ during the period that request for information are sent and responses received by the TRA and the uncertainty to the timetable that this raises (as is the case in the US). The TRA notes this view and has changed Article 6 accordingly, so that the timetables of Article 3 in relation to Phase 1 only remain unaffected by any request for information. In particular, if the TRA has serious doubts which remain by the end of Phase 1, this could push a case into Phase 2. However, the TRA would have the option to put time ‘on hold’ during any requests for information issued

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to the Parties during Phase 2 (i.e. time would not be put 'on hold' by a third party failing to respond within the given deadline). In order to avoid uncertainty, these would be subject to a maximum period of an additional 60 working days and the TRA would be obliged to inform a Party in its request for information that time would be put 'on hold' until the TRA receives the complete response.

Article 7 – Right to be heard

Three respondents replied to this section. All agreed with the principle that Parties to a Qualifying Transaction should know of the TRA's concerns regarding a transaction with a view to addressing them.

One respondent considered that the 30 day period (prior to issuing a decision under Article 3(5)(a) or (b)) for the TRA to inform Parties of its concerns be reduced to 20 days to assist Parties in solving any concerns at a faster pace. The TRA considers that on balance 30 days is more appropriate, in order to give Parties more time to address any concerns.

In relation to the right to request a hearing, all three respondents agreed that Parties to a Qualifying Transaction should have this right. One respondent considered that unconnected third parties should have no right to request a hearing or take part in any hearing. The TRA considers that third parties should have the right to request a hearing and to participate. Whilst jurisdictions around the world vary in the rights granted to third parties in merger cases, many accept the right of third parties to be heard and to participate, to various degrees, in the process, such as Belgium, Brazil, the Czech Republic, the EU, Germany and South Africa. Two respondents responded on the issue of whether a hearing should be public. Both considered it should, subject to issues of confidentiality. One respondent considered that a hearing should only be held in public with consent of the Parties to a Qualifying Transaction. The TRA's view, in light of the comments received, is that hearings should be public, subject however to confidentiality constraints, which would in particular restrict the participation of third parties to involvement in hearings. Therefore the TRA will not change this clause in relation to holding hearings in public, but has added wording providing for the TRA to have the right to hold a hearing in camera where appropriate.

One respondent noted that Parties' lawyers/consultants should be able to attend. The TRA agrees, this is explicit in Article 7.5.

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Article 8 – Ancillary restraints

The TRA received three comments on this article. All agreed that ancillary restraints should be dealt with as part of the TRA's assessment of a Qualifying Transaction. The TRA has made the amendment to Article 8.2 as discussed at Article 3 above.

Article 9 – Penalties

The TRA received two comments on this article. One considered that the penalties article is appropriate. The other did, but sought clarification that the 10% maximum fine relates to annual turnover, which it does. The TRA has amended the wording of Article 9 accordingly.

One respondent sought details of the criteria that the TRA would use in issuing fines, such as whether the breach/failure has been rectified, impact of the breach on the market, gravity and duration of the breach. Another respondent raised the issue that excessive penalties could inhibit parties from embarking on mergers and could affect competition in the long run. In response to these comments, the TRA is in the process of drafting Guidelines on fining, which would apply to all types of the fines that the TRA could impose under the Telecommunications Law, including under the Regulation. The Guidelines, which will broadly follow international fining principles will be open for public consultation.

One respondent requested that the TRA provide an exhaustive list of the breaches that would result in a fine under Article 9.3 (as is the case in the EC Merger Regulation). The TRA has done so and amended Article 9.3 accordingly.

The TRA has amended the wording at Article 9.2(a), where the TRA may order the taking of any act that it deems necessary to restore the position of the Parties and competition in the relevant market prior to implementation of the Qualifying Transaction, to now include an act 'or omission to act'. For example, an omission to act could include ordering shareholders not to vote on their shares acquired as part of the Qualifying Transaction.

Article 10 – Right of appeal

The TRA received three responses to this article. All agreed with the principle and procedure of appeal, although one respondent commented that the arbitration provisions of the Law are poorly drafted and leave room for debate. That respondent suggested that arbitrators should comprise a competent panel of

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international experts. The TRA notes this comment and agrees that arbitrators should be competent in the subject of the arbitration and where appropriate, with international experience.

The TRA received different suggestions as to which parties should be allowed the right to appeal: only the Parties to the Qualifying Transaction; only new entrants involved in a Qualifying Transaction; not the incumbent. Having considered the responses received, the TRA considers that it is appropriate to give the Parties to a Qualifying Transaction (irrespective of whether they are licensees) the right to appeal a decision – in line with practice in other jurisdictions such as Australia, Austria, Chile, Columbia, the EU and New Zealand. The TRA considers it necessary that all Parties to a Qualifying Transaction have the same right to an appeal, irrespective of whether they hold a telecommunications license from the TRA themselves, since all Parties to a Qualifying Transaction are affected by a decision of the TRA.

The TRA considers that third parties would only have the right to appeal a TRA decision under the Regulation if, upon application to the TRA, they can show that they have both ‘sufficient interest’ and be ‘directly and individually affected by the decision’. In line with other jurisdictions such as the EU, the TRA would anticipate that ‘sufficient interest’ could include members of the administrative or management bodies of the Parties to a Qualifying Transaction, and that direct competitors could fall within the scope of being ‘directly and individually affected by the decision’. The TRA would deal with each application on a case-by-case basis. In any event, rights under the Bahraini Law are not adversely affected by these provisions.

For clarity, the TRA has added wording to Article 10 to the effect that the timetables of Chapter XVI of the Telecommunications Law on arbitrations apply. For clarity the date on which a Person is deemed to become aware of a decision is also now provided. This date is the earlier of the date the decision is published on the TRA’s website or the date that the Person receives a copy of the decision.

Article 11 - Confidentiality

Three persons responded to this article. All agreed with the principle of confidentiality as set out in the article. Two respondents agreed that third parties should be able to redact information prior to access to the file being granted to the Parties to a Qualifying Transaction, one respondent suggested that third parties should not be able to redact such information prior to access to the file being granted, in order that Parties to a Qualifying Transaction have access to all allegations made against them. The TRA considers that third parties have the right to redact commercially sensitive information and therefore has not amended the wording of this article.

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Article 12 – Access to the file

All respondents agreed with the principle of access to the file. One raised the issue that only Parties to a Qualifying Transaction should have the right of access to the file, the TRA agrees and considers that the wording of Article 12.1 makes this clear.