

TRA/09/02/411/GDO.

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Mr. Alan Horne
General Director
Telecommunications Regulatory Authority
P.O. Box 10353
Manama
Kingdom of Bahrain

Dear Sir,

Subject: Response on Draft Competition Guidelines

Please find enclosed to this letter the response of Zain Bahrain to the above public consultation issued by the TRA on 4th November 2008.

Should you require additional information or clarification, please do not hesitate to contact me.

Yours sincerely,

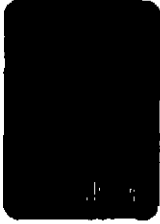
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Response to Consultation Document on the
“Draft Competition Guidelines”

Issued by the Telecommunications Regulatory Authority on 4th November 2008

January 31st, 2009

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Following the Telecommunications Regulatory Authority's (TRA) Request for Comments contained in document reference MCD/11/08/2008 of November 4, 2008, Zain Bahrain welcomes the opportunity to comment on the TRA's Draft Competition Guidelines ("Draft Guidelines").

Zain Bahrain considers that a pressing need exists to adopt clear and administrable rules relating to anti-competitive practices in Bahrain and supports TRA's overall initiative. The incipient nature of market competition and enforcement in Bahrain is fertile ground for incumbent operator Batelco to abuse its dominant position in various telecommunications markets.

Zain Bahrain has repeatedly encountered and called attention to Batelco's anti-competitive conduct including, for example, instances of predatory pricing (slashing of corporate internet rates or using agents to sell its products below costs), and wholesale price discrimination. Therefore, Zain Bahrain trusts that the adoption and application of the Draft Guidelines will serve not only as a deterrent for future anti-competitive conduct on the part of Batelco, but also as a valuable tool to investigate and take prompt and appropriate action against such conduct.

While Zain Bahrain agrees with the broad goals of the Draft Guidelines, it must nevertheless call attention to the need to revise and enhance this consultative document to further clarify its scope. Since the Draft Guidelines will exclusively apply to the telecommunications sector (i.e., they are not envisaged as broad guidelines applying to all economic sectors), there is a clear case to narrowly tailor the Draft Guidelines to the needs and the challenges specifically facing the telecommunications sector.

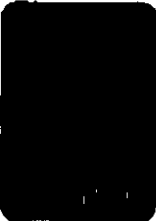
Zain Bahrain finds that, in its current form, the Draft Guidelines do not achieve this objective and that this creates a significant degree of legal uncertainty that is incompatible with the principles of predictability and transparency set forth by the Draft Guidelines.¹ Such guidelines are intended to apply to both ex-ante (sector specific) and ex-post (competition law) regulation but do not account

¹ See Draft Guidelines, ¶ 2.

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for the differences between these types of regulation, and on occasions, even confuse the exercise of both types of regulatory authority.

Because of this, and from a general perspective, Zain Bahrain wishes to call attention to the need to narrow and refine the scope of the Draft Guidelines. To avoid possible confusion in its application, and due to its relevance for the competitive process in the Bahraini telecommunications market, Zain Bahrain respectfully recommends that the Draft Guidelines should apply only to ex-post competition law.

The following document contains Zain Bahrain's general and specific comments regarding the Draft Guidelines.

1. General comment: the need to narrow the scope of the Draft Guidelines

The TRA states that the primary purpose of the Draft Guidelines is to "better inform market participants on how TRA will assess potential ex-post competition issues."² However, the TRA also indicates that it will apply the principles set out in the Draft Guidelines to both ex-ante and ex-post regulation.³

In addition, although its title would suggest the Draft Guidelines would cover ex-post enforcement against all forms of anti-competitive conduct set forth under Sec. 65 of the Telecommunications Law ("TL"), the Draft Guidelines in fact mainly concentrate on unilateral anti-competitive conduct or abuse of dominance (Sec. 65(b)1 of the TL).⁴ Collusion or concerted practices (Sec. 65(b)2 of the TL) and concentrations (Sec. 65(b)3 of the TL) are also addressed in the Draft Guidelines, albeit marginally.⁵

² See Draft Guidelines, ¶ 2.

For purposes of these comments, Zain Bahrain understands that ex-post regulation aims to redress proven anti-competitive behaviour or market abuse through a range of enforcement options including fines, injunctions, or bans. We will refer to ex-post regulation and competition law interchangeably throughout these comments. This will include review of concentrations, although Zain Bahrain is fully aware that this is technically not ex-post review. Ex ante regulation, on the other hand, consists of anticipatory intervention through government-specified controls to prevent socially undesirable actions or outcomes in markets (e.g., price controls), or direct market activity towards socially desirable ends. We will refer to ex-ante regulation and sector-specific regulation interchangeably throughout these comments.

³ The Draft Guidelines indicate that a need exists to "apply consistent principles when defining relevant markets and analysing competition in the context of both ex-post and ex-ante analyses." See Draft Guidelines, ¶ 3. Furthermore, the TRA also states that it intends to repeal "when appropriate" existing determinations relating to ex-ante market definition and market power determination. See Draft Guidelines, note 2.

⁴ See Draft Guidelines, ¶ 110.

⁵ See Draft Guidelines, ¶ 111-116.



1.1. Analysis

- Application of the Draft Guidelines to ex-post and ex-ante analysis

Zain Bahrain concurs with the TRA on the need to apply "consistent principles" when defining relevant markets and determining market power in the context of both ex-post and ex-ante regulation. Zain Bahrain respectfully notes, however, that this should not mean that a single set of all-purpose guidelines must be adopted and applied for both types of analysis.

Applying competition law principles to the exercise of ex-ante regulatory powers, as established under the TL following the EU regulatory framework, should not be confused with the exercise of ex-post competition law authority to discipline anti-competitive conduct. Zain Bahrain agrees that ex-ante market analysis for purposes of sector specific regulation should be informed by competition law principles. Nevertheless, Zain Bahrain notes that, due to the underlying differences between both types of TRA intervention, establishing a single methodology to be followed for ex-ante and ex-post regulation will inevitably lead to undue confusion in the market.

Zain Bahrain appreciates that sometimes a fine, and often-times grey line exists between the exercise of ex-ante and ex-post regulatory functions in the telecommunications sector. This balance becomes particularly more complicated when, as in the case of Bahrain, a single authority –the TRA is responsible for both types of intervention. Zain Bahrain thus recognizes the complicated task before the TRA and therefore believes that a higher degree of clarity is warranted in the Draft Guidelines.

Zain Bahrain is aware that the Draft Guidelines contain a general disclaimer recognizing that the application of the market definition methodology set forth therein may lead to different results under ex-ante and ex-post review.⁶ Nevertheless, in its current form, the Draft Guidelines do not sufficiently identify the specific issues that differentiate market analysis for ex-ante and ex-post regulation purposes. A detailed review of certain areas where such confusion exists is provided in sections 3.1, 3.3 and 4.4 below.

To avoid the possible pitfalls identified above, Zain Bahrain notes that the international practice has been to issue separate guidelines for ex-ante and ex-post market analysis, particularly relating to market definition and determination of market power. Zain Bahrain respectfully requests that the TRA implement this same approach.

- Application of the Draft Guidelines to all types of ex-post analysis

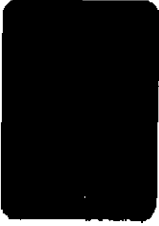
Zain Bahrain finds that the proposed scope of the Draft Guidelines as applied to ex-post regulation also creates a relevant degree of legal uncertainty and confusion that should be corrected by the TRA.

⁶ See Draft Guidelines, ¶ 9.

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First, the methodology for relevant market definition and determination of market power, which would horizontally apply to unilateral and concerted practices as well as merger review, creates uncertainty. The economic and evidentiary differences associated with the analysis of these three types of issues require, at the very least, an express identification of the nuances and specificities that must be applied in each case.⁷

Second, the lack of detailed analysis and standards of review to be applied particularly for concerted practices creates a void in the competition framework that must be filled by the TRA as further addressed in section 4.1 below.

1.2. Recommendations

Taking into account the pressing need to adopt and implement a robust competition law framework in Bahrain, Zain Bahrain respectfully recommends that to achieve further clarity and legal certainty, the TRA:

- (1) specifically circumscribe the scope of the Draft Guidelines to ex-post regulation;
- (2) further narrow the scope of the Draft Guidelines to solely addressing abuse of dominance under Sec. 65(b)1 of the TL or, alternatively, include the necessary language to ensure certainty in their implementation for the various types of ex-post enforcement;
- (3) Prepare and submit for public consultation additional draft guidelines on collusion or concerted practices regulated under Sec. 65(b)2 and 65(3) of the TL, respectively.

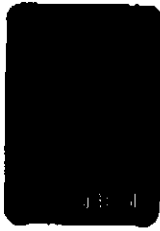
⁷ For instance, the so-called *Cellophane fallacy*, discussed in the Draft Guidelines at note 10, is specifically relevant for non-merger cases. However, the Draft Guidelines do not specifically indicate this fact. See Richard Whish, *Competition Law*, Oxford University Press, 2009, 30. See also Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, 105.

On this matter, for example, guidelines issued by the EC specifically address this nuance of market analysis, noting that: "Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account." See Commission Notice on the definition of relevant market for the purposes of Community competition law, (97/C 372/03), ¶ 19.

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2. Question 2.1

Do you agree with TRA's proposed framework for defining the relevant economic markets?

2.1. Geographic market

Zain Bahrain concurs with the TRA on the general description of the hypothetical monopolist test it will apply when defining relevant market. Nevertheless, Zain Bahrain notes that the TRA places considerable emphasis on the geographic scope of the market, establishing a two stage process for geographic market definition. A preliminary stage assumes that the market will be national while a full analysis stage will enquire into sub-national markets.⁸

2.1.1. Comment and Recommendation

Zain Bahrain respectfully notes that, because of the demographic and geographic characteristics of Bahrain, it does not see a need at this time to consider sub-national relevant geographic markets. The proposed test of granularity *versus* practicality put forward by TRA,⁹ which is based on the approach adopted by Ofcom in defining the geographic scope of the wholesale broadband market for the purpose of ex-ante regulation,¹⁰ does not seem warranted in Bahrain. Zain Bahrain, however, finds that in the case of new developments, their definition as distinct geographic markets may be warranted.

On this basis, Zain Bahrain respectfully recommends that TRA's emphasis under the Draft Guidelines should be placed on other more pressing issues, such as dominance determinations and substantive standards for review of anti-competitive conduct.

⁸ See Draft Guidelines, ¶¶ 34-40.

⁹ See Draft Guidelines, ¶ 39.

¹⁰ See Ofcom, Review of the wholesale broadband access markets 2006/07. Identification of relevant markets, assessment of market power and proposed remedies Explanatory Statement and Notification, 15 November 2007, ¶3.220



3. Question 3.1

Do you agree with TRA's proposed framework and factors for assessing SMP and dominance in relevant economic markets?

3.1. Market power

The Draft Guidelines address the concepts of significant market power (SMP) and dominance as defined under the TL and identify both the ex-ante¹¹ and ex-post¹² implications of a finding of SMP and/or dominance. Based on this analysis, the TRA states that SMP and dominance describe the "same economic concept of market power: namely the ability of a firm to act independently of others in the market, for example by sustaining prices above the competitive level"¹³ and concludes that such "interpretation is in line with international best practice."¹⁴

3.1.1. Analysis

- The Draft Guidelines misconstrue the TL and the European regulatory framework for electronic communications

It follows from the Draft Guidelines that SMP and dominance are equivalent for purposes of discharging TRA's ex-ante and ex-post regulatory authority. Zain Bahrain respectfully submits that TRA's position misconstrues both the TL and the European regulatory framework for electronic communications.

First, Zain Bahrain notes that the concepts of SMP and dominance differ in Bahraini law and in EU law. Under Article 14(2) of the EU Framework Directive,¹⁵ an "undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers." (Emphasis added)

By contrast, under Sec. 1 of the TL a SMP operator is understood as "a Licensed Operator which holds twenty-five percent or more of the market share of the relevant market as determined from

¹¹ Application of Sec. 57 of the TL relating to reference interconnection and access offers for dominant operators and Sec. 58 of the TL relating to tariff controls for SMP providers.

¹² Application of Sec. 65 of the TL describing anti-competitive conduct.

¹³ See Draft Guidelines, ¶ 64.

¹⁴ Id.

¹⁵ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. ("Framework Directive")



time to time by the Authority." This definition, unlike the one currently used in the European context, does not equate SMP to dominance.¹⁶ In fact, a finding of SMP under the TL does not imply that the operator holds the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. The ability to behave independently in the market instead falls squarely under the definition of "Dominant Position" set forth under Sec. 1 of the TL:

"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 through the ability of the Licensee to act independently - to a material extent - of competitors, Subscribers and Users;"

Similarly, the TRA's assertion that under EU law no distinction is made between SMP (for ex-ante regulation of electronic communications) and dominance (ex-post control of abuse of dominance under Article 82 EC Treaty) is both inaccurate and misleading, again showing the confusion between the regulatory and competition functions of TRA that permeate throughout the Draft Guidelines.¹⁷

Under EU law, a finding of SMP for purposes of ex-ante regulation, which as noted above constitutes a position equivalent to dominance, does not imply a finding of dominance for purposes of ex-post Article 82 EC Treaty enforcement. As noted by the EC:

"The designation of an undertaking as having SMP in a market identified for the purpose of ex-ante regulation does not automatically imply that this undertaking is also dominant for the purpose of Article 82 EC Treaty or similar national provisions. Moreover, the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers, and this, solely for purposes of Article 14 of the framework Directive."¹⁸


On this basis, it must be made clear that a finding of dominance for ex-ante regulatory purposes does not equate to a finding of dominance for ex-post regulatory purposes.

- The Draft Guidelines confuse TRA's ex-ante and ex-post regulatory authority

¹⁶ Zain Bahrain notes that the notion of SMP in Bahrain follows the initial definition of SMP provided under Article 4(3) of the Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP). This definition was adopted to usher in liberalization, but was later substituted by a definition under which SMP is equivalent to the concept of dominance under competition law. See Framework Directive, ¶ 25.

¹⁷ See Draft Guidelines, note 30.

¹⁸ See 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), ¶ 30.



As evidenced in the previous section, Zain Bahrain finds that by equating the notions of SMP and Dominant Position the Draft Guidelines introduce a great deal of uncertainty in the application of Sec. 65 of the TL. Zain Bahrain is of the view that this will only have the effect of confusing the exercise of the TRA's competition authority. The Draft Guidelines should therefore be circumscribed to the exercise of TRA's competition law functions only. This will contribute to giving further clarity and predictability to TRA's actions.

From the comments presented above, Zain Bahrain draws the following conclusions:

- In Europe, SMP is equivalent to dominance for purposes of ex-ante regulation under the electronic communications regulatory framework;
- In Bahrain, SMP and dominance are two different concepts and are subject to different standards under the Telecommunications Law;
- In Bahrain, a finding of SMP and/or dominance triggers different ex-ante regulatory obligations relating to interconnection/access and retail pricing, respectively;
- In Europe, a finding of SMP (i.e., dominance) for purpose of ex-ante regulation does not imply a finding of dominance for ex-post control of anti-competitive abuse of dominance (Art. 82 EC Treaty);
- In Bahrain, a finding of dominance for ex-ante regulation does not imply a finding of dominance for ex-post control of anti-competitive abuse of dominance (Sec. 65(b)(1) of the TL)

3.1.2. Recommendation

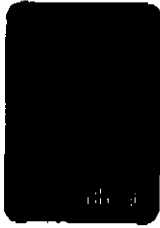
Based on the previous analysis, Zain Bahrain respectfully recommends that the TRA:

- (1) revise the Draft Regulation to limit their application to ex-post enforcement of abuse of dominance under Sec. 65(b)1 of the TL;
- (2) Eliminate references to concepts usually exclusively associated with ex-ante regulation, such as SMP, from the Draft Guidelines as this would convey more legal certainty to the TRA's exercise of competition law related authority, avoiding confusion with its ex-ante regulatory functions.

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3.2. Joint or collective dominance

The Draft Guidelines indicate that it is possible for two or more firms to jointly hold a dominant position in a relevant market. Citing to the *Airtours* decision of the Court of First Instance ("CFI") as setting forth the framework for defining collective dominance, the TRA states that joint dominance "allows multiple companies within a market to align their behaviour, in order to achieve a more profitable outcome for themselves - i.e. they are able to "tacitly collude" and therefore behave independently of other suppliers and consumers."¹⁹

3.2.1. Analysis

Accordingly, Zain Bahrain understands that the TRA's proposal to introduce the concept of collective dominance is a means to control oligopolistic interdependence. Zain Bahrain, however, respectfully submits that, due to the current state of development and application of the theory of collective dominance to unilateral conduct in other jurisdictions, particularly the European Union ("EU"), the TRA should not include reference to collective dominance at this time.²⁰ EU courts and the European Commission ("EC") have applied the notion of collective dominance almost exclusively in two specific areas: (i) merger review and (ii) sector-specific regulation.²¹ In fact, Zain Bahrain understands that, to date, there has been no case that has applied the concept of collective dominance in the context of abuse of dominance (Article 82 EC Treaty) relating to oligopolistic interdependence.²²

¹⁹ See Draft Guidelines, ¶ 99.

²⁰ For instance, addressing collective dominance for the purpose of article 82 EC Treaty, Which has stated that "[w]hat qualifies as an abuse of collective dominance is under-developed in the case law." See Richard Whish, *supra* note 7, 565. There are some commentators that because of the drawbacks associated with the application of joint dominance to unilateral conduct under article 82 EC Treaty, this theory should be completely discarded in these cases. See Giorgi Monti, *EC Competition Law*, Cambridge University Press, 2007, 338. ["It follows that while applying Article 82 to tacit collusion is attractive because it would eliminate the gap in EC competition law, it is a move that should be resisted because of the risks of damaging a competitive market structure are significantly greater than the possible benefits of creating amore competitive market."]

²¹ Damien Geradin, Paul Hofer, Frédéric Louis, Nicolas Petit, Mike Walker, *The Concept of Dominance in EC Competition Law*, College of Europe Research Paper on the Modernization of Article 82 EC, July, 2005, 27. ["The Commission has been extremely cautious in launching Article 82 proceedings on the basis of the collective dominance doctrine. Rather, the Commission seems to have focused the enforcement of the doctrine in different fields, i.e. merger control and sector-specific legislation."]

²² See Mark Clough, "Collective Dominance - the Contribution of the Community Courts", in Mark Hoskins and William Robinson (Eds.) *Essays for Judge David Edwards*, Hart Publishing, 2003, 174 ["(...) there has been no case in the context of Article 82 in which the Community court or European Commission have considered the connecting required for collective dominance as existing solely in oligopolistic market interaction."]; Similarly, Damien Geradin, *et al*, *supra* note 19, 27. ["In addition, among the few collective dominance decisions adopted by the Commission, there has

In this line, the EC has specifically stated that:

"The case law so far with respect to exclusionary abuse of a collective dominant position has dealt with situations where there were strong structural links between the undertakings holding the dominant position."²³

Because of this, commentators have correctly argued that there still remains "a certain degree of confusion as to what collective dominance means or should mean for the purpose of applying EC competition law."²⁴ Cognizant of this fact, and despite having considered collective dominance in the discussion paper for the relevant consultation,²⁵ in a recent document detailing its enforcement priorities relating to unilateral exclusionary conduct, a very similar objective to that set forth in the Draft Guidelines, the EC specifically excluded the consideration of joint or collective dominance.²⁶

3.2.2. Recommendation

Based on the arguments presented above, Zain Bahrain recommends that the TRA exercise the same caution recently shown by the EC and either:

- (1) exclude reference to collective dominance from the Draft Guidelines; or
- (2) Explicitly state that such concept will be implemented solely in the case of unilateral conduct, in particular, oligopolistic interdependence, when further international case-law is developed clarifying the matter.

been so far no Article 82 EC case where oligopolistic interdependence was held to constitute a sufficient connecting element required for a collective dominant position." See also, Barry Hawk and Giorgio Motta, *Oligopolies and Collective Dominance: A Solution in Search of a Problem*, VII Conference Antitrust Between EC and National Law, May 22-23, 2008, 15 ["EC case law strongly suggests that the legal doctrine of collective dominance has not been used in individual cases to address either an "oligopoly gap" or an "unproved cartel gap"."]

²³ DG Competition, Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, December 2005, ¶ 76.

²⁴ Lambros Papandrias, Some thoughts on collective dominance from a lawyer's perspective, in Pierre Buigres and Patrick Rey (Eds.) *The Economics of Antitrust and Regulation in Telecommunications. Perspectives for the New European Regulatory Framework*, Edward Elgar Publishing, 2004, 114.

²⁵ DG Competition, supra note 21, ¶¶ 43-50.

²⁶ Commission Communication, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, December 2008, ¶ 4. ("Guidance on Article 82 EC Treaty") ["Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by undertakings holding single dominance." (Emphasis added)]

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3.3. The treatment of existing regulatory obligation in competition analysis

Paragraphs 97 and 98 of the Draft Guidelines indicate that "when assessing the level of competition in a market on either an ex-post or an ex-ante basis, TRA will conduct its analysis as if there was no SMP/Dominance related regulation affecting the relevant market."²⁷ TRA further states that it will thus apply the so-called "Modified Greenfield Approach" (MGA) advocated by the EC in its analysis.²⁸

3.3.1. Analysis

Zain Bahrain submits that the across-the-board application of the MGA to ex-post and ex-ante market analysis once again evidences the perils of the broad scope of the Draft Guidelines and the confusion between both types of regulatory intervention that could derive therefrom. It specifically fails to recognize the significant difference between the consideration and weight that must be awarded to existing SMP/Dominance regulation for ex-ante *vis-à-vis* ex-post analysis.

Zain Bahrain concurs with the TRA that, for purposes of ex-ante regulation, a MGA type analysis is warranted as: (i) it controls circularity, and (ii) a mere finding of SMP/dominance is sufficient to trigger ex-ante regulatory intervention.

By contrast, the MGA is unwarranted in the case of ex-post regulation, especially for unilateral conduct, as: (i) in this case there is no circularity problem, and (ii) a finding of abuse of dominance is required to assess the competitive implication of specific business conduct. For these reasons, Zain Bahrain submits that when analyzing possible anti-competitive conduct in a specific relevant market, the TRA cannot disregard existing SMP/Dominance regulation affecting said relevant market (or its value chain) as it may: (i) directly affect the existence of a Dominant Position in the market, and/or (ii) directly affect and/or constrain a dominant player's competitive behaviour in the relevant market.

First, ex-post enforcement of competition law focuses on determining the existence of past or ongoing anti-competitive conduct in a specific relevant market. If such relevant market (or its value

²⁷ See Draft Guidelines, ¶ 97.

²⁸ *Id.* As noted by TRA, the EC has categorized the MGA as an analytical tool to avoid circularity in market analysis in the context of ex-ante regulation. It is intended to "ensure that absence of SMP is only found and regulation only rolled back where markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation in place." Commission decision of 17 May 2005, Case DE/2005/0144, C(2005) 1442 final, ¶ 23.

As noted by Cave, Stumpf and Valletti, a MGA "takes account of non-SMP regulation and of SMP-related regulation originating in markets which are not a component of the value chain under review." See Martin Cave, Ulrich Stumpf, Tommaso Valletti, A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to ex ante Regulation, Independent Report prepared for the European Commission, July 2006, note 2.

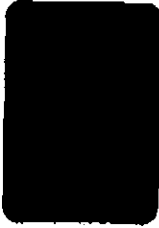
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chain) is affected by SMP/Dominance regulation, applying the MGA to ex-post analysis will lead to a flawed and unrealistic assessment of the actual competitive conditions in the market.

For example, the adoption of ex-ante wholesale broadband obligations, such as local loop unbundling and bitstream access, is directed at facilitating entry into the broadband Internet access market. If appropriately designed, such obligations will facilitate competition with the consequent erosion of the dominant provider's market power. This could, in theory, lead to a point where, due to ex-ante regulation, the dominant provider loses its former market power in the retail market; a fact that would restrict its ability to engage in anti-competitive abuse of dominance (as it is no longer dominant). If, as proposed by the TRA, a MGA is applied to ex-post analysis and the TRA disregards the existence and competitive effects of specific ex-ante regulation in the value chain of the relevant market, then the incumbent could be found to have a dominant position and could be liable under Sec. 65(b)1 of the TL for engaging in conduct that, absent dominance, would not be anti-competitive. For purposes of ex-post analysis, such outcome would be contrary to the objective of competition law as it would punish desirable competitive conduct.

Second, as recently noted by the CFI, citing to well-established case-law, "if anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings."²⁹

This is, however, not an absolute exemption from liability. Accordingly, the CFI has noted that "Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings."³⁰ The EC's practice has been in line with this approach when analyzing anti-competitive conduct in the electronic communications sector, paying detailed attention to existing ex-ante regulation affecting market player's conduct.³¹

On this basis, Zain Bahrain finds that, when analyzing possible anti-competitive conduct, the TRA should not disregard the nature and effects of existing ex-ante regulation in the specific market under investigation or in its value chain.

²⁹ Case T-271/03, *Deutsche Telekom AG v Commission* [2008], ¶ 85.

³⁰ *Id.* ¶ 88.

³¹ See, for example, Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — *Deutsche Telekom AG*), ¶¶ 164-183. See also, Commission Decision of 07 April 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 — *Wanadoo España vs. Telefónica*), ¶¶

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3.3.2. Recommendations

Zain Bahrain respectfully recommends that:

- (1) If the TRA opts to narrow the scope of the Draft Guidelines to include only ex-post enforcement of competition law as recommended in section 1.2(1) above, the TRA should correspondingly eliminate paragraphs 97 and 98 of the Draft Guidelines;
- (2) In the alternative, if the TRA decides not to narrow the scope of the Draft Guidelines, Zain Bahrain respectfully requests that it specifically review the way it will consider existing ex-ante regulation for purposes of market definition and determination of dominance in the context of ex-post competition law enforcement.

4. Question 4.1:

To what extent do respondents agree with TRA's list and definition of proposed anti-competitive practices?

A general point that Zain Bahrain would like to make is that whilst the Draft Guidelines rightly focus on anti-competitive conduct by firms that would have a material impact on the relevant market pursuant to Section 65 of the TL, the TRA should also monitor all licensees' competitive behaviour, with a view to taking some kind of enforcement action for anti-competitive behaviour, even if the effect of the anti-competitive behaviour is not likely to be material. Zain's concern is that a licensee might engage in anti-competitive behaviour whilst having a market position that does not quite reach the 'material impact' threshold of the TL and is therefore not necessarily caught by Section 65 of the TL, yet nevertheless could be harmful to competitors. For example, Section 58 of the TL requires that operators (not just those with SMP or a dominant position) ensure their tariffs shall be "fair and equitable, non-discriminatory and based on forward-looking costs". Consequently, Zain Bahrain hopes that any operator selling below costs would be faced with appropriate measures from the TRA.

4.1. Concerted practices – Section 65(b)2

As noted above in Section 1.1, the Draft Guidelines place emphasis on unilateral conduct,³² addressing concerted practice only tangentially. The Draft Guidelines simply enumerate a series of

³² See Draft Guidelines, ¶ 110.
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agreements not to compete (e.g., price fixing, fixing of output, carving of territories) without describing them in sufficient detail.³³

In view of this, Zain Bahrain respectfully submits that increased competition in the Bahraini telecommunications sector calls for additional guidance on TRA's enforcement standards against collusive agreements. Accordingly, Zain Bahrain requests the TRA to initiate a proceeding to issue a general guidance on the way it will enforce Sec. 65(b)2 of the TL.

In addition to this general issue, Zain Bahrain finds that the proposed standard for according leniency in the case of cooperation with the TRA in the investigation of concerted practices should also be reviewed.

- Leniency

The Draft Guidelines state that leniency will be granted at the sole discretion of the TRA to such parties involved in a concerted practice that cooperate with TRA in its investigation and prosecution.³⁴ Zain Bahrain finds that international experience shows that for a leniency programme to work properly, appropriate incentives must be given for parties to come forward and co-operate with the TRA in its investigations.

Leniency programmes have been found to be a valuable tool in enforcement actions against cartels, allowing authorities in many instances to penetrate the cloak of secrecy that characterizes such illicit agreements. Following the experience of the United States in this field, the EC first adopted leniency regulations in 1996, subsequently reforming them in 2002 and 2006.³⁵ Commenting on the effects of the EC's 1996 leniency policy, Motta identifies two reasons for its failure, including its discretionary nature.³⁶ This led to the 2002 reform which added transparency and certainty to the leniency programme by curtailing discretion in its administration, a characteristic maintained under current rules.

Leniency guidelines are thus designed to create incentives for undertakings involved in concerted practices to put an end to their participation and co-operate in the investigation, independently of the rest of the undertakings involved in the cartel. As such, Zain Bahrain finds that allowing the TRA unfettered discretion to determine if it will or will not grant leniency on a case-by-case basis will discourage participation in the programme, ultimately defeating its very purpose.

³³ See Draft Guidelines, ¶ 112.

³⁴ See Draft Guidelines, ¶ 114.

³⁵ See Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11). National competition authorities have also adopted leniency guidelines in the majority of EU Member States. For a list of these guidelines, see Authorities in EU Member States which operate a leniency programme, Available at: http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf

³⁶ Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, 194.

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4.1.1. Recommendations

Zain Bahrain respectfully recommends that the TRA:

- (1) revise the Draft Guidelines to eliminate the excessive discretion it affords itself in the review of leniency petitions; and
- (2) Expressly commit to initiate a regulatory proceeding to adopt specific guidelines that will govern a future leniency programme.

4.2. Excessive pricing

The Draft Guidelines state that the TRA will investigate excessive pricing by dominant providers in the telecommunications sector, as they may be considered exploitative or exclusionary.³⁷ The Draft Guidelines understand excessive pricing as being prices "substantially higher than would be expected in a competitive environment."³⁸

4.2.1. Analysis

Whilst Zain Bahrain understands the theory of anti-competitive effects of excessive pricing, it calls attention to the fact that, due to the characteristics of the Bahraini telecommunications market, at this time, excessive pricing could be better addressed through existing ex-ante regulation on pricing and tariffs.

Specifically, under Sec. 58 of the TL a party found to hold SMP in a market "shall be subject to tariff controls in relation to any Telecommunications service for which the Authority determines that insufficient competition exists." A finding of SMP, which as noted in section 3.1 above is subject to a lower evidentiary standard than dominance, will suffice to trigger the TRA's ex-ante regulatory powers relating to tariff control. Zain Bahrain submits that exercise of this ex-ante authority by the TRA would appear to make ex-post enforcement of excessive pricing unnecessary under the TL, unless market circumstances had changed considerably since the TRA's original approval of the prices under the ex-ante review. The Draft Guidelines are, however, silent on the interrelation of ex-ante and ex-post regulation on this matter.

³⁷ See Draft Guidelines, ¶¶ 121-122.

³⁸ See Draft Guidelines, ¶ 121.



4.2.2. Recommendation

On this basis, Zain Bahrain respectfully recommends that the TRA:

- (1) consider excluding excessive pricing from the list of possible abuses of dominant position addressed in the Draft Guidelines (unless the procedural ex-ante review of pricing under Sec. 58 of the TL is amended) or
- (2) Better explain how it will balance its ex-ante price regulation authority (Sec. 58 of the TL) and its proposed ex-post enforcement of excessive pricing. In such case, it would be recommendable to establish a clear set of standards and criteria to be applied in each case.

4.3. Predatory pricing

Zain Bahrain concurs with the TRA's assessment of predatory pricing behaviour and that the evidentiary standards set forth in the Draft Guidelines are in line with international practice.³⁹ As noted above, adoption of clear and administrable standards regarding abuse of dominance is of paramount importance in creating the necessary legal certainty to facilitate competition in the Bahraini market.

4.4. Bundling or tying

The Draft Guidelines address both pure bundling and mixed bundling.⁴⁰ It indicates that for a bundling strategy to be anti-competitive it must allow a dominant provider to horizontally leverage market power or foreclose single product competitors from the market that are unable to replicate the bundle.⁴¹ The Draft Guidelines do not, however, address tying specifically.

The Draft Guidelines set forth two similar scenarios to describe possible anti-competitive concerns for pure and mixed bundling of a product or service in which a firm is dominant and a product supplied competitively:

³⁹ See Ofcom, *The Application of the Competition Act in the Telecommunications Sector* (January 2000), ¶¶ 7.5-7.19. See also, Ofcom, *Complaint against BT's pricing of digital cordless phones*, 1 August 2006, ¶¶ 431-446.

⁴⁰ TRA states that "Pure" bundles are those where the products can only be purchased in the form of a bundle, while "Mixed" bundles are those where the products are available both as a bundle and on a stand-alone basis. See Draft Guidelines, ¶ 179.

⁴¹ See Draft Guidelines, ¶ 182.

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- (i) if the dominant firm is the only supplier of the bundle (i.e., the bundle cannot be replicated), the TRA states that bundling may lead to foreclosure as no other supplier is able to produce the bundle; and
- (ii) If the dominant firm is not the only supplier of the bundle (i.e., there exist or may exist competition between bundles), the pricing of the bundle "below the combined costs of the bundled products" may be considered predatory behaviour.⁴²

Zain Bahrain respectfully finds that the TRA's analysis of the competitive effects of tying and bundling is incomplete and should be revised.

4.4.1. Analysis

Bundling constitutes a widespread commercial practice in the economy and it has become particularly relevant in the telecommunications market. Zain Bahrain concurs with TRA that bundling can have efficiency enhancing effects. However, economic theory has identified instances where competitive harm can flow from bundling.

As noted by the TRA, there are two theories of anti-competitive harm deriving from bundling strategies. First, in the case of non-replicable bundles, bundling can be anti-competitive if it is used to leverage market power. In this case, the theory of anti-competitive harm is similar to the theory of tying. Second, in the case of replicable bundles, bundling can serve to foreclose equally efficient competitors from the market by having effects similar to predation.⁴³

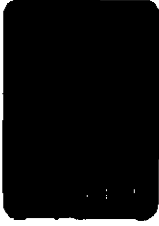
Zain Bahrain, however, finds that the Draft Guidelines do not sufficiently articulate the test that the TRA will apply to determine when a non-replicable bundle will be considered anti-competitive. On this issue, Zain Bahrain proposes that the TRA adopt the so-called discount-allocation standard that has been more fully articulated by U.S. government authorities and courts.⁴⁴

Under this standard, anti-competitive harm similar to that deriving from tying will be found if, after allocating to the competitive product all discounts and rebates attributable to the entire bundle, it is

⁴² This test can be referred to as the total-bundle predation-based test. See U.S. Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act, Chapter 6.I.C.3.a. Available at: <http://www.usdoj.gov/atr/public/reports/236681.htm> See also, although not using this specific nomenclature, Guidance on Article 82 EC Treaty, ¶ 60.

⁴³ For thorough exposition of both theories of competitive see U.S. Department of Justice, *supra* note 40, Chapter 6.I.C.1.

⁴⁴ See *Id.* Chapter 6.I.C.3.b. See also U.S. Antitrust Modernization Commission, Report and Recommendation, April 2007, 99.



determined that the target operator is selling the competitive product below the appropriate measure of the target operator's cost (incremental costs) for such product.

Moreover, Zain Bahrain finds that, although the recent Guidance on Article 82 EC Treaty does not directly speak on this issue, the discount-allocation test is in line with EU precedents cited in the Draft Guidelines on this matter.⁴⁵ In the "BT Together" case, BT's bundle (line rental and call provision) was non-replicable; competing Carrier Pre-Selection providers only offered one of the products in the bundle (i.e., call provision). Accordingly, Ofcom stated that any potential foreclosure effects "might arise where the secondary product were supplied below cost such that even equally efficient competitors in the secondary market were unable to compete."⁴⁶ Ofcom further noted that for anti-competitive exclusion to take place "BT's call charges under the bundled options would be insufficient to cover the cost of supplying those calls (i.e. that these calls are "discounted" below what it actually costs to provide them)."⁴⁷

Finally, Zain Bahrain respectfully submits that consideration of tying practices is insufficiently addressed under the Draft Guidelines. In fact, Zain Bahrain finds that no significant substantive standards are set forth specifically regarding tying arrangements. Zain Bahrain respectfully requests that the TRA remedy this significant omission.

4.4.2. Recommendation

On this basis, Zain Bahrain respectfully recommends that the TRA:

- (i) Revise the Draft Guidelines to clarify the standard under which non-replicable bundles will be deemed anti-competitive. To this end, Zain Bahrain recommends that the TRA consider and adopt the discount-allocation standard described above; and
- (ii) Further clarify its position regarding tying practices in the telecommunications market, as well as the standards it will apply to address their possible anti-competitive effects.

⁴⁵ See Draft Guidelines, ¶ 186

⁴⁶ Ofcom, Investigation against BT about potential anti-competitive exclusionary behaviour, Case: CW/00760/03/04, 12 July 2004, ¶ 133.

⁴⁷ Id.



5. Question 4.2

To what extent do respondents concur with TRA's proposed approaches for assessing potential anti-competitive conduct?

5.1. Need to consider efficiencies and other defences

5.1.1. Analysis and Recommendation

Zain Bahrain notes that the Draft Guidelines do not include explicit reference to possible efficiency defences that can be presented by an undertaking investigated for abuse of dominance under Sec. 65(b)1 of the TL. This approach is in line with international practice.⁴⁸ Zain Bahrain recognizes that the Draft Guidelines do transcribe the provisions of Sec. 65(c) of the TL in the context of concerted practices.⁴⁹ Nevertheless, Zain Bahrain finds that no specific guidance is given by TRA on this issue.

On this basis, Zain Bahrain respectfully recommends that the TRA review the Draft Guidelines to include specific reference to the treatment of possible efficiency enhancing effects of business conduct in the context of concerted practices as well as for abuse of dominance cases.

6. Question 5.1

Do respondents agree with the process proposed by TRA?


6.1. Need to address and provide guidance on remedies

6.1.1. Analysis and Recommendation

Zain Bahrain considers the process proposed by the TRA to be in line with international practice. However, Zain Bahrain would suggest that it could be helpful if the TRA were to introduce a timeframe within which investigations would be conducted, or at least, within which a preliminary submission would be sent to the 'target operator' (Draft Guidelines, ¶ 235). Zain Bahrain suggests

⁴⁸ For a comparative example, see Guidance on Article 82 EC Treaty. For the case of concerted practices, see Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08).

⁴⁹ See Draft Guidelines, ¶ 113. Sec. 65(c) of the TL states: "The restrictions provided for in subparagraph (2) of paragraph (b) of this Section shall not apply to any act or omission if it results in improving the provision of any goods or services or promoting technical or economic progress in the Kingdom if the Subscribers and Users have a reasonable share of the resulting benefit, provided that: 1 no restrictions other than those indispensable to attaining those objectives shall be imposed on Subscribers and Users; and 2 the act or omission shall not."



that two months from the TRA's decision on whether to open an investigation would be appropriate for such a submission. Nevertheless, Zain Bahrain is aware of the TRA's staffing levels and accepts the TRA's approach to dealing with such cases by order of priority rather than the order within which such complaints are received.

Furthermore, Zain Bahrain notes that the Draft Guidelines do not explicitly address remedies to be imposed in case of a finding of unilateral anti-competitive conduct. Appropriate remedies are a key element to stop a target operator's illicit unilateral conduct, prevent its recurrence, and re-establish the opportunity for competition in the affected market. To this end, Zain Bahrain finds that the broad principles set forth on this matter under Sec. 65(f) should be further developed and explained in the Draft Guidelines.

On this basis, Zain Bahrain respectfully recommends that the TRA review the Draft Guidelines to include specific reference regarding the remedies to be imposed to stop, prevent the recurrence of, and re-establish competitive conditions in the event of a finding of unilateral anti-competitive conduct.

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Regulatory & Interconnection

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