



30th September 2009

Mr. Alan Horne
General Director
Telecommunications Regulatory Authority
The General Director
Fax: +973 17532125
PO Box 10353
Manama
Kingdom of Bahrain
Email: consult@tra.org.bh

Dear Mr. Horne,

Subject: Repeal of the Determination on the Methodology for the Definition of Telecommunication Markets and Determination on the Methodology for Determining Market Power issued on 27th August 2009

Please find enclosed with this letter the response of Zain Bahrain to the public consultation issued by the TRA.

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

Sincerely,
Mohammed Shubbar

A handwritten signature in black ink, appearing to read "Mohammed Shubbar", written in a cursive style.

Specialist, Regulatory & Interconnection

MTC-Vodafone (Bahrain) B.S.C. Closed
P.O. Box 266
Manama, Kingdom of Bahrain

T: +973 3603 1000
F: +973 3603 1100

www.zain.com



Zain Bahrain Response to the TRA Consultation on the

“Repeal of the Determination on the Methodology for the Definition of Telecommunication Markets and Determination on the Methodology for Determining Market Power issued on 27th August 2009”

Issued by the Telecommunications Regulatory Authority on 27th August 2009

Ref: MCD/09/09/068

September 30th , 2009

This response to the consultation is submitted by:

Zain Bahrain
Bldg. No. 662, Road No. 2811,
Al- Seef District, Block 428
P.O. Box 266,
Kingdom of Bahrain

Contact person: Mohammed Shubbar
Telephone: 36031204
Mobile: 36030204
Fax: 36031769
Email address: Mohammed.Shubbar@bh.zain.com

MTC-Vodafone (Bahrain) B.S.C. Closed
P.O. Box 266
Manama, Kingdom of Bahrain

T: +973 3603 1000
F: +973 3603 1100

www.zain.com



Following the Telecommunications Regulatory Authority's (TRA) Request for Comments contained in document reference MCD/09/09/068 of August 27, 2009, Zain Bahrain welcomes the opportunity to comment on the TRA's Draft Determination – Repeal of the Determination on the Methodology for the Definition of Telecommunications Markets and Determination on the Methodology for Determining Market Power.

Zain Bahrain wishes to note that it finds the timing of the publication of this Draft Determination extremely surprising and highly questionable given that although this draft determination goes directly to the heart of the TRA's proposed Competition Guidelines as outlined in its consultation of November 2008 (MCD/11/08/2008), respondents have yet to see the responses to the earlier consultation posted on the TRA web site nor has the TRA, to the best of our knowledge, indicated whether it intends to effect any changes to the proposed competition guidelines based on stakeholder input. Therefore, to repeal what currently exists with respect to definitions of telecommunications markets and market power in the complete absence of any official publication of the methodology that will replace the aforementioned determinations is, in Zain Bahrain's view, a less than transparent approach to this matter. Indeed, this is a matter of considerable concern.

With these initial observations and concerns in mind, Zain Bahrain would like to highlight and reiterate the following.

1. Reiterating our comments submitted in response to MCD/11/08/2008 that the draft Competition Guidelines were overbroad in their scope, we note once again that the TRA was proposing a single methodology for defining markets and assessing dominance/market power that did not recognize: (i) the nuances and differences between ex ante and ex post enforcement and (ii) the differences between dominance and significant market power under the Bahrain telecommunications law. To date, we have no knowledge as to whether these serious concerns have been taken into account by the TRA.



2. Although alluded to in the introductory remarks above, we respectfully note and reiterate that the repeal of the afore-mentioned determinations, absent both the publication of the initial comments received in response to MCD/11/08/2008 and any indication as to whether the TRA plans to modify its proposed Competition Guidelines, is not a transparent approach. Indeed, it calls into question why the TRA would choose to repeal any regulatory instrument without indicating what will replace it. The ramifications of such an approach are serious, with the potential not only to cause great uncertainty in the market but also to open the door for further abuse by Batelco. Indeed, this approach calls into question how the TRA would deal with any competition issues that might arise once these determinations were repealed without any knowledge in the market as to what would then govern competition. This could possibly be construed as a rather roundabout way of indicating that the TRA is planning to introduce the proposed Competition Guidelines in their original form without any modifications. This may well be an erroneous conclusion on the part of Zain Bahrain. However, that is precisely the point in that there is no clarity whatsoever as to how the TRA plans to proceed other than repealing the existing determinations.
3. Zain Bahrain believes that the TRA should not only publish the responses to the consultation on the Competition Guidelines but should also request reply comments prior to adopting any final rule, particularly given Zain's previously submitted concerns regarding the proposed Competition Guidelines as repeated below.
4. As stated in its earlier response to the consultation on Competition Guidelines, Zain Bahrain found that, in its current form, the Draft Guidelines were not tailored to the needs and challenges specifically facing the telecommunications sector, thereby creating a significant degree of legal uncertainty that is incompatible with the principles of predictability and transparency set forth by the Draft Guidelines. Such guidelines are intended to apply to both ex-ante (sector specific) and ex-post (competition law) regulation but do not account for the differences between these types of regulation, and on occasions, even confuse the exercise of both types of regulatory authority.



5. In addition, as Zain Bahrain pointed out in the same consultation response, although its title suggested that 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 concentrated on unilateral anti-competitive conduct or abuse of dominance (Sec. 65(b)1 of the TL). Collusion or concerted practices (Sec. 65(b)2 of the TL) and concentrations (Sec. 65(b)3 of the TL) were also addressed in the Draft Guidelines, albeit marginally.
6. As also stated previously, due to the differences in competition analysis for ex ante and ex post purposes, Zain Bahrain also pointed out that it would be preferable to maintain separate guidelines on market definition and assessment of dominance/market power for both types of enforcement.

Therefore, in summary, Zain Bahrain respectfully requests that the Repeal of the Determination on the Methodology for the Definition of Telecommunications Markets and Determination on the Methodology for Determining Market Power be stayed until such time as the significant concerns highlighted above are thoroughly addressed by the TRA.

Sincerely,
Mohammed Shubbar

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Specialist, Regulatory & Interconnection
September 30th 2009