A revised Mergers and Acquisitions Regulation

18 October 2018
Ref: LAD 1018 271

Purpose: To set out the proposed amendments to the Authority's Mergers and Acquisitions Regulation, with a view to ensuring the Regulation is fit for purpose.
Legal disclaimer

This Consultation is not a binding legal document and also does not contain legal, commercial, financial, technical or other advice. The Telecommunications Regulatory Authority is not bound by it, nor does it necessarily set out the Authority's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the Authority. Inappropriate reliance ought not therefore to be placed on the contents of this document.
Instructions for submitting a response

The Telecommunications Regulatory Authority (the ‘Authority’) invites comments on this Consultation from all interested parties. Comments should be submitted to the Authority by 4pm, 18 November 2018.

Responses should be sent to the Authority preferably by email (or by post) to the attention of:

Legal Affairs Department
Telecommunications Regulatory Authority
P.O. Box 10353
Manama
Kingdom of Bahrain
Fax: +973 1753 2125

Responses should include:

- the name of the company/institution/association etc.;
- the name of the principal contact person;
- full contact details (physical address, telephone number, fax number, and email address); and
- in the case of responses from individual consumers, names and contact details.

The Authority expects the responses to follow the same structure as set out in the Consultation and the Annex. The Authority also invites respondents to substantiate their responses to the questions raised, wherever possible, by providing factual evidence to support their responses.

In the interest of transparency, the Authority will make all submissions received available to the public, subject to the confidentiality of the information received.

The Authority will evaluate requests for confidentiality in line with relevant legal provisions and the Authority’s published guidance on the treatment of confidential and non-confidential information.¹

Respondents are required to clearly mark any specific information included in their submission that is considered confidential. Where such confidential information is included, respondents are required to provide both a confidential and non-confidential version of their submission. If a submission is marked confidential in its entirety, reasons for this should be provided. The Authority may publish or refrain from publishing any document or submission at its sole discretion.

Once the Authority has received and considered submissions on this Consultation, the Authority will issue a Report on the Consultation, together with the finalised version of the Mergers and Acquisitions Regulation.

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1 Status of this consultation document

1. This consultation document is issued pursuant to the Authority’s Position Paper on how the Authority consults of 17 October 2017.2

2. The information contained in this document is intended to provide background on a proposed new approval regime for mergers and acquisitions involving at least one licensed party (hereinafter, the "New Regulation"). Interested parties should not take any action in reliance on the information or proposals contained in this document. Any views set out in this document should be considered as indicative and will be subject to further consideration following the receipt of comments from interested parties.

3. This consultation document does not represent a decision of the Authority. The issues discussed in this document remain open to consideration and should not be construed as indicating that the Authority has formed any final opinion or decision in respect of the New Regulation.

4. Once the Authority has received and considered responses to this consultation document, the Authority will decide whether to proceed to finalise the New Regulation for publication in the Official Gazette. If appropriate, the Authority will prepare and publish a further consultation report which summarises and responds to the comments received. Interested parties should not rely on a further consultation taking place and are encouraged to submit comments in response to this consultation.

5. The New Regulation should be reviewed in its entirety by stakeholders, who should not rely on the summary set forth in this consultation. The defined terms in the New Regulation have the same meaning when referred to in the rest of this consultation document, unless context requires otherwise. The Authority welcomes responses on any aspect of the New Regulation, as well as specifically on the questions set out in this Consultation, as summarised in Annex A.

1.1 Proposed measure

6. Under Article 3(c)(1) of the Telecommunications Law, the Authority has the power to issue regulations as may be necessary for the implementation of the Telecommunications Law ("the Law").3

7. The Authority proposes to:
   i. repeal, on the same day as the New Regulation comes into effect, the existing Telecommunications Mergers and Acquisitions Regulation issued on 28 September 2004 (as amended) (Regulation 3 of 2004)4; and
   ii. promulgate the New Regulation.

8. The New Regulation will be issued pursuant to Article 3(c)(1) of the Telecommunications Law and will be effective from the day following the date of its publication in the Official Gazette.

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2 Structure of this consultation

9. The purpose of this consultation is to seek formal views from licensees and other stakeholders that may be directly or indirectly affected by the Authority’s proposals. In particular, the Authority is seeking views in relation to:
   i. the objectives, principles and parameters of the New Regulation (in particular, the notification thresholds and proposed exemption from notification in “de minimis” cases);
   ii. the substantive test which the Authority proposes to apply under the New Regulation when considering whether to grant approval to potential transactions (i.e., mergers, acquisitions and/or establishment of a joint venture);*;
   iii. how the Authority should best ensure regard for public policy and matters of national interest in considering whether to grant approval to potential transactions;
   iv. the type of remedies the Authority should have at its disposal when considering whether to grant approval to potential transactions with conditions; and
   v. any other aspects of the New Regulation upon which respondents wish to comment.

10. The remainder of the consultation describes in more detail the rationale for the Authority’s specific proposals. It is structured as follows:
   i. Section 3 sets out the purpose of promulgating the New Regulation;
   ii. Section 4 sets out the key aspects of the draft New Regulation, focusing on those areas which the Authority has amended from the current Regulation and sets out questions to stakeholders in this regard.
   iii. Annex A then summarises the questions asked in this consultation.


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*A potential transaction which satisfies the notification criteria in Article 1 of the draft New Regulation constitutes a “Qualifying Transaction”.*
3 Rationale for promulgating the new Mergers and Acquisitions Regulation

3.1 Introduction

12. The current regulatory framework for assessment of conduct falling within the scope of Article 65(b)(3) of the Law is contained in Regulation 3 of 2004.

13. The Authority considers it is timely to review the current regulatory framework and to ensure it is fit for purpose with respect to both its procedural and substantive requirements. A review of the regulatory framework at this point in time is also in line with international experiences in other jurisdictions. Ultimately, the Authority is seeking to ensure:

i. That the substantive tests to which it has regard capture conduct that raises legitimate competition concerns, and is capable of enabling due regard to be given to issues of national security and other relevant public interest concerns; and

ii. That the assessment process it is required to follow is simplified, streamlined, transparent, and promotes efficient decision making that does not place an unnecessary administrative burden on the Authority and stakeholders.

14. Having conducted a review of the current Regulation, and for the reasons set out below, the Authority now considers it appropriate to replace that Regulation with the New Regulation in order to meet these objectives.

15. The draft New Regulation is set out for consultation in this document.

3.2 Background and justification

16. The current Regulation, setting out the requirement for licensees to notify and seek approval from the Authority for all Qualifying Transactions, was issued in September 2004. Since this time, the Authority has issued a number of decisions under the Regulation, and it has also adopted Competition Guidelines, which (although not specific to merger control) provide in turn additional guidance on the Authority’s general approach to assessing competition issues, including ex-post type investigations.

17. However, since 2004, telecommunication markets in the Kingdom have evolved significantly. This has included changes in the services offered in the markets, the means by which services are provided, the nature and level of competition between licensees and changes in the Authority’s regulatory policies. For example, these developments have included:

i. The award, in 2007, of two licences for the provision of National Fixed Wireless Services;

ii. The entry of a third mobile network operator (MNO) into the market in 2009; and

iii. The Government’s policy, set out in NTP4, to create a single National Broadband Network, by separating Batelco into two legally separate fixed network and downstream entities.

18. In addition, the Authority is also aware that, since 2004, the body of international case law in relation to the assessment of mergers and acquisitions in the telecommunications sector has grown considerably, with competition authorities now undertaking a range of tests to assess the impact of potential transactions.

\[\text{\textsuperscript{6}}\text{ Competition Guidelines issued by the TRA, dated 18 February 2010, MCD/02/019.}\]
19. Therefore, to ensure that the regulatory framework for reviewing potential transactions remains fit for purpose and consistent with market developments, the Authority considers it is appropriate to replace the current Regulation with the New Regulation.

Q1. Do you agree with the proposed purpose and objectives for the review of the current Regulation? If not, please state why, with reasons.
4 Key aspects of the draft New Regulation

20. This section summarises the key aspects of the draft New Regulation, focusing on those areas which the Authority has clarified, added or amended from the current Regulation. These are presented under the following categories:

i. Requirements to notify transactions (i.e., the types of potential transactions which must be notified to the Authority for prior approval);

ii. The substantive test that should be applied to determine whether the potential transaction can reasonably be expected to substantially lessen competition to the detriment of consumers and customers in the Kingdom;

iii. Public policy and matters of national interest (i.e., how due regard can be given to other factors such as types of public interest concerns);

iv. Potential remedies (i.e., the conditions that the Authority can impose on the Parties prior to approving a Qualifying Transaction); and

v. Procedural aspects regarding the timing and format for notifying potential transactions to the Authority and process for the Authority’s review.

4.1 Requirements to notify transactions

21. Having considered the operation of the current Regulation, the Authority proposes to make a number of amendments to the Regulation to clarify the types of potential transactions that will qualify for review under the draft New Regulation (referred to as “Qualifying Transaction”). Specifically, the Authority proposes the following:

i. To amend the reference to “licensee” in Article 1.1 of the Regulation to future proof the Regulation, depending on the outcome of the upcoming review of the licensing regime under the Law.

ii. To clarify the concepts of “change of control”, and “material influence” in Article 1.2 of the Regulation and to clearly allow the Authority to intervene in cases where the incremental acquisition of minority interests may give rise to competition issues, consistent with Article 29(g) of the Telecommunications Law.

iii. To exempt Parties from having to notify the Authority of Qualifying Transactions where they fall below certain thresholds in relation to the combined market share of the Parties’ activities in the Kingdom and does not raise primum facie potential concerns regarding national security or the public interest.

The definition of “licensee”

22. The Regulation only applies to mergers, acquisitions or joint ventures involving a licensee in the Kingdom (Regulation, Article 1.1). In this regard, “licensee” means a party that has been licensed by the Authority under the Law. Any purported extension of the Regulation to non-licensed parties raises legal and practical issues, and could cause unnecessary duplication with Law No 31 of 2018 promulgating the Law on Competition and Protection. Consequently, the Authority proposes to make only small changes to the definition of “licensee” in the Regulation, to future proof the Regulation in view of the Authority’s forthcoming review of the licensing regime applied in the sector.

23. The Authority believes this course of action should protect legal certainty and, at the same time, preserve all options for the Authority, should there be changes in the law or the market warranting an expansion in the scope of the Regulation to cover other types of transactions. In the meantime, the Authority proposes to clarify the definition of “licensee” in the New Regulation by way of
providing examples that are not exclusive and therefore are future proof. For example, the Authority believes the New Regulation should catch transactions between telecommunications infrastructure providers who registered with the Telecommunications Technical Office of the TRA. Conversely it should not apply to transactions between telecommunications infrastructure providers who are not registered with the Telecommunications Technical Office of the TRA at the time of the intended completion date of the potential transaction.

Q.2 Do you agree with the proposed jurisdiction of the New Regulation? If not, please state why, with reasons.

Change of control and non-controlling minority shareholdings

24. The current Regulation defines a Qualifying Transaction by reference to the concept of change of control on a lasting basis (Regulation, Article 1.2), resulting from any of the following types of transactions involving a market within or affecting the telecommunications industry in the Kingdom of Bahrain:
   
   i. The merger of two or more previously independent businesses, at least one of which is a licensee; or
   
   ii. The acquisition by one or more businesses (the acquiring party) whether by purchase of shares or assets, by contract or by any other means, of direct or indirect control of the whole or parts of the one or more other entities (the acquired party) where at least one of the acquiring parties and acquired parties is a licensee, or
   
   iii. The creation of a joint venture which consists of the acquisition of one or more businesses within the meaning of bullet point (ii) above.

25. Pursuant to Article 1.3 of the current Regulation, control means the ability to control or exert material influence over the acquired party. Article 1.3 provides a non-exhaustive list of instances where control will be presumed to exist. This includes the situation where one party to the proposed transaction will acquire beneficial ownership of more than twenty-five percent (25%) of the issued share capital in another party to the proposed transaction.

26. Having reviewed the current Regulation, the Authority considers that the concepts of “change of control”, “material influence” and “joint venture” could be better explained with new definitions in the Regulation.

27. The Authority believes that providing this additional clarity is important because these concepts underpin the issue of jurisdiction and application of the framework to Qualifying Transactions. In the interest of legal certainty, the Authority proposes to clarify these definitions directly in the New Regulation by simple and targeted amendments, rather than cross-referencing to other legislative measures.

28. A separate question arises in connection with the acquisition of non-controlling interests, where economic theories of harm suggest that companies who are able to acquire non-controlling minority stakes in, for example, competitors can influence their behaviour and reduce competition in the market, in similar ways as acquisitions of control. For example, if a firm (Firm A) has a non-controlling financial stake in a rival (Firm B), this limits the constraint that Firm B can exert on Firm A. Firm A could raise its prices with little fear of retaliation from Firm B. This is because Firm A (by virtue of its non-controlling interest in Firm B) would still benefit from (i.e., Firm A can “internalise”) the increase in sales and profits that accrue to Firm B, from customers switching to Firm B following
the increase in Firm A's prices. Given such concerns, authorities elsewhere have assessed a number of such instances of acquisitions of non-controlling stakes.

29. The current Regulation does not sufficiently allow the TRA to address the effects of such transactions, while the rules of other jurisdictions allow their local authorities to do so, such as in the US, Japan, Germany and the UK. The EU is also considering rules which will allow acquisitions of non-controlling minority shareholdings, that could harm competition, to be subject to review.

30. The Authority has considered various options to remedy this gap, including a notification system for acquisitions of non-controlling minority shareholdings and a self-assessment system. The Authority proposes to introduce, in the New Regulation, a reference to the requirements under Article 29(g) of the Law, "any Person that directly or indirectly acquires five percent or more of the shares of an Individual Licensee shall notify the Authority of such matter within seven days from the date that Person acquires such shares". The Authority considers this option achieves the desired aim without undue increase in the administrative burden on businesses and the Authority.

Q3. Do you agree with the proposed treatment of acquisitions of non-controlling minority shareholdings? If not, please state why, with reasons.

De minimis exemption

31. The current Regulation does not provide for any financial or market share threshold below which a Qualifying Transaction would be exempted from the notification obligation.

32. In some other jurisdictions, the relevant competition authorities apply so-called "de minimis" exemptions, whereby potential transactions that otherwise meet the notification thresholds (Qualifying Transactions) are exempted from some or all aspects of merger regulations, provided they meet certain criteria.

33. For example, in the UK, the Competition and Markets Authority (CMA) may decide not to refer a merger for an in-depth ("Phase 2") investigation if it believes the affected markets (which include horizontal, vertical and neighbouring markets) are not sufficiently important to justify such a reference. The CMA will generally consider that referring a merger for a Phase 2 investigation is not merited where the annual value of the market concerned is less than £5 million (around BHD2.5 million, on current market exchange rates). The Authority has considered applying a similar market value test in Bahrain. However, there are obvious difficulties in identifying the relevant market value level that should be used in such test. The Authority has also identified practical difficulties in setting a test based on deal value. The Authority is of the view that the potential merits of having specific numeric reference points achieved by setting thresholds based on market value or deal value are likely to be outweighed by the difficulty in choosing a value that is appropriate and meaningful across a range of cases, and that does not result in too many or too few potential transactions having to be notified.

34. Having considered this matter, the Authority proposes to add a new clause to the New Regulation enabling it to dispense Parties from the obligation to complete a Notification Form, if those Parties can demonstrate that:

These have included, for example the acquisition by Ryanair of a 20.8% share in Aer Lingus, UK Competition Commission 2016 (www.gov.uk/ma-cases/ryanair-aer-lingus-merger-inquiry).


9 Article 2.4 of the draft New Regulation.
i. In the case of horizontal relationships between the Parties, such relationships result in a combined market share of less than 15%; or

ii. In the case of vertical relationships between the Parties, such relationships result in a combined market share of less than 25%; and

iii. The Qualifying Transaction does not raise *prima facie* potential concerns regarding national security or the public interest.

35. The Authority believes that such an approach is appropriate as it will reduce the burden on Parties and the Authority, where Qualifying Transactions are unlikely to impact competition or raise national security or other public interest concerns. At the same time, by not applying a *de minimis* threshold based on the absolute size of the Parties or the markets concerned (as is the case in some other jurisdictions), the Authority will still be able to consider any Qualifying Transactions which may arise in strategically important or rapidly expanding markets, regardless of their size.

36. However, in order to mitigate the risk that potential transactions between parties, which on their face, would not result in a significant combined market share could nevertheless exert significant competition law concerns, the Authority proposes to have the ability to "call in" a transaction within a stipulated period of time. Additional information would need to come into the Authority's possession on the basis of which the Authority considers an investigation is necessary. The Authority expects such occasions to be rare but that it is necessary to provide for this in the new Regulation. In terms of timeframe, the Authority considers that the suggested timeframe of six (6) months is appropriate.

Q4. Do you agree with the proposed de minimis exception included in the draft New Regulation? If not, please state why and give reasons.

4.2 The substantive test applied to transactions

37. Having considered the application of its substantive test of whether a transaction might give rise to competition concerns, as set out in Article 4.1 of the current Regulation, as well as international developments in the assessment of mergers and acquisitions, the Authority proposes:

i. To better clarify that the substantial lessening of the competition test in Article 4 of the Regulation includes not only the creation or strengthening of a single dominant position, but also unilateral and coordinated effects; and

ii. To introduce explicitly into the test the concepts of "efficiencies" and "failing firm" that would

- allow the Authority to approve transactions in circumstances where the positive effects of a merger would outweigh potential negative short-term effects on competition and consumers, or
- where the Target would be likely to exit a market or compete less vigorously in the foreseeable future, so that any lessening of competition would occur in any event, regardless of the merger. This includes situations in which the buyer has a higher incentive to invest in better quality networks and provide more competitive services than the seller would.

**Assessing the potential for a transaction to result in a substantial lessening of competition**

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*Article 2.5 of the draft New Regulation.*
38. Under Article 4.1 of the current Regulation, the substantive test applied by the Authority to assess Qualifying Transactions is whether the transaction "has, or is likely to have, the effect of substantially lessening competition".

39. The Authority considers that this test is sufficiently broad to capture different factors which could all have the effect of substantially lessening competition, namely the creation or strengthening of a single or collectively dominant position and the elimination of important competitive constraints, even where that does not result in the creation or strengthening of a dominant position. However, the Authority accepts that, as currently drafted, the test might not provide the desired degree of clarity to stakeholders as to how the Authority will judge whether a transaction may be likely to result in a substantial lessening of competition. For example, while in its decision making to date, the Authority has focused on the creation or strengthening of a single or collective dominant position, through a standard market share analysis, it recognises that other merger screening tools may be better suited to the analysis of more complex cases that could arise in the Kingdom and which have arisen in other jurisdictions in recent years.

40. The Authority therefore proposes to amend Article 4.1 so that in the New Regulation it reads as follows:

"The Authority shall assess whether a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition in a market within or affecting the telecommunications industry in the Kingdom of Bahrain. In particular, a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition where: (a) it results, or is likely to result, in the creation or reinforcement of a single or collective dominant position; or (b) it has, or is likely to have, unilateral effects, even if it does not result in the creation or reinforcement of a single or collective dominant position."

41. In assessing Qualifying Transactions against this test, the Authority is likely to consider a range of factors, including but not limited to, the following. These factors reflect similar experiences in other jurisdictions:

i. Whether the Qualifying Transaction results in the creation or reinforcement of a single dominant position, having regard to: (i) market shares; (ii) concentration levels; (iii) barriers to entry and expansion; and (iv) countervailing buyers' power;

ii. Whether the Qualifying Transaction results in the creation of unilateral effects\(^1\), even if it does not result in the creation or reinforcement of a single dominant position having regard to: (i) the elimination of important competitive constraints that the Parties have exerted upon each other; (ii) a reduction of competitive pressure on the remaining competitors; or (iii) the elimination of a market "maverick";

iii. Whether the Qualifying Transaction results in the creation or reinforcement of a collective dominant position\(^2\) having regard to: (i) the existence of cross shareholdings between competitors; (ii) the transparency of prices or other market behaviour (such as, for example, network access terms); (iii) the ability to identify a common price or other common market behaviour (such as, for example, network access terms); (iv) the ability to punish competitors who do not match the common price or other common market behaviour (such as, for example, network access refusal); and (v) the ability to maintain a collusive equilibrium over time (for example where new entry or expansion in the market is difficult or end-users are vulnerable).

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\(^1\) Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices on its own and without needing to coordinate with its rivals. Unilateral effects can be horizontal or vertical.

\(^2\) An abuse of collective dominance may occur where a number of firms that together hold a dominant position take part in a tacitly agreed collective exclusionary or exploitative strategy.
Q6. Do you agree with the proposed competition test included in the draft New Regulation and the factors the Authority may examine to assess this? If not, please state why and give reasons.

Other factors which the Authority may take into account in its competition assessment

42. As drafted in the current Regulation, the substantive test does not sufficiently clearly allow the Authority to take into account other potential impacts or factors relating to the Qualifying Transaction, such as its impact on investment levels or the possibility that, absent the transaction, one of the affected Parties could exit the market.\(^\text{13}\)

43. Indeed, the Authority does not currently appear to have the power to balance the positive and negative effects of a transaction, other than through the application of Article 65(c) of the Telecommunications Law.

44. Other merger control regimes (e.g. in Australia, the EU and US) use a number of tools for this balancing act, including efficiencies, and/or failing firm defence\(^\text{14}\) tests.

45. The Authority believes that being clear that it has such powers would be beneficial for the industry and stakeholders. As such, the Authority proposes to add a new sub-Article, 4.2, to the New Regulation to address this matter. The new sub-Article will explicitly state that in assessing whether a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition, the Authority may also have regard to several other factors, including, but not limited to, the following:

i. Whether the overall market affected by the Qualifying Transaction is of insufficient importance in terms of its overall size so that any lessening of competition will not be substantial;

ii. Whether any countervailing efficiencies\(^\text{15}\) or consumer benefits arising from a Qualifying Transaction will outweigh any short-term lessening of competition; and

iii. Whether, even absent the Qualifying Transaction, the Acquired Party could reasonably be expected to exit the market or compete less vigorously in the foreseeable future, so that any lessening of competition would occur regardless of the Qualifying Transaction.

46. Of critical importance to the analyses under points (ii) and (iii) above is the concept of the counterfactual – i.e., what would happen without the transaction. Indeed, elsewhere in the world, there has been a debate about how high to set the evidential hurdle for efficiencies and failing firm defences. The EU in particular has chosen to set very high hurdles, particularly for efficiencies (i.e., placing the burden of proof for any merger defences on the merging parties). The Authority does not consider it is necessary, or indeed possible, to set out, in the New Regulation, the extent of the burden of proof it will place on the Parties to a transaction to demonstrate either of these defences. This might more sensibly be considered on a case-by-case basis as Qualifying Transactions are reviewed under the New Regulation, allowing greater flexibility to ensure a future proof application.

\(^{13}\) Arguably, this is covered implicitly in the test currently set out in Article 4.1 of the current Regulation, although the wording of the test provides a lack of transparency around this.

\(^{14}\) If one of the parties to a merger that raises competition concerns is in financial difficulties, the merger may nevertheless be approved if the party in financial difficulties would in any event exit the market absent the merger: See OECD Working Party Roundtable Discussion on the Failing Firm Defence (21 October 2009).

\(^{15}\) Examples of efficiencies may consist of, among other things, economic considerations in terms of price or cost and/or technical improvements in the quality of the goods.
of the framework. Nevertheless, for the avoidance of doubt, the Authority will expect Parties to be able to demonstrate any efficiency or failing firm defence with a reasonable degree of evidence.

Q6. Do you agree with the proposed sub-Article 4.2 in the draft New Regulation? If not, please state why and give reasons.

4.3 Public policy and national interest issues

47. The existing Regulation does not currently allow the Authority to block or approve a merger on national security or public interest grounds. The Authority considers that the review of the current Regulation is an opportune time to introduce a broader test. Inclusion of national security and public interest issues is also envisaged in section 4 of Law No 31 of 2018 promulgating the Law on Competition Promotion and Protection.

48. This approach is also consistent with best practice elsewhere. For example, the EU has formal exceptions to the EU Merger Regulation in relation to public security and public policy.\(^\text{15}\)

49. The Authority therefore proposes to include in the New Regulation:

(i) a requirement for it to consider whether the potential transaction (for example, the acquisition of Control of a Bahraini Person by a foreign Person) would likely raise public policy issues such as those of national security. The Authority will send a copy of the notification to the relevant Government agencies for those agencies to indicate whether there is a prima facie case that national security issues might arise as a result of the potential transaction. Where the relevant Government agencies consider there is a prima facie case that national security could be affected as a result of the potential transaction, the Authority will further seek the views of the relevant Government agencies for assessment of such concerns;

(ii) the ability for the Authority to take into account other public interest grounds (such as ensuring sufficient diversity of offerings for consumers, avoiding over-reliance on certain forms or sources of supply, promotion of local jobs or other socio-political factors) and conduct a review of the same.

50. In addition, the draft New Regulation also reiterates that in assessing a Qualifying Transaction, the Authority may have regard to any of its duties and powers under section 3(b) of the Telecommunications Law. As noted above, the Authority considers that the proposed inclusion of a reference to national security in the New Regulation is an important addition and reflects a debate that has been had in other jurisdictions regarding the merits of introducing a broader test in the assessment of mergers in selected areas of the economy, such as critical telecommunications infrastructure\(^\text{17}\).

\(^{15}\) Subsequent EU case law has established that these exceptions can only be invoked where there is "a genuine and sufficiently serious threat to a fundamental interest of society". A number of members of the European Economic Area have established foreign investment screening regimes, particularly in relation to national infrastructure sectors such as telecommunications. In addition, the European Commission has recently made proposals on an EU-wide Foreign Direct Investment (FDI) screening mechanism. As well as the EU, other relevant international organisations also permit some limited restrictions on investment in relation to national security. The World Trade Organisation's General Agreement on Trade in Services, contains exceptions acknowledging a member's right, in certain cases, to take "action which it considers necessary for the protection of its essential security interests", and to take action necessary to maintain public order where a "genuine and sufficiently serious threat is posed to one of the fundamental interests of society". The OECD Code similarly recognises a government's right to take action which it considers necessary for "the protection of its essential security interests".

\(^{17}\) For example, this has often arisen in relation to concerns about the takeover of strategic telecommunications infrastructure by foreign multinationals, either as a result of concerns around national security or the broader public interest.
National Security concerns

51. In considering, with other relevant government authorities, potential national security concerns, the Authority expects the types of factors that will be considered, might include, amongst others, whether the Qualifying Transaction involves any of the following:
   i. critical infrastructure;
   ii. the physical proximity of such infrastructure to government and military facilities and restricted airspace;
   iii. any technology controlled by the Bahraini Person that may have defence applications;
   iv. sensitive Bahraini government contracts, particularly classified contracts, of the Bahraini Person.

Public interest concerns

52. In considering the question of when and how it is legitimate for the Authority to intervene in otherwise private deals on public interest grounds (other than competition grounds), the Authority proposes to draw on the following set of key principles and aims – which are to:
   i. ensure the Kingdom remains attractive to inward investment – changes should not put at risk the Kingdom’s current region-leading position in attracting foreign direct investment;
   ii. provide certainty and transparency wherever possible – any changes to the rules need to be transparent in nature and provide investors with as much clarity as possible about how they would work in practice.
   iii. ensure that the powers set out in the New Regulation are proportionate.

53. The draft New Regulation retains the recognition that, in assessing a Qualifying Transaction, the Authority may also have regard to its duties and powers under Article 3(b) of the Telecommunications Law, to the extent these are relevant.\(^\text{16}\)

Q7. Do you agree with the Authority’s proposed treatment of national security and other public interest concerns that could arise in a Qualifying Transaction? If not, please state why, with reasons.

4.4 Potential remedies the Authority may apply

54. As per Article 3(2) of the draft New Regulation, the Parties may offer Commitments to the Authority with a view to ensuring that the transaction, as modified through those Commitments, is compatible with the New Regulation. Furthermore, as per Article 3(3), the Authority may make any decisions clearing a Qualifying Transaction subject to certain conditions and obligations (Commitments) that are intended to render the Qualifying Transaction compatible with the New Regulation, and make impose conditions and obligations regarding compliance with the Commitments.

\(^{16}\) This Article requires the Authority to undertake its duties in the manner best calculated to protect the interest of Subscribers and Users, particularly with regards to tariffs charged, the availability and provision of service, quality of services and the protection of personal information and privacy of services. The proposed change in the Regulation is aimed at clarifying that this assessment would only be made where there is a prima facie case such interests could be affected.
55. The draft New Regulation does not set out the specific conditions and obligations that the Authority might apply. The Authority does not consider it possible or desirable to seek to set out an exhaustive list but anticipates development of precedent in this area. However, consistent with its powers under the Law and practices in other jurisdictions, the Authority considers that these could include, but not be limited to, the following, depending on the nature of the concerns arising in connection to a specific Qualifying Transaction:

i. The ability to impose structural undertakings on the Parties (including, for example, divestment of certain assets or the creation of legally or functionally separate business units);

ii. The ability to require the Parties to divest certain spectrum rights, which might include for example, requiring the Parties to trade certain spectrum rights with other parties and/or returning certain rights to the Authority;

iii. The ability to impose behavioural remedies on the Parties (including, for example, the provision of certain services – at either wholesale or retail levels – on regulated terms); and

iv. The ability to impose obligations on the Parties which will enable the Authority to monitor the Parties’ ongoing performance against such Commitments, such as the provision of regular and detailed financial and operational information on the Parties’ businesses.

v. Taking any action or omission required to protect national security or the public interest.

Q8. Do you agree with the types of remedies the Authority may apply when considering a potentially problematic Qualifying Transaction?

4.5 Procedural aspects

56. Finally, the Authority has reviewed the procedural aspects of the Regulation (i.e., the process through which a Qualifying Transaction is notified to the Authority and reviewed). In this regard, the Authority notes that the current Regulation already contains provisions on notification requirements (e.g. Regulation, Article 2) which are largely in line with international best practice. International best practice however, has sought to rationalise the need for parties to submit specified numbers of hard copy submissions. The Authority also wishes to reduce the need for multiple hard copy submissions. Therefore, to further alleviate the administrative burden on the Parties and to reflect the advancement of technology, the Authority proposes, in the New Regulation, to allow notification in electronic format (e.g. through CD-ROM, USB or other digital means as may be accepted by the Authority).

57. In addition and to further clarify the rights and obligations of all parties, the Authority also proposes to include the following in the New Regulation:

i. the ability for the parties to withdraw and resile a notification, in situations where the review period is running out but there remain outstanding issues to be resolved (such as, in the FTC Notification Rules in the US). This would have the effect of stopping the clock;

ii. clarifications on when and how to withdraw a notification if the deal is abandoned;

iii. cross-referencing to the powers of the Authority to carry out on-site inspections under Article 77 of the Law and the introduction of an additional power to conduct interviews with the merging parties’ employees particularly those with managing responsibility for the businesses in the Kingdom;

iv. amendments to the timetable for review in order to clarify and streamline the same.
For additional clarity, Figure 1, below, presents a flowchart, describing how the steps a potential Qualifying Transactions may follow, as per the draft New Regulation. For simplified cases that do not raise concerns under the substantive tests in Article 4 of the draft Regulation, the Authority may complete its investigation more quickly.
Figure 1: Illustrative process flowchart (timelines intended to be maximum unless otherwise stipulated)

Q9. Do you have any comments on the proposed procedural aspects of the New Regulation?
Annex A - List of questions

Q1. Do you agree with the proposed purpose and objectives for the review of the current Regulation? If not, please state why, with reasons.

Q2. Do you agree with the proposed jurisdiction of the New Regulation? If not, please state why, with reasons.

Q3. Do you agree with the proposed treatment of acquisitions of non-controlling minority shareholdings? If not, please state why, with reasons.

Q4. Do you agree with the proposed de minimis exception included in the draft New Regulation? If not, please state why and give reasons.

Q5. Do you agree with the proposed competition test included in the draft New Regulation and the factors the Authority may examine to assess this? If not, please state why and give reasons.

Q6. Do you agree with the proposed sub-Article 4.2 in the draft New Regulation? If not, please state why and give reasons.

Q7. Do you agree with the Authority’s proposed treatment of national security and other public interest concerns that could arise in a Qualifying Transaction? If not, please state why, with reasons.

Q8. Do you agree with the types of remedies the Authority may apply when considering a potentially problematic Qualifying Transaction?

Q9. Do you have any comments on the proposed procedural aspects of the New Regulation?
Annex B – Draft New Regulation

Revised Telecommunications Mergers and Acquisitions Regulation

Issued by the Telecommunications Regulatory Authority

Purpose: To provide an amended framework for the treatment of mergers and acquisitions by the Telecommunications Regulatory Authority.
Preamble

This Regulation is issued by the Telecommunications Regulatory Authority (the “Authority”) of the Kingdom of Bahrain under section 3(c)(1) and 65 of the Telecommunications Law. Where this document is a translation of the original version, and any discrepancies exist between the two, the original version shall prevail. The Telecommunications Mergers and Acquisitions Regulation No. 3 of 28th September 2004 (Regulation 3 of 2004) is subsumed into this revised version and shall no longer apply with effect from the date that this Regulation comes into force.

This Regulation is without prejudice to other laws of the Kingdom of Bahrain, in particular the Commercial Companies Law (promulgated by Legislative Decree No. 21 for 2001), that are applicable to the Parties of a Qualifying Transaction.

Definitions

Any word, phrase or expression used in this Regulation shall, unless the context requires otherwise or it is expressly defined herein, have the same meaning as it has in the Telecommunications Law and the terms below shall have the following meaning:

“Commitment” means a modification to a Qualifying Transaction in order to remove the Authority’s serious doubts about the compatibility of a Qualifying Transaction with this Regulation;

“Control” means that a Person has the ability, directly or indirectly, to control or exert material influence over another Person, individually or jointly with others, where it:

(a) beneficially owns more than a total of twenty-five percent (25%) of the issued share capital of the other Person; or

(b) is entitled to vote a majority of the votes that may be cast at a general meeting (or functional equivalent thereof) of the other Person; or

(c) is able to appoint or veto the appointment of a majority of the directors of the other Person; or

(d) is a holding company and the other Person is a subsidiary of that holding company; or

(e) in the case where the other Person is a trust or a similar entity, has the ability to control a majority of the votes of the trustees (or functional equivalent thereof), to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust; or

(f) in the case where the other Person is a limited liability company or similar entity, owns more than a total of
twenty-five percent (25%) of the members' interest (or functional equivalent thereof), or controls or has the right to control the member's votes in such company; or

(g) has the ability to direct or cause the direction of the management or policies of the other Person, including, without limitation, strategic business decisions related to the budget, business plan, significant investments or the appointment of senior management;

“Days” means working days unless otherwise specified. If an event (including the expiration of a time limit, a notification, or the issuing of a document) occurs on a non-working day, that event is deemed to have been occurred on the first following working day.

“Issue [a document]” means to send a document, whether it is a decision, a letter, a request for information, a Statement of Objections, or other administrative act of the Authority, by fax and/or email and/or hand delivery and/or courier and/or by any other means, to the recipient of such communication;

“Issued share capital” means, with respect to any person, all shares, interests, participations or rights or other equivalent (however designated, whether voting or non-voting, ordinary or preferred) in the equity or capital of such person, now or hereafter issued;

“Juristic person” means any company, corporation, association, partnership, joint venture, trust, organization, government agency, public body, entity, or enterprise (including assets amounting to a business or parts of a business with a market presence);

“Licensee” means a Person that:

(a) Is licensed by the Authority under the Telecommunications Law; or

(b) Is registered with the Authority under the Telecommunications Law, or other applicable regulations or guidelines, including paragraph 1.5.3 of the Telecommunications Infrastructure Deployment Guideline (TOD/0308/062, December 2008, Issue 1); or

(c) Is otherwise subject to the scope of the Telecommunications Law, excluding Telecommunications Infrastructure Providers that fall outside paragraphs (a) and (b) above;

“Notifying Party” means the Person or Persons referred to in Article 2.2; or “Notifying Parties”

“Party” means a Person participating in a Qualifying Transaction;
"Person" means both a juristic person and a natural person;

"Qualifying Transaction" means a merger, acquisition or joint venture which fulfils the criteria in Article 1;

"Regulation" means this Telecommunications Mergers and Acquisitions Regulation;

"Telecommunications Law" means the Legislative Decree No. 48 of 2002 as amended from time to time; and

"Third Party" means a person that is not participating in a Qualifying Transaction.

**Article 1 - Scope**

1.1 This Regulation applies to mergers, acquisitions or joint ventures involving a Licensee and a market within or affecting the telecommunications industry in the Kingdom of Bahrain.

1.2 A Qualifying Transaction shall be deemed to arise where a change of Control on a lasting basis results from:

(a) the merger of two or more previously independent Persons, at least one of which is a Licensee. A merger occurs where the Persons cease to be distinct by being brought under common ownership or common Control; or

(b) the acquisition of Control by one or more Persons (the "Acquiring Party") of one or more other Persons (the "Acquired Party") where at least one of the Acquiring Party and/or the Acquired Party is a Licensee; or

(c) the creation of a joint venture, which constitutes a Qualifying Transaction within the meaning of paragraph (b); and

which involves a market within or affecting the telecommunications industry in the Kingdom of Bahrain.

1.3 The direct or indirect acquisition of a minority interest that does not confer Control over a Licensee is subject to Article 29(g) and Article 65(b)(3) of the Telecommunications Law. Notwithstanding this, the incremental acquisition of minority interests which, if implemented, would eventually confer Control over a Licensee, shall be subject to this Regulation.

**Article 2 - Notification**

*Notification requirements and timing of notification*

2.1 All Qualifying Transactions shall be notified to the Authority prior to their implementation. The Notifying Parties must notify the Authority of a Qualifying
Transaction no later than 25 Days from the date of the signing of the documents bringing about the Qualifying Transaction, whether by agreement, acquisition of a controlling interest or a public bid. Notifying Parties may notify a Qualifying Transaction to the Authority as soon as (i) the Parties can demonstrate a good faith intention to bring about a Qualifying Transaction, or (ii) in the case of a public bid, where they have publicly announced an intention to make such a bid.

Notifying Parties

2.2 A Qualifying Transaction which consists of a merger under Article 1(2)(a), or a joint venture under Article 1(2)(c), shall be notified jointly by the Parties. A Qualifying Transaction consisting of an acquisition under Article 1(2)(b) shall be notified by the Acquiring Party.

Exemptions

2.3 Article 2.1 shall not prevent the implementation of a series of transactions in securities, including those securities convertible into other securities admitted to trading on the Bahraini or any other stock exchange, by which a controlling interest is acquired from various sellers, provided that the Qualifying Transaction is notified to the Authority within 25 Days of such acquisition of a controlling interest.

2.4 Parties shall be exempted from the requirements contained in Articles 2.1 and 5.1, where the following conditions are met:

(a) In case of horizontal relationships between the Parties’ activities in the Kingdom or any part thereof, such relationships result in a combined market share of less than 15%; or

(b) In case of vertical relationships between the Parties’ activities in the Kingdom or any part thereof, such relationships result in a combined market share of less than 25%; and

(c) The Qualifying Transaction does not raise prima facie potential concerns regarding national security under Article 4.4 or the public interest under Article 4.5.

2.5 Notwithstanding the above, the Authority retains the right to require the Parties to notify a Qualifying Transaction in accordance with Article 2.9, and assess under Article 65 of the Telecommunications Law the compatibility of the Qualifying Transaction with Article 4 of the Regulation, where the Authority has serious doubts about the applicability of the exemption conditions under Article 2.4. The time limit for the exercise of this right by the Authority is six months from the later of the date on which (i) the details of the Qualifying Transaction became public; and/or (ii) the Authority becomes aware of the details of the Qualifying Transaction.

Informal guidance on notification requirement

2.6 At any time prior to notification, any of the Parties may approach the Authority for an informal discussion or confidential guidance as to whether an anticipated transaction (a) constitutes a Qualifying Transaction or (b) may benefit from any of the above exemptions from a notification requirement. The Parties should treat any advice given by the Authority as confidential and should not reveal to any Third Party either the
contents of the advice or the fact that advice has been requested or given. Any view expressed by the Authority prior to notification shall not be binding either on the Authority or on the Parties.

Notification procedure (including format and filing fee)

2.7 A notification shall be made using the Notification Form attached to this Regulation.

2.8 A notification fee of BD 300 shall be payable to the Authority when a notification is made. The Authority may update and publish on its website and in the Official Gazette, from time to time, new notification fees for the purpose of this Article.

2.9 The notification must contain all the information requested in the Notification Form, unless otherwise waived in writing by the Authority. The Notification Form must be signed by a duly authorized representative of all of the Notifying Parties, enclosing all supporting documents and proof of payment of the notification fee to the Authority bank account.

2.10 A Notification Form may be submitted to the Authority either by e-mail, CD-ROM, USB or by submitting one original hard copy file.

Article 3 – Procedure

Publication of a merger notice

3.1 As soon as practically possible after a complete notification under Article 2.9 has been submitted, the Authority shall publish on its website a notice about the notified transaction. Such notice shall include a high-level description of the notified transaction and shall state that interested Third Parties have 10 Days from the date of publication of the notice to make any submission to the Authority about the notified transaction.

Notification assessment

3.2 The Authority shall assess the notified transaction according to the criteria set out in Articles 1 and 4, and shall issue one of the following decisions addressed to the Notifying Parties:

(a) A declaration that the notified transaction does not constitute a Qualifying Transaction under Article 1; or

(b) A declaration that the Qualifying Transaction, in its original form or as modified through Commitments, is compatible with the Regulation (Phase 1 Decision); or

(c) Where a Qualifying Transaction raises serious doubts as to its compatibility with the Regulation, a decision initiating a Phase 2 investigation; or

(d) At the end of a Phase 2 investigation, a declaration that the Qualifying Transaction, in its original form or as modified through Commitments, is either compatible or incompatible with the Regulation (Phase 2 Decision).
3.3 The Authority may attach to its decisions under Articles 3.2(b) (Phase 1 Decision) and 3.2(d) (Phase 2 Decision) conditions and obligations intended to ensure that the Parties comply with Commitments offered with a view to rendering the modified Qualifying Transaction compatible with the Regulation.

Time limits

3.4 Should the Authority fail to issue one of the decisions under Article 3.2 within the applicable time limits, the Qualifying Transaction shall be deemed to have been declared compatible with the Regulation. The applicable time limits are as follows:

(a) The time limit for the issuing of a decision under Article 3.2(a), (b), and (c) is 25 Days from the date of the Authority announcement regarding the notified transaction under Article 3.1;

(b) The time limit for the issuing of a decision under Article 3.2(d) is 90 Days from the date in which a decision under Article 3.2(c) is issued;

(c) Where the Notifying Parties offer Commitments pursuant to Article 3.6, the applicable time limits for the adoption of a decision under Article 3.2 shall automatically be extended by 5 Days where Commitments are offered during Phase 1, and by 15 days where Commitments are offered in Phase 2.

Statement of Objections

3.5 Prior to taking a decision under Article 3.2(d) (Phase 2 Decision) declaring a Qualifying Transaction incompatible with the Regulation, the Authority shall issue a Statement of Objections addressed to the Notifying Parties. The Notifying Parties shall respond within the time period set by the Authority. Unless extended by the Authority, the maximum time period for responses shall be 25 Days from the date of the Statement of Objections.

Commitments (including time limits and procedure)

3.6 The Notifying Parties may offer Commitments to the Authority subject to the following conditions and time limits. Commitments must be designed to entirely eliminate the concerns identified by the Authority. The maximum applicable time limits for offering Commitments are as follows:

(a) In Phase 1, within 20 Days of the date of publication of a merger notice under Article 3.1.

(b) In Phase 2, (i) within 20 Days from the date of the decision under Article 3.2(c) to open a Phase 2 investigation; or (ii) where a Statement of Objections is issued, within the time limit set by the Authority under Article 3.5.

3.7 The Authority may at its discretion consider or disregard any Commitments offered by the Notifying Parties after the expiry of the applicable time limits.

3.8 The Authority may decide to consult on the Commitments with interested Third Parties. Prior to the consultation, the Authority shall give the Notifying Parties an opportunity to request deletions of business secrets and other confidential information from the
offered Commitments, disclosure of which would be seriously detrimental to the Notifying Parties' legitimate business interests should such information become known to Third Parties. A time limit shall be set by the Authority for the submission of such proposed deletions. The Authority has sole discretion on whether to agree to requested deletions. In exercising its discretion, the Authority shall have regard to its statutory obligations in the Telecommunications Law.

Abandonment of a Qualifying Transaction

3.9 At any time prior to the Authority issuing a decision under Article 3.2, the Notifying Parties may abandon the notified Qualifying Transaction. If the Authority is satisfied that the Qualified Transaction has been abandoned, the Authority shall conclude the procedure by simple administrative act. The Authority may note on its website the fact that the notification has been withdrawn.

Notification withdrawal

3.10 The Notifying Parties may, with the Authority's prior written consent, at any time voluntarily withdraw the notification and submit a new Notification Form. A new Notification Form will be treated as a new Qualifying Transaction under the procedure in Article 2, save that the Notifying Parties will not be required to pay new notification fees, if the previous notification was withdrawn prior to a decision under Article 3.2(c).

Publication of decisions

3.11 The Authority shall publish a final decision under Article 3.2(b) or Article 3.2(d) on its website and in the Official Gazette as soon as practicable, unless the Authority considers that there is an overriding public interest for not doing so. Prior to publication, the Authority shall give the Notifying Parties an opportunity to request deletions of business secrets and other confidential information from the published version of decisions, disclosure of which would be seriously detrimental to the Parties' legitimate business interests should such information become known to Third Parties. A time limit shall be set by the Authority for the submission of such proposed deletions. The Authority has sole discretion on whether to agree to requested deletions. In exercising its discretion, the Authority shall have regard to its statutory obligations in the Telecommunications Law.

Article 4 – Substantive tests applied by the Authority

Competition test

4.1 The Authority shall assess whether a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition in a market within or affecting the telecommunications industry in the Kingdom of Bahrain. In particular, a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition where: (a) it results, or is likely to result, in the creation or reinforcement of a single or collective dominant position; or (b) it has, or is likely to have, unilateral effects, even if it does not result in the creation or reinforcement of a single or collective dominant position.
4.2 When assessing whether a Qualifying Transaction has, or is likely to have, the effect of substantially lessening competition under Article 4.1, the Authority may also have regard to the following factors, amongst others:

(a) Whether the overall market affected by the Qualifying Transaction is of insufficient importance in terms of its overall size so that any lessening of competition will not be substantial;

(b) Whether any countervailing efficiencies or consumer benefits arising from a Qualifying Transaction will outweigh any lessening of competition; and

(c) Whether, even absent the Qualifying Transaction, the Acquired Party could reasonably be expected to exit the market or compete less vigorously in the foreseeable future, so that any lessening of competition would occur regardless of the Qualifying Transaction.

National security test

4.3 The Authority shall seek the views of the relevant Government agencies as to whether a Qualifying Transaction, involving the acquisition of Control of a Bahraini Person by a foreign Person, poses a threat to national security and where this is the case, the assessment of such concerns. In reaching its decision, the Authority shall have regard to the views of the relevant Government agencies on national security issues.

Public interest test

4.4 In assessing a Qualifying Transaction, the Authority may have regard to any issues which the Authority reasonably considers might raise public interest concerns, as well as to any of duties and powers under section 3(b) of the Telecommunications Law.

Article 5 - Suspension of a Qualifying Transaction

5.1 A Qualifying Transaction shall not be implemented, until it has been declared compatible with the Regulation pursuant to Article 3.2; or after the time limits in Article 3.4 have expired without the Authority declaring the Qualifying Transaction incompatible with this Regulation. If requested by the Notifying Parties, the Authority may, at its sole discretion, grant an express written waiver from this suspension obligation.

5.2 Article 5.1 shall not prevent the implementation of a public bid or series of transactions in securities, provided that the Acquiring Party does not exercise the voting rights attached to the securities in question, or does so only to maintain the full value of the securities in question.

Article 6 - Requests for Information

6.1 The Authority may issue a request to the Notifying Parties, as well as other Parties and Third Parties, to provide all relevant information during any stage of the procedure.

6.2 Such requests for information shall set out the legal basis for the request, the information required and the time limit by which responses shall be submitted, as well as the penalties for supplying misleading, incorrect or incomplete information within the set time limit.
The Authority may disregard any information received after the expiration of a time limit set by the Authority for responding to an information request.

6.3 The Authority may decide to suspend the time limits provided under Article 3.4 until a complete response to such information request is received, if necessary.

6.4 For the purposes of carrying out its functions and duties under this Regulation, the Authority may also carry out on-site inspections under Article 77 of the Telecommunications Law, and conduct separate interviews of any Person that consents to be interviewed, for the purpose of collecting relevant information.

**Article 7 - Right to be heard**

7.1 The Notifying Parties shall be given sufficient opportunity to submit their comments on the key objections which the Authority proposes to take into account in its decisions, within the time limits set by the Authority.

**State of play meetings**

7.2 Where the Authority opens a Phase 2 investigation, it may hold state of play meetings or telephone conference calls with the Notifying Parties at key stages of the procedure. The Authority shall discuss its proposals for any such meetings and their timing, with the Notifying Parties at the beginning of the Phase 2 investigation. The Authority envisages that it shall conduct, at a minimum, one state of play meeting shortly in advance of the issuing of a Statement of Objections pursuant to Article 3.5, to help clarify certain issues and facts and make the Statement of Objections more robust.

**Interested Parties**

7.3 Interested Third Parties shall have the right to submit comments on a notified Qualifying Transaction to the Authority. Such interested Third Parties may request a meeting with the Authority, which the Authority may grant where it deems necessary.

**ring**

Before taking a decision under Article 3.2(d) (Phase 2 Decision), the Authority may hold an oral hearing with the Notifying Parties. Such oral hearing would give the Notifying Parties the right to make their case and address any concerns of the Authority. Where appropriate, the Authority may invite interested Third Parties to make their case also. The Authority may hold such hearing, or part of the hearing, in camera to protect confidential information.

**Article 8 - Restrictions directly related and necessary to a Qualifying Transaction**

8.1 If the documents bringing about a Qualifying Transaction contain any potential restrictions on competition, which are deemed by the Notifying Parties to be directly
related and necessary to the implementation of the Qualifying Transaction, it is for the Notifying Parties to list and justify these in the Notification Form.

8.2 Any decision issued under Article 3.2(b) (Phase 1 Decision) or Article 3.2(d) (Phase 2 Decision) declaring a Qualifying Transaction to be compatible with the Regulation shall be deemed to cover the restrictions identified in accordance with Article 8.1, without the Authority having to assess such restrictions in individual cases. This is without prejudice to the Authority’s power to conduct such individual assessment, if necessary.

**Article 9 - Sanctions**

9.1 The Authority may impose the following penalties in order to ensure compliance with this Regulation.

9.2 Where a Qualifying Transaction has been implemented in breach of Article 5, the Authority may require the Parties to dissolve the Qualifying Transaction, in order to restore the position of the Parties and competition in the relevant market prior to implementation. In particular the Authority may require dissolution of the merger, acquisition or joint venture, or the disposal of all the shares or assets acquired. Where it is impossible to restore the situation existing prior to the implementation of the Qualifying Transaction through dissolution of the Qualifying Transaction, the Authority may order the taking of any other act or omission to act that the Authority deems necessary to achieve such restoration as far as possible, including (a) the forced divestment of any parts of an enterprise, or (b) the amendment to or revocation of the license(s) of any relevant Licensee in accordance with the provisions of the relevant license(s) and/or section 35 of the Telecommunications Law.

9.3 In case of breach of any condition or obligation attached under Article 3.3 to a decision issued under Article 3.2(b) (Phase 1 Decision) or Article 3.2(d) (Phase 2 Decision) declaring the modified Qualifying Transaction to be compatible with the Regulation, the Authority may order any other appropriate measures deemed necessary to remedy the breach. In extreme or repeated cases of non-compliance, the Authority may also revoke the clearance decision. Where the Qualifying Transaction has already been implemented, the Authority may take any of the measures contemplated under Article 9.2.

9.4 The Authority may revoke any decision issued under Article 3.2 if such decision is based on misleading or incorrect information for which one or more of the Notifying Parties is responsible or where it has been obtained by deceit. Where the Qualifying Transaction has already been implemented, the Authority may take any of the measures contemplated under Article 9.2.

9.5 The Authority may impose financial penalties of up to ten per cent (10%) of the combined annual turnover of the Notifying Parties, where, either intentionally or negligently, such Parties:

(a) Failed to notify a Qualifying Transaction prior to its implementation in accordance with Article 1;

(b) Implemented a Qualifying Transaction in breach of Article 5;

(c) Failed to comply with a condition or obligation adopted under Article 3.3;
(d) Failed to provide complete information requested by the Authority within a prescribed time limit; and

(e) Supplied misleading or incorrect information to the Authority in communications with the Authority made pursuant to Articles 2, 6 and 7.

9.6 In calculating the amount of any fine, the Authority will have due regard to the nature, gravity and duration of the infringement, in accordance with the Authority's Fining Guidelines.

9.7 The Authority may not impose a fine on the Parties under Article 9.5, if a similar determination has been or will be made against them under the Telecommunications Law for the same conduct.

9.8 If the Authority considers that a Qualifying Transaction effects anti-competitive changes in market structure as defined under section 65(b)(3) of the Telecommunications Law, the Authority may issue an order of amendment to or revocation of the license(s) of any relevant Licensee in accordance with the provisions of the relevant license(s) and/or section 35 of the Telecommunications Law.

9.9 Decisions taken under this Article shall be of an administrative and not criminal law nature.

Article 10 - Right of appeal

10.1 Any decision taken by the Authority under Article 3 or Article 9 is subject to appeal in accordance with the general appeal provisions in the Telecommunications Law.

10.2 Such right of appeal may be exercised by the Parties to a Qualifying Transaction (irrespective of whether they are licensees).

10.3 Third parties have the right to appeal a decision under the Regulation in accordance with the general appeal provisions of the Telecommunications Law if, upon application to the Authority, they can show that they have both sufficient interest and be directly and individually affected by the decision.

10.4 Such right of appeal is without prejudice to rights under Bahraini law.

10.5 All notifications of intention to appeal a decision shall be subject to the timetables set out in the Telecommunications Law (if any). Anyone bringing such an appeal shall be deemed to become aware of the decision on the earlier of the date that the decision is published on the Authority's website or the date that the Person receives a copy of the issued decision.

Article 11 - Confidentiality

11.1 The Authority shall treat all information submitted to it as a result of this Regulation as confidential and shall only use such information for the purposes of assessing the relevant Qualifying Transaction. This provision also applies to any information that comes to the Authority as a result of responses to Article 6 requests for information and any other investigations, meetings or hearings.
11.2 If access to the file is granted in accordance with Article 12, any Person that has submitted information to the Authority in relation to the Qualifying Transaction will be contacted to submit requested deletions of business secrets or other confidential information disclosure of which would be seriously detrimental to that Person’s business interests should such information become known to other Persons. A time limit shall be set by the Authority for the submission of such deletions.

Article 12 - Access to the file

12.1 If so requested, the Authority shall grant access to the file to the Parties to whom the Authority has addressed a Statement of Objections pursuant to Article 3.4 for the purpose of enabling them to exercise their rights of defence. Access to the file may be granted in any suitable electronic format (CD-ROM, USB, or secured FTP file transfer).

12.2 The right of access to the file shall not extend to business secrets or other confidential information or to internal documents of the Authority. Documents obtained through access to the file shall only be used for the purpose of responding to the Statement of Objections.

Article 13 – Entry into force

13.1 This Regulation shall enter into force on [__], repealing and replacing Regulation 3 of 2004.

13.2 Without prejudice to Article 65(h) of the Telecommunications Law, the Authority may adopt additional guidance to clarify the substantive and procedural aspects of the implementation of the Regulation.
NOTIFICATION FORM
RELATING TO THE
NOTIFICATION OF A QUALIFYING TRANSACTION
PURSUANT TO THE TELECOMMUNICATIONS MERGER REGULATION
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SECTION 1

Description of the Qualifying Transaction

1.1. Provide an executive summary of the Qualifying Transaction, specifying the Parties to the Qualifying Transaction, the nature of the Qualifying Transaction (for example, merger, acquisition, joint venture), the areas of activity of the Parties, the market(s) on which the Qualifying Transaction will have an impact and the strategic and economic rationale for the Qualifying Transaction.

1.2. Provide a summary (up to 300 words) of the information provided under Section 1.1. This summary will be published on the Authority’s website. The summary must be drafted so that it contains no confidential information or business secrets.
SECTION 2

Information about the Parties

2.1. Information on Notifying Party (or Parties)

Give details of:

2.1.1. name and address of Party;

2.1.2. nature of the Party's business;

2.1.3. name, address, telephone number, mobile number, fax number and e-mail address of, and position held by, the appropriate contact person; and

2.1.4. an address for service of the Notifying Party (or each of the Notifying Parties) to which documents and, in particular, Authority decisions may be delivered. The name, email address and telephone number of a person at this address who is authorised to accept service must be provided.

2.2. Information on other parties (*) to the Qualifying Transaction

For each party to the Qualifying Transaction (except the Notifying Party or Parties) give details of:

2.2.1. name and address of Party;

2.2.2. nature of Party's business;

2.2.3. name, address, telephone number, mobile number, fax number and e-mail address of, and position held by, the appropriate contact person; and

2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Authority decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.3. Appointment of representatives

Where notifications are signed by representatives of Parties, such representatives must produce written proof that they are authorised to act. The written proof must contain the name and position of the persons granting such authority.

(*)This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.
Provide the following contact details of information of any representatives who have been authorised to act for any of the parties to the Qualifying Transaction, indicating whom they represent:

2.3.1. name of representative;

2.3.2. address of representative;

2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and

2.3.4. an address of the representative for service (which should be in Bahrain) to which correspondence may be sent and documents delivered. Such address may include embassies, lawyers or accountant's offices, if the appropriate organisation has agreed with the Parties to act as representative. If the address is outside of Bahrain, the Authority will not be responsible for ensuring receipt of documents.
SECTION 3

Details of the Qualifying Transaction

3.1. Describe the nature of the Qualifying Transaction being notified. In doing so state:

(a) whether the proposed Qualifying Transaction is a merger, an acquisition of sole or joint control, a joint venture within the meaning of Article 1.2(a), (b) or (c) (as appropriate) of the Telecommunications Mergers and Acquisitions Regulation;

(b) whether the whole or parts of Parties are subject to the Qualifying Transaction;

(c) a brief explanation of the economic and financial structure of the Qualifying Transaction;

(d) whether any public offer for the securities of one party by another party has the support of the former’s supervisory boards of management or other bodies legally representing that party;

(e) the proposed or expected date of any major events designed to bring about the implementation of the Qualifying Transaction (other than a decision approving the Qualifying Transaction under Article 3.2);

(f) the structure of ownership and control before completion of the Qualifying Transaction, and the proposed structure of ownership and control after the completion of the Qualifying Transaction. Please include diagrams and/or organisation charts;

(g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support; and

(h) the economic sectors involved in the Qualifying Transaction.

3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be);

3.3. For each of the Parties to the Qualifying Transaction provide the following data for the last financial year and for any available data for any interim period in the current year:

3.3.1. world-wide turnover;

3.3.2. turnover within the Kingdom of Bahrain;

3.4. In case the transaction concerns the acquisition of joint control of a joint venture, provide the following information:

3.4.1. the turnover of the joint venture and/or the turnover of the contributed activities to the joint venture; and/or
3.4.2. the total value of assets transferred to the joint venture.

3.5. Describe the commercial / economic rationale of the Qualifying Transaction.

3.6. List the competition authorities in other jurisdictions to which the Qualifying Transaction has been or will be notified and the proposed timing of such notifications. Where the Qualifying Transaction has a wider context (e.g., world-wide/ GCC wide), describe this.
SECTION 4

Ownership and control

For each of the parties to the Qualifying Transaction provide a list of all Parties belonging to the same group.

This list must include:

4.1. all Parties or persons controlling these parties, directly or indirectly;

4.2. all Parties active in any reportable market that are controlled, directly or indirectly:

   (a) by these parties;

   (b) by any other Party identified in 4.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organisation charts or diagrams to show the structure of ownership and control of the Parties.
SECTION 5

Supporting documentation

Notifying Parties must provide the following:

5.1. copies of the final or most recent versions of all documents bringing about the Qualifying Transaction, whether by agreement between the Parties to the Qualifying Transaction, acquisition of a controlling interest or a public bid;

5.2. copies of the most recent annual reports and accounts of all the Parties to the Qualifying Transaction, for the last three (3) financial years if available
SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the Qualifying Transaction must be assessed.

The Notifying Party or Parties must provide the data requested having regard to the following definitions:

I. Relevant product markets

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

II. Relevant geographic markets

The relevant geographic market comprises the area in which the Parties concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include inter alia the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the Parties' market shares between neighbouring geographic areas, or substantial price differences.

III. Relevant markets

For purposes of information required in this Notification, relevant markets consist of all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions, on the basis of which:

(a) two or more of the parties to the Qualifying Transaction are engaged in business activities in the same relevant market (horizontal relationships);

(b) one or more of the parties to the Qualifying Transaction are engaged in business activities in a product market, which is upstream or downstream of a market in which any other party to the Qualifying Transaction is engaged, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the Qualifying Transaction (vertical relationships).
6.1. Identify all relevant markets.
SECTION 7

Information on markets

For each relevant market described in Section 6, for the financial year preceding the operation and for any available interim period in the current year, provide the following: (1)

7.1 an estimate of the total size of the market(s) in terms of sales value (in BD and US$) and volume (units) (2). Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2 the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the Qualifying Transaction. Indicate if there have been significant changes to the sales and market shares for the last three financial years;

7.3 an estimate of the market share in value (and where appropriate, volume) of the three largest competitors (indicating the basis for the estimates). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for these competitors; and

7.4 a list of the three wholesale / enterprise customers in the Kingdom of Bahrain with the largest account for each of the Parties. Provide a contact name, description of position within the organisation and telephone number for each customer mentioned.

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1 In the context of pre-notification, you may want to discuss with the Authority to what extent dispensation (waivers) to provide the requested information would be appropriate for certain relevant markets.

2 The value and volume of a market should reflect output less exports plus imports for the Kingdom of Bahrain.
Declaration

The notification must conclude with the following declaration which is to be signed by or on behalf of all the Notifying Parties, signed by duly authorized representative(s) of each Party:

The Notifying Party or Parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of the Telecommunications Mergers and Acquisitions Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of: