Communications Regulatory Authority
State of Qatar

هيئة تنظيم الاتصالات
دولة قطر

Competition Policy

Response Document

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1 Background

The Competition Policy

1. The Communications Regulatory Authority (the "Authority", hereafter) [1] is empowered to regulate telecommunications, post and access to digital media in the State of QATAR under Decree Law 42 of 2014.
2. The Authority has the objective to enhance the role of competition as a catalyst for investment and innovation in the Information & Communications Technology (ICT) sector in the State of Qatar. The Authority uses a number of complementary tools to ensure competition in the sector.
3. Given this, and in line with international practice, the Authority has developed a Competition Policy to describe its approach to implementing the relevant provision of the Telecoms Law which prohibits anti-competitive conduct and in relation to mergers.
4. The Competition Policy comprises two documents: the Statement of Competition Policy and an accompanying Explanatory Document. The Statement of Competition Policy details the conduct that may infringe the competition related elements of the Telecoms Law and summarizes how the Authority will assess the implications of mergers and transfers of ownership and control on competition in the relevant markets. The Explanatory Document provides more detail of the approach that the Authority would take when investigating the forms of behavior which could be anti-competitive and amount to an abuse of a dominant position, or when assessing the impact of mergers or transfers of control on markets.
5. The application of the Competition Policy typically involves investigation of an operator's behaviour in response to a specific complaint or based on the Authority's own initiative. The purpose of the Competition Policy is therefore to create a transparent and predictable environment in which market participants understand the circumstances in which the Authority will undertake investigations in relation to potential anti-competitive behaviour, and under which market participants can evaluate their behaviour to ensure it does not infringe the regulatory framework.

Scope of the Competition Policy

6. The Competition Policy explains the competition related provisions of the regulatory framework and the approach and methodologies that the Authority will use in applying the regulatory framework in relation to competition policy. In doing so it considers:

   6.1 behaviors which are considered anti-competitive under the regulatory framework and other common forms of anti-competitive behavior. These are categorized into anti-competitive behaviors which apply to:

[1] Note: The Authority has been established as an independent regulatory authority as of April 1st, 2014. It takes over the responsibilities of the former Regulatory Authority within the Supreme Council for Information and Communication Technology (ictQATAR). Thus, for consistency, we use the term "The Authority" in this document, although in some of the referenced documents the term ictQATAR may still be used.

- any person, including all service providers i.e. on a symmetrical basis; and
- dominant service providers who are prohibited from abusing their dominant position i.e. on an asymmetrical basis;

6.2 aspects of transfers of control and mergers which are considered anti-competitive; and

6.3 remedies for infringements of the Competition Policy.

7. In parallel to the Competition Policy, the Authority has developed its methodology for Market Definition and Dominance Designation (MDDD) which forms the basis for ex-ante regulation by the Authority[2].

Process

8. The Competition Policy has been developed in two phases:
    - Phase I – The Authority developed a Draft Competition Policy and published it for consultation on 20 May 2015. Market players could submit their opinions on the Draft Competition Policy until 2 July 2015.
    - Phase II – After considering responses by market players to the draft document, the Authority has updated the Competition Policy and published a final version of the Statement of Competition Policy and Explanatory Document.
9. The current document provides an overview of the responses by market players to the consultation and the Authority's response.
10. Vodafone and Ooredoo have both submitted responses.[3] In the following sections, these will be referred to as "Vodafone's response to the Draft Competition Policy" and "Ooredoo's response to the Draft Competition Policy", respectively.

[2] Notice of the Standards, Methodology and Analysis to be applied in the Review of Market Definition and Dominance Designation and for Ex post Competition Investigations in the Telecommunication Sector in Qatar.

[3] Vodafone's submission to the Communications Regulatory Authority's ("CRA") consultation document on Draft Competition Policy dated 20 May 2015 ("Consultation Document"); Ooredoo submission on the DRAFT COMPETITION POLICY, Reference CRA 2015/05/20 00.

2 General comments

2.1 Policy objective

2.1.1 The Authority's view as expressed in the CD

11. The Draft Policy states that the key objective of the Competition Policy *"is to encourage and support an open and competitive Information & Communications Technology (ICT) sector that provides advanced, innovative, and reliable communications services in the State of Qatar."*[4]

2.1.2 SP's Responses to the CD

12. *"Ooredoo recommends that the competition policy have a primary objective which is to promote "the long-term interests of consumers' in acquiring and using communications services and applications / content accessible using those services, achieved through innovation, investment, sustainable competition and growth of the communications markets over the long-term"."*[5]
13. Vodafone has not provided any comments on the policy objective.

2.1.3 The Authority's Comments and Conclusion

14. The Authority notes that the objective of the Competition Policy relates directly to the stated objectives of the Authority. The Authority does not consider it is necessary to amend its objectives as part of the Competition Policy.

2.2 Regulatory and institutional framework

2.2.1 The Authority's view as expressed in the CD

15. The Draft Policy points out that ex ante and ex post regulatory instruments are distinct and mostly complementary. Ex ante instruments are covered in separate regulatory processes (including Market Definition and Dominance Designation). MDDD related ex ante instruments are applicable to those service providers who the Authority concludes are dominant in relevant markets and where there is a significant risk that, absent intervention there is a Dominant Service Providers could exploit market power or attempt to exclude rivals or potential rivals.
16. The Draft Policy does not refer to any procedures for authorizing in advance specific conduct that may bring benefits to the public.

2.2.2 SP's Responses to the CD

17. Ooredoo and Vodafone express concerns regarding the Authority's ability to handle ex post regulation:

[4] CRA, Draft Competition Policy dated 20 May 2015, section 1.
[5] Ooredoo's submission to the Draft Competition Policy, para. 1.43.

17.1 Ooredoo is concerned about the *"current inadequateness of resources and skillsets within the CRA, in relation to competition economics and law"*;6

17.2 Vodafone feels that *"[c]urrently the CRA is not sufficiently resourced and experienced to handle ex-post investigations across all areas of the telecoms market."* and recommends a transition period of 12 months.[7]

17.3 Ooredoo considers that an independent competition authority or separate teams within the Authority should be used for ex post and ex ante regulation in order to strike an appropriate balance between both types of regulation.[8]

18. Ooredoo notes that currently the institutional framework in Qatar is lacking an appropriate process of appeal – the current system (through Administrative Courts in Qatar) is deemed to involve a long process and Courts that lack the economic expertise. Given this, *"Ooredoo urges the CRA to cooperate with the Ministry, to reinstate the independent Appeal Committee as soon as possible, and in any case before the CRA starts exercising its ex post competition powers".*[9]

19. Ooredoo advises the Authority to establish *"an authorization regime that allows parties to engage in certain types of conduct if the public benefits associated with that conduct outweighs the anti-competitive harm."*[10]

20. Ooredoo also feels that the Authority has not explained its rationale for using the Competition framework within the European Union as a basis for the Competition Policy in Qatar.[11]

21. Finally, Vodafone feels that Ooredoo's dominance in non-telecommunications markets and the ubiquity of Triple Play offers necessitate that the Authority is granted the right to investigate such bundled products as well.[12]

2.2.3 The Authority's Comments and Conclusion

22. Regarding Vodafone's and Ooredoo's concerns in relation to the capacity of the Authority to handle ex post regulation:

22.1 The Authority considers that it has the internal capacity to implement and administer the Competition Policy. But it notes that across the sector all stakeholders will have to build capacity and capabilities to implement a more ex post approach to regulation.

22.2 The Authority does not consider that separate organizations or teams are necessary for implementing ex post and ex ante regulation. Many other national regulatory authorities deal with both ex post or ex ante procedures using the same team, including other GCC telecommunication regulators.

22.3 With regard to Vodafone's suggestion for a 12 month transitionary period, the Authority notes that the Competition Policy is an articulation of the current law (as determined by Telecommunications Law No 34 2006 and the Telecommunication By-Law No 1 2009) and therefore a 12 month transition

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[6] Ooredoo's submission to the Draft Competition Policy, para. 1.6 et seq.
[7] Vodafone's submission to the Draft Competition Policy, para.1.3.
[8] Ooredoo's submission to the Draft Competition Policy, para. 1.10.
[9] Ooredoo's submission to the Draft Competition Policy, para. 1.19, 1.21.
[10] Ooredoo's submission to the Draft Competition Policy, para. 1.44 and 1.48.
[11] Ooredoo's submission to the Draft Competition Policy, para. 1.30.
[12] Vodafone's submission to the Draft Competition Policy, para. 3.2.

period would be inappropriate. Indeed, the Authority notes that this Policy is not introducing new regulatory measures or obligations on the Service Providers, but is rather providing clarity on obligations which have always been in place since the Telecommunications Law came into effect.

23. In relation to the appeals framework, The Authority notes that operators can appeal any of its decisions before an Administrative Court. Instituting a new court or appeals process does not fall within the jurisdiction of the Authority.

24. The Authority recognizes that in relation to anti-competitive agreements, in order to provide greater transparency and certainty, in some cases, parties may benefit from being able to ask Authority for advice on its likely approach and consideration of a potentially anti-competitive agreement prior to making the agreement. The Authority therefore agrees that, in the case of difficult or contentious agreements where there is a reasonable degree of uncertainty over whether it is prohibited by the regulatory framework, the parties may ask the Authority to give an opinion on its likely approach and methodology to assessing that behaviour. The Authority may then choose to provide such advice, which will be provided in an open and transparent manner. However, parties should note that this advice does not amount to a Decision, and that the Authority is not compelled to provide advice.

25. Furthermore, this should not be interpreted as an obligation on firms to request approval for all of their agreements.

26. The Authority has not specifically followed any particular international legal systems in drafting its Competition Policy. Rather it has reviewed and applied international best practice in the context of the Qatari market and institutional frameworks.[13]

2.3 General procedure for making and investigating complaints

2.3.1 The Authority's view as expressed in the CD

27. The Ex-Post Investigation Procedures published by the Authority sets out the Authority's approach to investigating complaints and provides instructions on how to make a complaint. For this reason, the Competition Policy does not cover any procedures for handling ex-post investigations into anti-competitive conduct, other than the assessment methodology for the investigation of possible anti-competitive conduct or the competitive impact of MEA activity.

2.3.2 SP's Responses to the CD

28. Ooredoo explicitly requests that only evidence based complaints that are sufficiently substantiated should be allowed and that an explicit note on the negative effects of vexatious complaints should be included in the policy:

28.1 Ooredoo states that *"[t]he alleging party should first have standing, if so proven, share part of the burden of proof with the CRA, in the sense that the alleging party must provide sufficiently complete and robust quantitative evidence as part of any complaint*";[14]

[13] See Telecoms Law, Article 45 and Telecoms By-Law, Article 75.
[14] Ooredoo's submission to the Draft Competition Policy, para. 1.29.1.

28.2 "*Ooredoo believes that the competition policy framework and/or the Procedures document should clearly indicate that lack of sufficient evidence will cause the complaint to be dismissed and that repeated allegations of anticompetitive behaviour by a competitor which are not substantiated by appropriate evidence could trigger some form of punishment*."[15]

28.3 Ooredoo states that the burden of proof that anti-competitive behavior has occurred should, however, remain with the Authority, which has powers to request data from parties alleged of anti-competitive behavior.[16]

28.4 Furthermore, "*Any finding of anticompetitive behavior can only be reached if this is supported by robust, complete and through quantitative analysis*."[17]

29. Vodafone does not provide any explicit comments related to the general procedure for making a complaint.

2.3.3 The Authority's Comments and Conclusion

30. The Authority notes that the procedure for making a complaint is not part of the Competition Policy. That said, it agrees that complainants should provide supportive evidence when making complaints and it will be more likely to investigate where supporting evidence is supplied. The Authority will determine whether to pursue a complaint based on the facts and the context of the complaint. However, the Authority does not see any merit in specifically punishing vexatious complaints. In cases of repeatedly unsubstantiated submissions, the Authority may refuse to accept submissions that do not fulfil a pre-determined threshold.

31. The Authority agrees with Ooredoo that the burden of proof for finding actual or likely anti-competitive effects lies with the Authority and not with the defendant or the complainant. The Authority will judge on the balance of probabilities whether the evidence is sufficient. However, where parties under investigation wish to claim that such conduct should be permitted as a result of the efficiency benefits that it creates, the burden of proof will be on the party subject to the investigation to prove such efficiencies.

32. In relation to Ooredoo's suggestion that any finding of anti-competitive behaviour should only be made if robust, complete and thorough quantitative analysis supports it, the Authority agrees that it will make its decisions based on its assessment of the evidence on the balance of probabilities.

2.4 The concept of "lessening of competition"

2.4.1 The Authority's view as expressed in the CD

33. When defining the concept of the lessening of competition, the Draft Competition Policy notes that the concept involves both actual and potential reduction of the level of competition:

33.1 "*The concept of "lessening of competition" implies the actual or potential reduction in the level of competition between entities. Both actual and potential*

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[15] Ooredoo's submission to the Draft Competition Policy, para. 1.25.
[16] Ooredoo's submission to the Draft Competition Policy, para. 1.27.
[17] Ooredoo's submission to the Draft Competition Policy, para. 1.29.3

competition are important constraints on a firm's behavior in a competitive market, although one factor may be more important than the other, depending on the circumstances."[18]

33.2 "*It is not necessary to find that a dominant firm intended to abuse its dominant position to find that it has infringed the prohibition on abuse of a dominant position. Furthermore, the Authority will not only look into behaviour that has caused actual competitive injury but also in conduct which is likely to unreasonably lead to anti-competitive foreclosure*."[19]

2.4.2 SP's Responses to the CD

34. Ooredoo's suggests that the Authority should only consider conduct that had the *intent* to harm competition and when evaluating a potentially harmful conduct, consider only actual, but not potential effects on competition:

34.1 When discussing collective boycott, Ooredoo suggests to include in the Policy a single threshold that considers the purpose / intent of the agreeing parties[20];

34.2 Ooredoo also suggests that any abuse of market power should be subject to a purpose-based test demonstrating that the conduct has the purpose of substantially lessening competition in the communications market;[21]

34.3 Finally, "*Ooredoo stresses that rigorous quantitative analysis is necessary on behalf of the alleging party and the CRA to prove that the agreement has resulted in a substantial lessening of competition and consumer harm*."[22]

35. Vodafone does not provide any explicit comments related to the definition of lessening of competition.

2.4.3 The Authority's Comments and Conclusion

36. The Authority notes that it is not in line with international best practice to include a requirement that any infringing anti-competitive behaviour shall have necessarily had the ***intent*** of being anti-competitive. The tests set in the Competition Policy are objective standards of conduct, and do not relate to the subjective intent of the parties.

37. With regard to the effects of the investigated conduct, the Authority notes that both actual and potential effects are relevant. If a finding of infringement were found only where actual effects had already been felt, then it would imply a non-infringement decision even where there is a serious risk of the conduct creating anti-competitive harm in the future. This would potentially impose costs on the sector and on consumers, as the Authority could only intervene where the effects had already been felt. Therefore, in assessing the effects of the conduct, the Authority could find an infringement based on actual effects or a likelihood of potential effects.

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18 CRA, Draft Competition Policy dated 20 May 2015, section 2.
19 CRA, Draft Competition Policy, dated 20 May 2015, section 3.1.
20 Ooredoo's submission to the Draft Competition Policy, para. 3.15.
21 Ooredoo's submission to the Draft Competition Policy, para. 1.35 et seq.
22 Ooredoo's submission to the Draft Competition Policy, para. 3.23.4.

3 Approach to Market Definition and Dominance Designation

3.1 Approach to definition of Candidate Markets and assessment of Dominance

3.1.1 The Authority's view as expressed in the CD

34. The Authority sets out its approach to defining markets in the draft "Standards, Methodology and Analysis to be applied in the Review of Market Definition and Dominance Designation and for Ex Post Competition Policy Investigations in the Telecommunication Sector in Qatar" (the "Methodology Document")[23]. The document describes the evidence and analytical approach that the Authority would use in assessing the market.

35. The Authority notes that *"Two key dimensions are considered during the process:*

    a. the relevant product dimension (also regarded as a service market in the telecommunications context), and

    b. *the relevant geographical dimension of each relevant product markets."*[24]

36. It defines markets which have *"similar supply and demand-side competitive constraints"*[25] based on both the product and geographic dimensions.

3.1.2 SP's Responses to the CD

37. Vodafone *"has no objection to the tests used for the identification of candidate markets. The tests mentioned are standard market identification tests used in the European Union and elsewhere."*[26]

38. Ooredoo notes that "*The CRA appears to consider it sufficient for two or more products to be sold together in bundles to be considered part of the same candidate market*."[27]

39. Ooredoo adds that the Authority should not consider "*homogeneous market conditions*" and instead should only consider "[p]*roduct substitutability and other factors need also to be considered… appropriate consideration of demand-side substitutability is fundamental for the correct application of the market definition process.*"[28]

40. It further notes that "*defining geographic markets would be excessively complex and, considering the significant variations in competitive conditions across the country, it invites the CRA to reconsider this issue and provide a more detailed and evidenced assessment to support its conclusions*."[29]

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[23] Annexure 1 of the consultation on the Competition Policy.
[24] Methodology document page 5
[25] Methodology document page 6
[26] Vodafone's submission to the Draft Competition Policy, para. 2.2.
[27] Ooredoo's submission to the Draft Competition Policy, para. 2.7.3.
[28] Ooredoo response 2.7.4
[29] Ooredoo response 2.7.1

3.1.3 The Authority's Comments and Conclusion

41. The Authority sets out its approach to defining markets with bundles in its Statement on the responses to its MDDD consultation.[30] The Authority notes that it does take into account product substitutability in its market definition approach. Nonetheless, in defining markets for ex-ante purposes, it can be relevant to group together products and services which have similar competitive conditions for the purposes of defining a limited number of practical markets where competitive conditions are broadly homogeneous. The Authority therefore concludes in its 2015 MDDD decision document that "*if the competitive conditions of each of the elements of a bundle are similar then it may be practical and proportionate to define the market around the bundle rather than each element of the bundle*".[31]

42. In relation to geographic markets, the Authority will assess markets on a case by case basis depending on the facts and economic context of the issue being examined. In some cases, national markets may be appropriate, in other cases, it may be necessary to assess markets on a sub-national basis using the standard tools of competition policy as set out in the Methodology document.

3.2 Approach to assessing Dominance in an Ex Post Investigation

3.2.1 The Authority's view as expressed in the CD

43. The Authority states that "*the dominance assessment for an ex post investigation may not necessarily correspond precisely to a dominance assessment made for ex ante purposes. One reason for this is the different temporal perspectives of each assessment. An ex post assessment is backward looking based on what has occurred*."[32]

44. The Authority analyses "*the defined Relevant Markets in a quantitative and qualitative respect to determine whether dominance exists in such Relevant Markets. The Authority analyses the extent to which an SP, acting alone or jointly with others, is in a position to behave to an appreciable extent independently of customers or competitors.*"[33]

45. The Authority adds that "*market shares could serve as a key indicator in a number of cases and in the absence of other compelling evidence they are in itself conclusive to designate a SP as having a dominant position*." [34]

3.2.2 SP's Responses to the CD

46. Ooredoo voices its concern that "*the CRA is suggesting that it is possible to reach conclusions on dominance on the basis of market shares alone, without*

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30 See paragraphs 18 to 18.4 of the MDDD response document.
31 MDDD response document Paragraph 18.4
32 Draft Competition Policy section 3.3.2
33 Methodology document section 2.
34 Methodology document section 4.2.

the need for additional evidence or analysis"[35]. It mentions that the "*the 40% market share threshold used by the CRA for presumed dominance is too low*"[36] and that "*various cases show how market shares are not the only variable taken into account by Authorities in the assessment of dominance*."[37]

47. Ooredoo raises a concern that the phrase *"in the absence of compelling evidence*" could be interpreted as an indication that the Authority might not perform an appropriate and thorough analysis of all available evidence. Ooredoo expects the Authority to take into account prices (and their evolution), profitability, entry and expansion, product variety and innovation when assessing market power. [38]

48. Ooredoo believes that the forward looking perspective cannot be excluded from the overall framework, and that considerations on the potential threat of entry or on supply substitutability would not be taken into account unless a forward looking perspective was also considered in the analysis. Thus, the Authority should clarify this aspect, establishing what time perspective will be adopted in the relevant market assessment.[39]

49. Vodafone notes that in assessing dominance *"individual case-by-case assessments are not necessary or appropriate given the size and structure of the Qatar telecoms market."*[40] Vodafone suggests adopting the EU approach of "periodic assessment of markets" to determine dominance[41].

3.2.3 The Authority's Comments and Conclusion

50. In assessing dominance, the Authority analyses the factors mentioned by Ooredoo, among the others mentioned in the Methodology Document, such as economies of scale and scope, and countervailing buyer power, as part of its assessment. Nonetheless, the Authority maintains that market shares are an important indicator of market power and that if there is insufficient evidence provided relating to other factors, it will rely on using market share information to designate a SP as having a dominant position. This is in accordance with Article 72 of the Executive By-Law, which establishes a 40% market share threshold for deeming an individual SP as a DSP, in the absence of evidence to the contrary.

51. In relation to the use of a backward looking test which considered dominance at the time of conduct being investigated, the Authority notes that it will consider whether at that time of the conduct being investigated, potential competition constrained suppliers in the market. Therefore, in the case of *potential competition*, the Authority will consider whether, at the time of the conduct under investigation, the threat of potential competition was sufficient to provide a competitive constraint on suppliers in that market.

52. The Authority disagrees with Vodafone that case by case assessments are not necessary. As noted in in the draft Competition Policy, ex post assessments of

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35 Ooredoo's submission to the Draft Competition Policy
36 Ooredoo response paragraph 2.23.
37 Ooredoo response paragraph 2.24.
38 Ooredoo response 2.17.
39 Ooredoo response 2.22.
40 Vodafone response 1.4.
41 Ibid.

dominance may differ from ex ante assessments. Therefore the Authority will conduct ex post assessments on a case by case basis.

53. The Authority confirms that it may periodically review ex ante markets in exercising its duties under the law.

3.3 Application of the Three Criteria Test

3.3.1 The Authority's view as expressed in the CD

54. The Authority notes that the TCT will be used to assess whether a market is susceptible to ex-ante regulation. The Authority notes that the third criterion of this test measures "*whether existing (ex post) competition law is sufficient to address any potential anti-competitive practice in the market under consideration*".[42]

3.3.2 SP's Responses to the CD

55. Vodafone expresses concerns that the move from ex ante to ex post regulation;[43]

- had not been the object of public discussion;
- may be problematic in a market that is not fully liberalized; and
- if warranted, such a move *"should be implemented on a phased basis".*

56. Specifically, *"Vodafone has two primary concerns regarding the approach set out in the Consultation Document: (i) it will not be an effective means of ensuring ongoing effective competition in the telecoms markets in Qatar; and (ii) ex post investigations will take significant time and resources before addressing the competitive harm."*[44]

57. Vodafone also considers that *"for the CRA to move to the TCT, the Telecommunications Law will need to be revisited and amended accordingly as it contains automatic remedies that need to be imposed once a Service Provider is found to have SMP"*.[45]

58. Vodafone also notes that the third criterion cannot be passed purely as a result of the implementation of an Ex Post Competition Policy. This is because the Policy must be tested before it can be adjudged to be sufficient to deal with anti-competitive practice. It adds that until then, *"it is Vodafone's view that effective dispute resolution; implementation and enforcement of the ARF have been and remain a major concern and impediment to effective competition in Qatar."*[46]

59. More generally, Vodafone raises concerns about the approach. Primarily, these are that *"(i) it will not be an effective means of ensuring ongoing effective competition in the telecoms markets in Qatar; and (ii) ex post investigations will*

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[42] Methodology document section 2.
[43] Vodafone's submission to the Draft Competition Policy, para. 1.1 et seqq.
[44] Vodafone's submission to the Draft Competition Policy, para. 2.8.
[45] Vodafone response 2.1.
[46] Vodafone response 2.4.

take significant time and resources before addressing the competitive harm." [47] Vodafone adds that it believes ex-ante regulation is still necessary, that the CRA has not set out the tests and criteria used, and that the remedial powers are not sufficient.[48]

60. Ooredoo recommends a four-step approach to assess markets which is "*consistent with the European framework*"[49]. These are: Step 1: Define the markets at the retail level.; Step 2: For each retail market, identify whether the market is competitive in the absence of wholesale regulation. Step 3: If the retail market is not competitive, identity wholesale inputs and define wholesale remedies. Step 4: Reassess retail markets in light of wholesale remedies. Once ex-ante regulation at the wholesale level is defined, the retail markets should be reassessed, this time in light of the wholesale regulation.

3.3.3 The Authority's Comments and Conclusion

61. The Authority notes that the TCT is used to determine whether a market is susceptible to ex-ante regulation (and hence whether it is a relevant market for a dominance assessment). It does not in itself imply SMP, and therefore no automatic remedies are enforced solely if a market meets the three criteria.

62. Ex Ante regulation is only removed in those markets where the Authority judges that there is a strong tendency towards competition, where barriers to entry are not high, and where ex post regulation is proportionate and practicable to implement. In other markets, where ex ante regulation is maintained, ex post regulation will be complementary.

63. The Authority does not consider that the Telecommunications Law needs to be amended in order to incorporate the TCT. The Authority has consulted on the use of the TCT in 2014, and again in the MDDD and Competition Policy consultations of 2015. Therefore, as set out in the statement of the responses to the MDDD consultation, it has the authority to incorporate the TCT in its approach. The Telecommunication Law No 34 2006 and the Telecommunication By-Law No 1 2009 include explicit provisions regarding ex post regulation. The Authority is attending to those provisions by developing an explicit framework on how they should be applied.

64. The Authority does consider that the Competition Policy needs to be tested before applying the TCT. The Competition Policy is merely an articulation of the existing law in Qatar, intended to provide greater clarity and transparency to stakeholders. The Authority notes Vodafone's concerns relating to the enforcement of the regulatory framework, but these are not directly related to the Competition Policy.

65. As noted in in the draft Competition Policy, ex post assessments of dominance may differ from ex ante assessments. Therefore the Authority will generally conduct ex post assessments on a case by case basis.

66. In relation to Ooredoo's four step approach to the assessment of market conditions as set out in the MDDD response document, the Authority agrees that, in common with the EU, the purpose of applying the TCT in the Qatari

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47 Vodafone response 2.8.
48 Vodafone response 2.8.
49 Ooredoo response paragraph 2.9

context is to ensure that remedies can be aimed at fundamental bottlenecks. Where the Authority applies the TCT in a market where barriers to entry are high or the tendency to competition is unlikely, the Authority will then, in addition, consider whether existing ex ante wholesale remedies are sufficient to mitigate the concerns.

4 Conduct, arrangements or concerted practices that constitute "anti-competitive practices"

4.1 Approach to defining agreements and concerted practices

4.1.1 The Authority's view as expressed in the CD

67. The Draft Competition Policy defines agreements and concerted practices broadly – *"as any form of arrangement or commitment between two or more parties that express their **joint intention** to conduct themselves in the market in a specific way. […] There must be a consensus between the parties involved related to what conduct is expected from each of them."*[50] It follows that it is not required for companies to have effectively followed the content of the arrangement for it to be deemed anti-competitive.

68. The Authority has adopted a broad definition of undertaking, including any body, corporate or partnership, unincorporated association, or person engaged in an economic activity.

In the Draft Competition Policy the Authority posed the following question:

Question 1	Do consultees agree that the prohibition of anti-competitive conduct can apply to agreements between independent undertakings, and are there other forms of conduct that the prohibition should apply to? If not, please provide a comprehensive and evidenced justification for your position.

4.1.2 SP's Responses to the CD

69. Regarding the scope of the Policy, Ooredoo notes *"that for a conduct to be investigated as potentially anti-competitive, it is necessary to demonstrate that the parties have an explicit agreement, be it formal or informal, to behave jointly in a particular way."*[51]

70. As regards to the relationship of parties involved in an agreement and concerted practice, both Ooredoo and Vodafone agree with the Authority that anti-competitive conduct can apply only to agreements between independent undertakings.[52]

4.1.3 The Authority's Comments and Conclusion

71. The Authority notes that the Competition Policy should not be restricted to "explicit agreements". The Authority notes that joint intention can take place in

[50] CRA, Draft Competition Policy, dated 20 May 2015, section 2.2.
[51] Ooredoo's submission to the Draft Competition Policy, para. 3.3.
[52] Ooredoo's submission to the Draft Competition Policy, para. 3.2; Vodafone's submission to the Draft Competition Policy, para. CQ1.

the form of implicit agreements and concerted practices, which can also have the effect of preventing or substantially lessening competition.

4.2 Forms of agreements which could be considered to prevent or substantially lessen competition

4.2.1 The Authority's view as expressed in the CD

72. The Draft Competition Policy distinguishes between agreements that have the restriction or distortion of competition as their purpose – anti-competitive agreements "by object", and other agreements that result in a prevention or substantial lessening of competition – anti competitive agreements "by effect". It specifies that agreements in the first category will be deemed to be anti-competitive by the very nature of the agreement, while agreements in the second category will be assessed individually to determine whether they are capable of anti-competitive effects.

4.2.2 SP's Responses to the CD

73. In relation to anti-competitive agreements by object:

- Ooredoo and Vodafone both note that it remains unclear which agreements will be considered anti-competitive by object rather than by effect[53];
- Ooredoo also requests that Agreements that are "*anti-competitive by object*" should be referred to as "*anti-competitive by purpose/intent*"[54].

74. "*Vodafone also urges the CRA to ensure the competition policy is reflective of the structure of the Qatari market, including in relation to agreements that have to date been sanctioned by the CRA (either by decision or conduct). Vodafone requests the CRA provide further detail on its intended approach to these types of agreements.*"[55]

4.2.3 The Authority's Comments and Conclusion

75. Regarding the clear distinction between anti-competitive agreements by object and by effect, section 2.4 of the Draft Competition Policy notes that agreements that may restrict competition by object include price fixing, output limitation, sharing of markets and customers, and agreements for fixed and minimum resale price maintenance. It notes that this list is not exhaustive.

76. The Authority does not agree that the prohibition on anti-competitive agreements should apply to agreements only where the parties intended or had the purpose to restrict competition. The test underlying the prohibition is an objective one: whether the agreement had the object or effect of restricting competition. The intention of the parties when applying the test is not relevant.

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[53] Ooredoo's submission to the Draft Competition Policy, para. 3.4; Vodafone's submission to the Draft Competition Policy, para. 3.1.

[54] Ooredoo's submission to the Draft Competition Policy, para. 3.4.

[55] Vodafone's submission to the Draft Competition Policy, para. 3.1.

77. The Authority does not see any merit in redrafting the prohibition of anti-competitive agreements by "object" to be instead anti-competitive by *"purpose/intent"*.

78. The Authority does not see a need to provide special guidance to agreements which the CRA has previously sanctioned. The Competition Policy will apply in the same way to all agreements.

4.3 Horizontal agreements

4.3.1 The Authority's view as expressed in the CD

79. The Draft Competition Policy defines horizontal agreements as agreements and concerted practices between undertakings which operate at the same level of the production or distribution chain. It sets out that the following forms of horizontal agreements could be anti-competitive, either by object or effect:

- price / output fixing;
- market sharing;
- fixing of trading conditions;
- bid rigging;
- information sharing;
- group boycott; and
- joint purchasing.

80. The list of horizontal agreements that may be anti-competitive is not exhaustive.

4.3.2 SP's Responses to the CD

81. Ooredoo suggests that production agreements and agreements on commercialization should be included in the list of horizontal agreements, or alternatively that the Policy should state explicitly that the list is non-exhaustive.[56]

82. In relation to anti-competitive agreements by object Ooredoo notes that:

82.1 "[...] *the only horizontal agreements that might be considered anticompetitive by object are price fixing, market sharing, limiting output, bid rigging and sharing of information on future prices. All other conducts need to be assessed on a case by case basis*."[57]

82.2 "*Anticompetitive effects of joint purchasing should […] be judged on a case by case basis.*"[58]

82.3 It notes that fixing of trading conditions is not anti-competitive by object, for example, fixing of technical conditions may serve the interoperability of services[59]; and

[56] Ooredoo's submission to the Draft Competition Policy, para. 3.8.
[57] Ooredoo's submission to the Draft Competition Policy, para. 3.9.
[58] Ooredoo's submission to the Draft Competition Policy, para. 3.16.
[59] Ooredoo's submission to the Draft Competition Policy, para. 3.12.

82.4 It requests that the Authority clearly explains what kind of information sharing could be prohibited and make clear that information sharing is not prohibited per se[60].

83. In relation to the remaining horizontal agreements:

83.1 Ooredoo "*agrees that bid rigging could harm competition*"[61];

83.2 It also agrees that collective boycott may harm competition, but notes that the specific factors that lead to parties collectively boycotting certain suppliers or customers, such as security concerns, must be given adequate consideration[62];

83.3 It recommends the introduction of a single threshold test for collective boycott, based on purpose / intent[63]; and

83.4 It requests that in relation to market partitioning, the Authority should take into account that current market partitioning of the Qatari fixed telecommunications market along a geographic line is the result of the historical evolution of network roll-out[64].

84. Vodafone does not provide any specific comments in relation to horizontal agreements.

4.3.3 The Authority's Comments and Conclusion

85. Regarding Ooredoo's suggestion to include production agreements and agreements on commercialization, the Authority explicitly states in section 2.3 of the Draft Competition Policy that the list of potentially non-competitive agreements is not exhaustive and reiterates this in section 2.6.

86. In line with Ooredoo's suggestion, the Draft Competition Policy states in section 2.4 that agreements in relation to price fixing, output limitation and sharing of markets and customers will be considered anti-competitive by object. The Draft Policy also states that fixing of trading conditions, information sharing and joint purchasing agreements are not prohibited per se and provides examples of when they may be justified.[65] It also clearly states that information sharing related to confidential, commercially sensitive strategic information is prohibited per se and thus provides examples of information sharing that may constitute anti-competitive conduct.[66] The Authority will investigate any other information sharing on a case-by-case basis.

87. The Authority considers group (or collective) boycott to be generally anti-competitive by object[67].

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60 Ooredoo's submission to the Draft Competition Policy, para. 3.14.
61 Ooredoo's submission to the Draft Competition Policy, para. 3.13.
62 Ooredoo's submission to the Draft Competition Policy, para. 3.15.
63 Ooredoo's submission to the Draft Competition Policy, para. 3.15.
64 Ooredoo's submission to the Draft Competition Policy, para. 3.11.
65 CRA, Draft Competition Policy dated 20 May 2015, sections 2.5.3, 2.5.5, and 2.5.7.
66 CRA, Draft Competition Policy dated 20 May 2015, section 2.5.5.
67 This is supported by international practice. See, for example, European Commission (2014) "Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice", 25.06.2014.

88. The Authority may consider security concerns as a mitigating factor in its assessment of the remedies to a finding of an infringement as a result of collective boycott.

89. In relation to market partitioning, the Authority recognizes that there are different market conditions in different geographic areas and will take that into account when defining markets and assessing competitive conditions in the markets.

4.4 Vertical agreements

4.4.1 The Authority's view as expressed in the CD

90. The Draft Competition Policy defines vertical agreements as agreements and concerted practices between undertakings, which operate at different levels of the production or distribution chain. The Authority expressed the opinion that *"[g]enerally, vertical agreements are less likely to have anti-competitive effects than horizontal agreements because they relate to different parts of the production and distribution chain."*[68] It also noted that vertical agreements can bring about many benefits.

91. The Draft Competition Policy describes the following common forms of vertical agreements which the Authority considers could be likely to prevent or substantially lessen competition and notes that the list is not exhaustive:

- exclusive distribution agreements;
- single branding;
- retail price maintenance;
- limited distribution; and
- market partitioning.

4.4.2 SP's Responses to the CD

92. In relation to the general approach to vertical agreements, "*Ooredoo does not agree with the CRA that vertical agreements are less likely to generate anti-competitive concerns*."[69]

93. Regarding the specific vertical agreements as defined in the Draft Competition Policy:

93.1 Ooredoo agrees that exclusive distribution agreements can have a negative effect on competition and expresses concerns about exclusive distribution agreements where one of the parties is dominant in a regional market or in a specific product market[70];

93.2 It notes that "*While Ooredoo agrees that limited distribution agreements might have anticompetitive effects, it believes that the CRA should also take into account the characteristics of the product being sold and whether these would benefit from limited distribution*"[71];

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[68] CRA, Draft Competition Policy dated 20 May 2015, section 2.6.
[69] Ooredoo's submission to the Draft Competition Policy, para. 3.17.
[70] Ooredoo's submission to the Draft Competition Policy, para. 3.18.
[71] Ooredoo's submission to the Draft Competition Policy, para.3.21.

94. Ooredoo requests that the Authority investigates market partitioning on a case-by-case basis[72];

95. Ooredoo requests that the Authority considers ex ante regulation and regulated prices in particular when discussing Retail price maintenance[73]; and

96. Ooredoo asks that the Competition Policy should explicitly distinguish between single branding and franchising and exclude franchise agreements from its scope[74].

97. Vodafone does not provide any specific comments in relation to vertical agreements.

4.4.3 The Authority's Comments and Conclusion

98. The Authority maintains that vertical agreements are less likely than horizontal agreements to have anti-competitive effects because the agreeing parties are usually not in direct competition with each other. This does not mean that the Authority cannot conclude that a vertical agreement prevents or substantially lessens competition.

99. In relation to the specific types of agreements listed:

99.1 The Authority notes in section 2.6.1 of the Draft Competition Policy that it will consider exclusive distribution agreements when at least *"one of the parties is dominant in the respective market"*. As the CRA will undertake a regional and product market definition during the investigation process, the Policy already addresses the concern that Ooredoo raises;

99.2 The Authority agrees that depending on the characteristics of the product or service being provided, some vertical agreements may create efficiency gains that outweigh their competitive effects. When examining the effects of the conduct, the Authority makes its assessment given the legal and economic context of the agreement in question, including an assessment of the nature of the product. The Authority has therefore updated the Competition Policy to make this clear. At the same time, the Authority notes that involved parties can refer to any specifics of the product to substantiate an efficiency defense of otherwise anti-competitive practices under section 2.8 of the Draft Competition Policy.

99.3 The Draft Competition Policy makes it clear that the Authority will investigate all vertical agreements that do not prevent or substantially lessen competition by their object on a case-by-case basis[75];

99.4 The Authority notes that regulated prices are not agreements between independent parties and therefore not in the scope of the Competition Policy; and

99.5 With respect to the distinction between single branding and franchising[76], The Authority agrees that single-branding agreements can be distinct from

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[72] Ooredoo's submission to the Draft Competition Policy, para.3.22.
[73] Ooredoo's submission to the Draft Competition Policy, para.3.20.
[74] Ooredoo's submission to the Draft Competition Policy, para.3.19.
[75] CRA, Draft Competition Policy dated 20 May 2015, section 2.6.
[76] Franchise agreements are normally "closed distribution" agreements where the supplier (the Franchisor) provides marketing, and branding which all franchisees must adopt. The Franchisor usually requires extensive controls over the supply system to maintain the value of the brand and marketing supplied.

franchise agreements, which are not necessarily anti-competitive, and has updated the Competition Policy accordingly.

4.5 Approach to assessing agreements and concerted practices that may restrict competition

4.5.1 The Authority's view as expressed in the CD

100. The Draft Policy explains that agreements and concerted practices which are anti-competitive by object are prohibited regardless of their actual effect on competition.

101. The Draft Policy explains how the Authority will evaluate the actual effects of arrangements which may prevent or substantially lessen competition by effect, by specifically looking into:

- the nature of the agreement and the market;
- the market position of parties to the agreement; and
- the market position of competitors and buyers of the products or services that are the object of the agreement.

101.1 The Draft Policy also notes that certain agreements may fall outside the application of the Policy and be assumed not to prevent or substantially lessen competition if they fulfil certain criteria regarding the size of the agreeing parties, i.e. "de minimis threshold". The thresholds are as follows:

- for anti-competitive agreements by object, the undertakings should have market share lower than 5% of the relevant market and make an annual revenue lower than 1 million QAR in the relevant market;
- for horizontal agreements which may be anti-competitive by effect, market share jointly held by the undertakings should not exceed 10% on any of the relevant markets affected by the agreement; and
- for vertical agreements which may be anti-competitive by effect, the market share held by each of the undertakings should not exceed 10% on any of the relevant markets affected by the agreement.

In the Draft Competition Policy the Authority posed the following questions:

Question 2 Do consultees agree with the approach to assessing whether agreements are prohibited as they amount to anti-competitive conduct? If not, please provide a comprehensive and evidenced justification for your position.

Question 3 Do consultees agree with the approach to identifying de minimis agreements where no anti-competitive effect can be presumed? If not, please provide a comprehensive and evidenced justification for your position.

4.5.2 SP's Responses to the CD

102. Regarding the explicit prohibition of agreements and concerted practices which are anti-competitive by object, *"[...] Ooredoo believes that the CRA should consider that prohibitions of conducts "per se", i.e. by object, should be deleted or be limited as much as possible."*[77]

103. Regarding the factors which the Authority would analyze:

103.1 Vodafone does not have any objections to the approach[78];

103.2 Ooredoo notes that "*The market position of competitors, whilst a relevant factor, should never be taken as an excuse to justify or allow anti-competitive behavior*."[79] and

103.3 Ooredoo requests that the nature of the product is considered when the Authority investigates allegations of anti-competitive agreements[80].

104. Regarding the de minimis rule, Vodafone does not express any objections[81], while Ooredoo makes the following comments:

- Ooredoo expresses concerns regarding the application of the 10% threshold in relation to national market definition[82];
- it notes that excluding the smallest operators from competition law is not appropriate to Qatar's environment, where with only three operators, competitive dynamics can quickly change[83];
- it also states that *"[t]he policy also deviates from the practice in the EU with regards to having a threshold for certain offences. In the policy it is stated that for agreements which are anti-competitive by object, the Policy excludes those with market share of less than 5% and make annual revenue lower than 1 million QAR in the relevant market. In comparison the 2001 De Minimis Notice from the EC only applies to those agreements that do not contain price fixing, limitation of output/sales and the allocation of markets/customers. The EU guidelines also specify equivalent agreements between non-competitors that will result in the threshold not applying. The general threshold would then apply for other forms of by object anti-competitive agreements."*[84]

4.5.3 The Authority's Comments and Conclusion

105. The prohibition against anti-competitive conduct by object is in line with international best practice. Such conduct is highly likely to prevent or substantially lessen competition and harm consumers in the long run because of its purpose. Therefore, the Authority will prohibit such conduct. The definition of conduct that is anti-competitive by object is already limited and is line with international best practice.

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77 Ooredoo's submission to the Draft Competition Policy, para. 3.6.
78 Vodafone's submission to the Draft Competition Policy, para. CQ2.
79 Ooredoo's submission to the Draft Competition Policy, para. 3.23.1.
80 Ooredoo's submission to the Draft Competition Policy, para. 3.23.3.
81 Vodafone's submission to the Draft Competition Policy, para. CQ3.
82 Ooredoo's submission to the Draft Competition Policy, para.3.26.
83 Ooredoo's submission to the Draft Competition Policy, para. 1.49.
84 Ooredoo's submission to the Draft Competition Policy, para. 3.29.

106. When investigating the potential and actual effects of alleged anti-competitive behavior the Authority will take into account the market position of competitors to the extent that it can affect the potential and actual effects of any conduct. In making its assessment, the Authority will take account of the specific economic context of the agreement, including the nature of the product supplied.

107. Regarding the application of the de minimis rule below the 10% market share threshold, the Authority has the following comments:

107.1 The provision of a de minimis rule provides transparency to stakeholders. The 10% value is a rebuttable threshold and the Authority may investigate the actual effects of a specific agreement on competition on a case-by-case basis. The Authority will consider evidence put to it by complainants who believe that conduct of stakeholders with market shares of less than 10% prevents or substantially restricts competition. However, in most cases, the Authority does not consider that stakeholders with low market shares are capable of preventing or substantially restricting competition.

107.2 The Authority will define the relevant market when applying this Competition Policy[85], and this also includes determining the market to which the de minimis rule should apply. Thus, the Authority will determine whether the firm under investigation is eligible for exemption according to the de minimis rule on a case-by case basis, depending on the result of the specific geographic and product / service market definition. Ooredoo should note that markets will not always be defined in the same way for ex post investigations and for ex ante MDDD process.[86]

108. Finally, in drafting the Competition Policy, the Authority is mindful of international best practice, but does not explicitly aim to replicate other jurisdictions' approach and instead adopts an approach which is specific to the Qatari market and institutional context. The de minimis rule is not intended to exactly mirror the EU regulation but to provide a clear threshold which reflects the Qatari context and institutional framework. In line with Ooredoo's suggestion, the Authority will exclude price and output fixing as well as market sharing from the application of the de minimis provision.

4.6 Possible "defense" to anti-competitive agreements

4.6.1 The Authority's view as expressed in the CD

109. The Draft Competition Policy provided for the option that parties to anti-competitive agreements and concerted practices could raise a defense on the basis of economic benefits that the agreement brings about and hence that it should be allowed to remain in force. A defense would require the parties involved to demonstrate that all of the following criteria are simultaneously fulfilled:

- efficiency;
- fair share to consumers;

[85] CRA, Draft Competition Policy dated 20 May 2015, section 1.1.5.

[86] See also Notice of the Standards, Methodology and Analysis to be applied in the Review of Market Definition and Dominance Designation and for Ex post Competition Investigations in the Telecommunication Sector in Qatar.

- indispensability; and
- no elimination of competition.

In the Draft Competition Policy the Authority posed the following questions:	
Question 4	Do consultees agree that the CRA should consider possible efficiency defenses in assessing whether an agreement is consistent with the prohibition on anti-competitive behaviour? If not, please provide a comprehensive and evidenced justification for your position.
Question 5	Do consultees agree that the CRA should consider possible defenses in assessing whether an agreement is consistent with the prohibition on anti-competitive behaviour? If not, please provide a comprehensive and evidenced justification for your position.

4.6.2 SP's Responses to the CD

110. Ooredoo agrees with the general consideration of a possible efficiency defense to anti-competitive agreements[87]. However, Ooredoo also notes that:

110.1 "*Ooredoo considers that a defense of "objective justification", which would apply to all of the offences under the competition regime, needs to be incorporated into the competition provisions*."[88]

110.2 "*The CRA should confirm and specify which types of agreements it believes will not be subject to possible defenses, as it is currently unclear.*"[89]; and

110.3 The burden of proof of efficiency gains by the company and the proof of losses by the Authority should be supported by quantitative analysis[90].

111. Vodafone expresses the view "t*hat efficiency defenses should only be used by those undertakings that are not dominant in the relevant markets that are affected by the agreement*" as otherwise the fourth criterion – no elimination of competition – cannot be fulfilled[91].

4.6.3 The Authority's Comments and Conclusion

112. Regarding the scope of the efficiency defense, the Authority notes that:

112.1 Anti-competitive conduct by object bears the high potential to prevent or substantially lessen competition and thus harm consumers in the long run. Therefore, the Authority will not allow for an efficiency defense in relation to such conduct.

112.2 Parties to an agreement which is anti-competitive by object may be able to claim an efficiency defense, however, the Authority expects that in most cases, agreements that prevent or substantially lessen competition *by object* are not capable of providing efficiencies which off-set the anti-competitive effects.

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87 Ooredoo's submission to the Draft Competition Policy, para. 3.30.
88 Ooredoo's submission to the Draft Competition Policy, para. 1.45.
89 Ooredoo's submission to the Draft Competition Policy, para. 3.34.
90 Ooredoo's submission to the Draft Competition Policy, para. 3.32.
91 Vodafone's submission to the Draft Competition Policy, para. CQ4.

113. In relation to the burden of proof, the Authority agrees that the burden of proof for showing harm lies with the Authority, while the burden of proof for demonstrating efficiency gains lies with the parties to the agreement. The parties under investigation will have to demonstrate that the alleged efficiencies are identifiable, verifiable and not speculative.

114. The Authority notes that efficiencies may outweigh potentially harmful effects even where one of the parties to an agreement is dominant. Therefore, parties to all agreements which are not anti-competitive by object should be able to claim the efficiency defense.

5 Abuse of a dominant position

5.1 The scope of the prohibited conduct

5.1.1 The Authority's view as expressed in the CD

115. The Draft Competition Policy sets out the scope of conduct which is prohibited under the abuse of a dominant position, the specific types of conduct which the Authority may consider to constitute abuse of dominance, and the factors that the Authority may consider in assessing whether there is a reasonable justification for the conduct.

116. The Draft Competition Policy explicitly states that holding a dominant position in itself is not prohibited.

117. With regard to the intention and the actual effects of an abusive conduct, the Authority states: "*[i]t is not necessary to find that a dominant firm intended to abuse its dominant position to find that it has infringed the prohibition on abuse of a dominant position. Furthermore, the Authority will not only look into behaviour that has caused actual competitive injury but also in conduct which is likely to unreasonably lead to anti-competitive foreclosure.*"[92]

118. It defines the following specific types of conduct that may amount to an abuse of a dominant position:

- margin squeeze;
- rebates, discounts and loyalty schemes;
- unjustified price or non-price discrimination;
- cross-subsidization;
- excessive pricing;
- predatory pricing;
- refusal to supply;
- bundling and tying;
- exclusionary tying;
- customer lock-in through contract length; and
- exclusive distribution agreements.

5.1.2 SP's Responses to the CD

119. *"Vodafone agrees with the Authority that having a dominant position is not in itself anti-competitive."*[93]

120. Ooredoo finds that the Draft Policy covers all categories of conduct that could potentially constitute abuse of a dominant position[94]. Vodafone also does not express any objections to the list of behaviors that could constitute an abuse of

[92] CRA, Draft Competition Policy dated 20 May 2015, section 3.1.
[93] Vodafone's submission to the Draft Competition Policy, para. CQ10.
[94] Ooredoo's submission to the Draft Competition Policy, para. 4.87.

a dominant position as described in the document.[95] However, it points out that this list of abusive behaviors should not be exhaustive[96].

121. Regarding the intent, the requirement for alleging parties, and the actual effects of any abusive conduct, Ooredoo expresses the following:

121.1 It notes that any abuse of market power should be subject to a purpose-based test demonstrating that the conduct has the purpose of substantially lessening competition in the communications market[97]; and

121.2 Ooredoo "*stresses that rigorous quantitative analysis is necessary **on behalf of the alleging party** and the CRA to prove that the agreement has **resulted** in a substantial lessening of competition and consumer harm*."[98]

122. In relation to data that alleging parties should provide, Vodafone notes that alleging parties may not always possess sufficient information to provide full evidence proving the abusive behaviour. It requests that the CRA should rely on its powers during investigations to request data from the company under investigation.[99]

5.1.3 The Authority's Comments and Conclusion

123. The Draft Competition Policy already notes that the list of examples of anti-competitive conducts by a dominant firm is not exhaustive[100].

124. In relation to Ooredoo's comments regarding the need to prove the intent of the dominant firm, the Authority reiterates that it is not necessary for the dominant firm to have *intended* to abuse its dominant position. Demonstration of intent poses a prohibitively high burden on the side of the Authority. Dominant firms have a specific *objective obligation* not to behave in a way which constitutes an abuse of their market power.

125. In relation to Ooredoo's comment regarding the burden of proof on alleging parties, the Authority considers that a requirement on a complainant to *prove* allegations of an abuse of a dominant position imposes a disproportionately high standard of proof on complainants, not least, as Vodafone note, because complainants may not have access to data to prove an abuse.

126. As noted by Vodafone, the Authority will use the powers granted to it by the Telecommunications Law No 34 2006 and the Telecommunication By-Law No 1 2009 to request additional data where it feels that there is a potential abuse of dominance.

127. Finally, the Authority reiterates that in line with international best practice, it will consider a specific conduct to be abusive when there is good evidence that actual or potential anti-competitive effects are likely to occur. It will use all evidence available to assess the likely effect of the conduct on the balance of probabilities.

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[95] Vodafone's submission to the Draft Competition Policy, para. CQ8.
[96] Vodafone's submission to the Draft Competition Policy, para. CQ9.
[97] Ooredoo's submission to the Draft Competition Policy, para. 1.35 et seqq.
[98] Ooredoo's submission to the Draft Competition Policy, para. 3.23.4, bold text highlighted by the Authority.
[99] Vodafone's submission to the Draft Competition Policy, para. 3.2
[100] CRA, Draft Competition Policy dated 20 May 2015, sections 3.1 and 3.5.

5.2 General approach to investigating abuse of dominance

5.2.1 The Authority's view as expressed in the CD

128. The Draft Competition Policy notes that the Authority can start an investigation based on a specific complaint or on the Authority's own initiative, for example following a market review. It notes that interim measures when necessary are possible on the discretion of the Authority and explains that when investigating a potentially abusive conduct, the Authority will determine whether a conduct is likely to foreclose, restrict or distort competition and harm consumer welfare by analyzing the following factors:

- position of the dominant firm;
- specific features of the market and economic context of the conduct;
- positions of the dominant firm's competitors;
- positions of suppliers or customers;
- extent of the abuse;
- evidence of exclusionary or exploitation strategy;
- for exclusionary abuse, possible evidence of actual foreclosure;
- any other factors that the Authority considers relevant.

In the Draft Competition Policy the Authority poses the following question:

Question 6 Do consultees agree with the CRA's general approach to assessing whether conduct can be considered an abuse of a dominant position as described in section 3.2? If not, please provide a comprehensive and evidenced justification for your position.

5.2.2 SP's Responses to the CD

129. Ooredoo states that the general approach in section 3.2 of the Draft Competition Policy *"does not refer to actual analysis on the impact on the market, rather it just focuses on the likelihood that some abusive behavior has had an impact on the market. Therefore it would be useful to include actual metrics that show that an operator has been able to abuse its position such as pricing and customer switching behavior."*[101]

130. Vodafone suggests that that the Authority should adopt a pragmatic approach during investigations and consider relevant factors other than data, such as market behavior.[102]

131. With regard to the factors which the Authority will investigate, a number of comments have been submitted. In relation to the factor of the "position of the dominant firm":

131.1 Ooredoo "*notes that market definition should not be "used" to assess dominance or anticompetitive conduct. Market definition should be conducted*

[101] Ooredoo's submission to the Draft Competition Policy, para. 4.3.
[102] Vodafone's submission to the Draft Competition Policy, para. 3.2.

as a first step of the analysis, in an objective manner, using all available information on the market, and without reference to dominance or any conduct. The analysis of dominance or of a conduct should be dependent on the market definition and not vice versa."[103]

131.2 It also notes that the position of the dominant firm should not be taken into account in isolation[104].

131.3 Vodafone considers that the Authority should not assess dominance individually, on a case-by-case basis; rather it should be determined during a periodic assessment[105].

132. Ooredoo notes that when looking into the position of suppliers or customers, the Authority should also consider the ability of competitors to react to the dominant firm's strategy[106].

133. Ooredoo requests that the Authority uses robust quantitative evidence when investigating the extent of the abuse[107]

134. Regarding the use of evidence of actual foreclosure for abuse, *"Ooredoo believes it is important to identify beyond reasonable doubt that the reason for foreclosure was the actual conduct."*[108]

5.2.3 The Authority's Comments and Conclusion

135. Section 3.1 of the Draft Policy states that "*the Authority will not only look into behavior that has caused actual competitive injury but also in conduct which is likely to unreasonably lead to anti-competitive foreclosure*."[109] The Authority reiterates that *actual* negative effects are not required for behavior to constitute abuse of market power. The Authority has provided the tests it will use. However, it will not set out the specific evidence on which it could rely in every case, as analysis of foreclosure will depend on the specific economic context in which the potentially abusive behavior takes place.

136. In response to Vodafone's suggestion that the Authority should adopt a pragmatic approach during investigations and consider relevant factors other than data, such as market behavior, the Authority notes that section 3.4 of the Draft Competition Policy makes it clear that the Authority will consider a range of evidence best suited to the context and data available in the specific investigation. The Authority will aim to substantiate any findings with robust and thorough analysis based on the balance of probabilities.

137. The Authority also reiterates that it will consider a number of factors included in section 3.2 of the Draft Policy when investigating potentially abusive behavior.

138. In relation to the market position of the dominant firm, the Draft Competition Policy is clear in section 3.3.1 that market definition is the first step in an analysis of a potentially abusive conduct. It is a tool to help assess market power and is not an end in itself.

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[103] Ooredoo's submission to the Draft Competition Policy, para. 4.13.4.
[104] Ooredoo's submission to the Draft Competition Policy, para. 4.5.
[105] Vodafone's submission to the Draft Competition Policy, para. 1.4.
[106] Ooredoo's submission to the Draft Competition Policy, para. 4.8.
[107] Ooredoo's submission to the Draft Competition Policy, para. 4.9.
[108] Ooredoo's submission to the Draft Competition Policy, para. 4.11.
[109] Highlighted by the Authority.

139. In response to Vodafone's request for a periodic assessment of dominance, the Authority notes that the determination of dominance and thus the position of the potentially dominant firm is strongly related to the definition of the relevant geographic and product market in relation to the conduct being examined. The relevant market may differ across cases and will depend on the specifics of the conduct under investigation. Any finding of dominance in an ex ante context may not be relevant to an ex post investigation.

140. The Authority will consider the ability of competitors to react to the dominant firm's strategy as part of the analysis of the position of the dominant firm's competitors.

5.3 Assessment process

5.3.1 The Authority's view as expressed in the CD

141. When conducting ex post investigations, the Authority will use the following assessment process:

141.1 it will firstly define the relevant markets – i.e. the set of products and the geographic area in which firms compete;

141.2 it will assess the dominance of the firm under investigation, where it notes that the dominance assessment for an ex-post investigation may not necessarily correspond precisely to a dominance assessment made for ex-ante purposes;

141.3 it will examine the effects of the conduct, compared to a counterfactual where the conduct had not taken place; and

141.4 upon completion of an investigation and finding that the behavior constituted an abuse, the Authority may impose a remedy.

In the Draft Competition Policy the Authority poses the following question:

Question 7 Do consultees agree with the description of the assessment process when assessing whether conduct amounts to an abuse of a dominant position as described in section 3.3? If not, please provide a comprehensive and evidenced justification for your position.

5.3.2 SP's Responses to the CD

142. Regarding the assessment process, Ooredoo states that *"[t]he CRA has not provided a description of how it will assess the effects of the conduct, so Ooredoo has no comment on section 3.3.3."*[110] It further adds that "*[g]iven the complex nature of estimating the impacts of any anti-competitive conduct and that some conduct is only anti-competitive "by effec*t", Ooredoo expects that the CRA will expand on this section."[111]

143. Vodafone has no objections to the description of the assessment process except for the first step in the process in which the market is defined.[112]

[110] Ooredoo's submission to the Draft Competition Policy, para. 4.18.
[111] Ooredoo's submission to the Draft Competition Policy, para. 4.19.
[112] Vodafone's submission to the Draft Competition Policy, para. CQ7.

5.3.3 The Authority's Comments and Conclusion

144. Section 3.3. of the Draft Competition Policy explains the general procedure that the Authority will follow when investigating a potential abuse of a dominant position. The Authority does not see any need to provide further details on the assessment process as it will look at the effects of the conduct on a case-by-case basis. A general approach for assessing price-related abuses is described in section 3.4 of the Draft Competition Policy. Where the investigation of a specific abusive conduct follows some general principle, the respective section describes it.

5.4 General approach to investigating price-related abuses

5.4.1 The Authority's view as expressed in the CD

145. The Draft Competition policy states that *"[w]hen investigating price-related abuses, the Authority may compare prices and costs in its investigations. The precise approach the Authority will take in doing this will depend on the specific case under investigation and the types of information that is available in the particular case. The Authority will conduct an evidence based analysis and rely on the best data available. Where accurate or complete information is not available, it will apply reasonable proxies and benchmarks."*[113]

146. The aspects that the Authority will generally consider are as follows:

146.1 an appropriate cost base standard and cost standard that will depend on the nature of the analysis;

146.2 an appropriate period of assessment to assess the potential or actual anti-competitive effects of a specific conduct; and

146.3 an appropriate product or product set for which the comparison of prices and costs will be made.

5.4.2 SP's Responses to the CD

147. Vodafone has no objections to the description of the assessment process, except that it believes that it is not necessary to define markets on a case by case basis.[114]

148. Ooredoo noted:

148.1 "*Ooredoo expects the CRA to be consulting, whether as part of this competition policy document or separately, on some of the specific methodological options that are relevant when conducting such assessments* [of price-related abuses]."[115]

148.2 Ooredoo expects the CRA to explain more fully the EEO approach and why it has been chosen as a reference.[116]

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[113] CRA, Draft Competition Policy dated 20 May 2015, section 3.4.
[114] Vodafone's submission to the Draft Competition Policy, para. CQ7.
[115] Ooredoo's submission to the Draft Competition Policy, para. 4.25.
[116] Ooredoo's submission to the Draft Competition Policy, para. 4.26.

148.3 "*Ooredoo would expect the CRA to consult on other methodological issues such as the relevant time period and the level of service granularity at which the analysis should be conducted*."[117]

5.4.3 The Authority's Comments and Conclusion

149. The Authority explains above[118] why case by case assessments of markets may be necessary.

150. In response to Ooredoo's comments:

150.1 The Authority notes that section 3.4 of the Draft Policy already discussed relevant specific methodological options.

150.2 EEO is used in ex post investigations because it provides certainty to providers which know their own costs and can understand whether their conduct is likely to infringe prohibitions. Furthermore, the application of the EEO approach does not incentivize less efficient entrants in the market. Nonetheless, in an ex ante basis, the Authority may choose a different set of costs to benchmark prices (for example those of a Reasonably Efficient Entrant who may have lower scale economies, or the costs of an entrant using a later generation technology which is cheaper).

150.3 The Authority has discussed issues that are generally relevant for the investigation of price-related abuses in section 3.4 of the Draft Competition Policy. All of the factors mentioned by Ooredoo in relation to cost standards need to be determined on a case-by-case basis depending on the specific context to the investigation. Therefore, the Authority does not consider it appropriate to provide a full and detailed explanation of the approach it could take in every potential hypothetical investigation in the Competition Policy.

5.5 Conduct that the Authority will consider to be abuse of dominance

5.5.1 The Authority's view as expressed in the CD

151. The Draft Competition Policy explains that the abuse of a dominant position can be targeted at potential competitors, consumers or suppliers. Depending on the aim of the conduct it distinguishes between:

- exclusionary abuses, which can prevent or substantially lessen existing and potential future competition in a relevant market; and
- exploitative abuses, which can extract rents from consumers or suppliers.

152. The Authority notes that the dominant position, the conduct, and the effects of the abuse may be in different markets.

153. The Draft Competition Policy defines the following examples of abuse of a dominant position and explicitly states that the list is non exhaustive:

- refusal to supply;

[117] Ooredoo's submission to the Draft Competition Policy, para. 4.26.

[118] Paragraph 52.

- margin squeeze;
- predatory pricing;
- rebates, discounts and loyalty schemes;
- unjustified price or non-price discrimination;
- cross-subsidization;
- excessive pricing;
- bundling and tying;
- exclusionary tying;
- customer lock-in through contract length; and
- exclusive distribution agreements.

154. In the Competition Policy, the Authority explains its approach to investigating each specific conduct.

In the Draft Competition Policy the Authority poses the following questions:

Question 8 For each of the potential categories of conduct listed in section 3.5 of the draft Competition Policy, do consultees consider that the conduct as described amounts to an abuse of a dominant position? If not, please provide a comprehensive and evidenced justification for your position. Please provide a separate answer for each of:

i. refusal to supply ;
ii. margin squeeze;
iii. predatory pricing;
iv. rebates, discounts and loyalty schemes;
v. unjustified price or non-price discrimination;
vi. cross-subsidization;
vii. excessive pricing;
viii. bundling and tying;
ix. exclusionary tying;
x. customer lock-in through contract length;
xi. exclusive distribution agreements.

Question 9 Do consultees consider that the Competition Policy should list any other categories of conduct which amounts to an abuse of a dominant position? If so, please provide a comprehensive and evidenced justification for your position.

5.5.2 SP's Responses to the CD

155. *"Vodafone has no objection to the abuse of a dominant position as described in the document."*[119]

[119] Vodafone's submission to the Draft Competition Policy, para. CQ8.

156. Vodafone and Ooredoo consider that the list covers the main categories of conduct that could be considered an abuse of dominance[120]. Vodafone notes that the list should not be viewed as exhaustive[121].

5.5.3 The Authority's Comments and Conclusion

157. Section 3.5 of the Draft Competition Policy states that the list of potential abuses of a dominant position is not exhaustive.

5.6 Refusal to supply

5.6.1 The Authority's view as expressed in the CD

158. The Draft Competition Policy states that "[f*]irms are generally free to choose their trading partner irrespective of whether they have market power or not. However, a refusal to supply by a dominant firm that results in the prevention or substantial lessening of competition or inhibits innovation can be an abuse of a dominant position*".[122]

159. It differentiates between "actual" and "constructive" refusal to supply and notes that a constructive refusal occurs when a dominant firm supplies an input with unreasonable trading conditions, (such as undue delays or degradation in the value of the input).

160. It provides an overview of the criteria that need to be fulfilled for the Authority to consider certain refusal to supply to be anti-competitive, namely:

- dominance of the firm under investigation;
- its position in the downstream market;
- whether the refusal to supply is for an objectively necessary product or service; and
- the potential for the conduct to result in elimination or a substantial lessening of effective competition in the downstream market.

161. The Draft Competition Policy provides examples (but not an exhaustive list) of behavior that may be considered anti-competitive refusal to supply, namely:

- refusal to provide access to facility or network;
- refusal to supply information; and
- refusal to provide intellectual property rights.

162. The Draft Competition Policy explicitly notes that intellectual property rights promote incentives for innovation and commercialization and that a dominant market player is also generally free to decide to whom to grant rights to use that intellectual property. However, refusal to supply intellectual property may, under specific circumstances, constitute an abuse of a dominant position, for example, if the right is objectively necessary to operate in a market but used by a dominant firm to eliminate or substantially lessen effective competition.

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[120] Vodafone's submission to the Draft Competition Policy, para. CQ9; Ooredoo's submission to the Draft Competition Policy, para. 4.87.

[121] Vodafone's submission to the Draft Competition Policy, para. CQ9.

[122] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.1.

5.6.2 SP's Responses to the CD

163. With regard to refusal to supply, the consultees express a number of concerns.

164. Ooredoo notes *"that the definition of "essential facilities" from an ex ante regulatory perspective is still under consultation. It will therefore be important to ensure that the use of this power is used in a way that is consistent with the introduction of ex-ante obligations."*[123]

165. It notes that refusal to deal should not be an offence per-se and refers to the criteria applied in the European Union to determine abuse of dominance.[124]

166. Ooredoo highlights the importance of considering restrictions on refusal to supply and their potential impact on the incentives for investment and innovation:

166.1 It states that "*Considering the importance the CRA has placed on innovation and investment it is important that the definition of essential facility is restricted as much as possible, in order to continue to provide operators with investment incentives*."[125]

166.2 Ooredoo further notes that considering refusal to supply intellectual property as a potentially abusive behavior can have negative effects on the incentives for innovation.[126]

166.3 "*In this context, it is important that any investigation into alleged refusal to supply carefully considers whether the service that is being refused is really necessary or whether alternative services could be used*."[127]

167. In relation to the suggested process of investigating alleged abusive behaviour, Ooredoo makes the following comments:

167.1 "*In the Policy [the Authority] states the economic theory relating to essential facilities but does not state the process for determining when access to essential facilities will be required and the conditions that will be placed on these access obligations*."[128]

167.2 "*For a refusal of supply to exist, there must be a degree of permanence to the conduct in question, as well as a long term impact on competition (i.e. consumer harm). A temporary and limited suspension of access to ducts would not satisfy these threshold requirements.*"[129]

167.3 "*Ooredoo also notes that there has been substantial discussion internationally on the appropriate analysis and tests that a competition authority needs to conduct to establish whether abuse of dominance has occurred. These are often complex tests, which require consideration of a large number of factors and methodological options. The draft competition policy document issued by the CRA does not include any discussion of these methodologies and approaches and therefore no comments can be provided by operators at this*

[123] Ooredoo's submission to the Draft Competition Policy, para. 4.31.
[124] Ooredoo's submission to the Draft Competition Policy, para. 4.36.
[125] Ooredoo's submission to the Draft Competition Policy, para. 4.32.
[126] Ooredoo's submission to the Draft Competition Policy, para. 4.40.
[127] Ooredoo's submission to the Draft Competition Policy, para. 4.33.
[128] Ooredoo's submission to the Draft Competition Policy, para. 4.34.
[129] Ooredoo's submission to the Draft Competition Policy, para. 4.38.

stage. Ooredoo believes that this should be subject to a separate consultation."[130]

5.6.3 The Authority's Comments and Conclusion

168. The Authority notes that there is not necessarily a direct link between ex ante and ex post definitions of "*essential facilities*". The Competition Policy sets out how potential anti-competitive behaviour, including refusal to supply, will be investigated in an ex post context. The Authority does not agree with Oordeoo's comment that an ex ante regime "*is only now being developed*" and that a transition period is required to give wholesale providers time to develop any wholesale service. The ex ante MDDD framework has now been in operation for a number of years. Therefore an unreasonable delay in the supply of wholesale services may be considered as a refusal to supply.

169. The Draft Competition Policy is clear in stating that firms are generally free to choose their trading partner and thus not all refusals to supply will be automatically deemed as abuse of dominance. Therefore, refusal to supply is not prohibited per se. The Draft Competition Policy outlines the principles (in section 3.5.1 and section 3.6.1) which the Authority will use to determine whether specific refusal to supply is an abuse, and these are in line with the criteria that Ooredoo lists.

170. The Authority notes that the Draft Competition Policy already addresses Ooredoo's concerns regarding the implication of the prohibition of abusive refusals to supply on operators' incentives for investment and innovation, and the consideration of objective necessity in its discussion of the abusive practices in section 3.5.1. The Draft Competition Policy explicitly states in section 3.5.1 that it considers incentives for innovation and commercialization as relevant factors regarding refusal to provide intellectual property rights. Parties under investigation may therefore choose to raise a defense that the refusal to supply brings efficiency benefits (in line with the approach set out in section 3.6) which offsets potential anti-competitive harm.

171. In relation to the process, the Authority notes that where the three criteria listed in the Competition Policy are fulfilled, a refusal to supply by the dominant firm may amount to an abuse of a dominant position. The Authority agrees that a refusal to supply for a short period may not amount to an infringement, particularly if it is unlikely to lead to foreclosure. However, it also notes that unreasonably refusing short-term access, particularly on a repeated basis, without justification may amount to constructive refusal to supply if there is a high likelihood that entry or expansion are inhibited.

5.7 Margin squeeze

5.7.1 The Authority's view as expressed in the CD

172. The Draft Competition Policy defines margin squeeze as the case *"when a vertically integrated firm is active on more than one level of the supply and distribution chain, and supplies an important input to the downstream rivals,*

[130] Ooredoo's submission to the Draft Competition Policy, para. 4.42.

and sets prices in the wholesale and retail market such that the downstream rival is not able to trade profitably in the downstream market on a lasting basis"[131].

173. The Draft Competition Policy also provides a general framework for investigating a potential case of margin squeeze and notes that the investigations will specifically assess the ability of an equally efficient operator to recover downstream costs and make a reasonable profit over a reasonable period of time, given the margin between the price of the upstream product or service and the retail market price. In doing so it will consider an appropriate profitability indicator given the specifics of the case. Profitability indicators may include (but are not limited to) Internal Rate of Return, Return on Capital Employed, and Return on Turnover.

5.7.2 SP's Responses to the CD

174. Vodafone feels that complainants would not have sufficient data to substantiate complaints related to margin squeeze and that investigations may be difficult. It suggests that the Authority should maintain ex ante price regulation.[132]

175. Ooredoo comments on the approach provided by the Authority and notes that:

175.1 when investigating a potential margin squeeze the Authority needs to consider all relevant factors, such as historical inefficiencies, that may lead to the cost of the incumbent being higher than those of a new entrant[133];

175.2 it is unclear why the draft policy document discusses some aspects of the approach related to margin squeeze assessment such as rate of return, but not others such as the level of efficiency or the level of product aggregation, and requests that the draft methodology should include all relevant factors or exclude the discussion of the rate of return.[134]

5.7.3 The Authority's Comments and Conclusion

176. In relation to the evidence that complainants are required to provide, they are required to substantiate their complaints with supporting evidence, and provide relevant data and information to the Authority during any investigation. However, they do not need to prove that the dominant firm is abusing its position through a margin squeeze when making a complaint. For example, in the case of margin squeeze, complainants can make complaints based on information about their own costs and wholesale prices. If the Authority proceeds with an investigation, it will gather the relevant information as set out in the Competition Policy to investigate the conduct.

177. When investigating a margin squeeze, the precise approach it adopts will depend on the specific context of the investigation. The Authority does not consider that it is appropriate to set out in advance the precise approach it will take to determining the analysis in every potential hypothetical case. Rather the Competition Policy sets out the broad approach and principles it will adopt.

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131 CRA, Draft Competition Policy dated 20 May 2015, section 3.5.2.
132 Vodafone's submission to the Draft Competition Policy, para. 3.2.
133 Ooredoo's submission to the Draft Competition Policy, para. 4.43.
134 Ooredoo's submission to the Draft Competition Policy, para. 4.44 et seq.

178. As noted in the draft Competition Policy, the Authority will consider the costs of an Equally Efficient Operator given the specifics of the margin squeeze.

5.8 Rebates, discounts and loyalty schemes

5.8.1 The Authority's view as expressed in the CD

179. The Draft Competition Policy describe fidelity rebates, volume discounts and loyalty schemes as practices that offer customers different unit prices depending on the volumes of output they take. It explains how, when a dominant firm uses such practices, this could have an anti-competitive effect by making it hard for competitors to replicate the discount or rebate that customers would receive if they purchased their demand from the dominant firm.

5.8.2 SP's Responses to the CD

180. Ooredoo highlights that rebates and discounts can provide benefits to consumers[135].

181. With regard to the investigation process, Ooredoo:

181.1 requests more guidance regarding cases where prices are set between LRAIC and AAC[136] and notes that;

181.2 "*Whilst Ooredoo agrees with the type of analysis suggested by the CRA, it also believes that the level of the threshold and the size of the rebate are also factors to be considered in initial assessments of the scale of the impact*."[137]

5.8.3 The Authority's Comments and Conclusion

182. The Authority notes that rebates and discounts can bring about lower prices to some consumers. However, they can be used by dominant firms to foreclose competitors.

183. In relation to Ooredoo's request for more guidance on the investigation process when a dominant firm sets prices between LRAIC and AAC, the Authority refers Ooredoo to the assessment of potential predatory pricing which the Draft Competition Policy describes in section 3.5.11, where the following cost standards are explained:

- ***"Prices above Average Total Cost**, (which can be proxied by Long Run Average Incremental Cost (LRAIC)), will not be considered predatory;*
- ***Prices below the ATC but above the Average Avoidable Cost (AAC)** may be predatory. Prices lower than ATC can indicate that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market. Any*

[135] Ooredoo's submission to the Draft Competition Policy, para. 4.49.
[136] Ooredoo's submission to the Draft Competition Policy, para. 4.50.
[137] Ooredoo's submission to the Draft Competition Policy, para. 4.51.

prices between AAC and LRAIC will require further investigation, [as described below;] and

- ***Prices below the AAC** will be considered predatory. Prices below AAC indicate that the dominant firm is sacrificing profits in the short term by not recovering its variable costs and that an equally efficient competitor cannot compete effectively."*[138]

184. The Authority notes that, in the investigation of potentially abusive rebates, discounts and loyalty schemes, it will implicitly take into account the size of the rebate and the level at which it is applied.

5.9 Unjustified discrimination

5.9.1 The Authority's view as expressed in the CD

185. The Draft Competition Policy defines unjustified discrimination in the following manner: *"[u]njustified price or non-price discrimination occurs where a dominant firm offers similar products to the same group of customers with differences in the terms of trade that are not related to differences in costs for the provision of a good or a service **and** thereby places rivals at a competitive disadvantage and or exploits consumers"*[139]

186. The Draft Competition Policy clarifies that this definition does not imply that dominant firms must treat all customers equally and notes potential efficiency gains from price discrimination. It also notes that price discrimination can be justified on reasonable technical, economic or commercial grounds and that the Authority will take into account the potential effect on the dominant firm's competitors that result from the discriminatory offer.

5.9.2 SP's Responses to the CD

187. With regard to the definition of price-discrimination, Ooredoo notes:

187.1 "*It is likely that there will be some difference in cost for delivering a service to different customers, for example it costs more to connect a customer to broadband in more rural areas due to more duct being used. However, consumers may be offered the same price because the transaction costs of setting cost related prices may be too high*."[140] and adds

187.2 "*if price discrimination is not resulting in firms leaving the market (and therefore in a substantial lessening of competition) then consumers are likely to benefit from efficient price discrimination. Therefore, Ooredoo disagrees with the CRA conclusion that any price discrimination that cannot be justified by "differences in customers' circumstances" can be assumed to harm competition. This is a gross over-simplification, and Ooredoo requests that this is reconsidered and removed from the draft policy document*."[141]

188. In relation to the methodology, Ooredoo makes the following comment: *"[t]he CRA also gives a judgment that the wholesale inputs consumed by another*

[138] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.11.
[139] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.4.
[140] Ooredoo's submission to the Draft Competition Policy, para. 4.55.
[141] Ooredoo's submission to the Draft Competition Policy, para. 4.56.

Service Provider (SP) are not more than 20% more expensive than the functional network cost of the internal product. This is primarily in the context of on-net and off-net calls. Ooredoo agrees with the CRA that there are additional costs of off-net calls and that there is significant international precedent that allows for differences in price. Ooredoo believes that this should be a soft threshold to account for a case when the differences in cost are greater than 20%."[142]

189. Thus Ooredoo concludes that *"[c]onsidering the significant controversy over the application of this alleged abuse of dominance in the EU28, Ooredoo believes that the CRA should clarify the process involved in undertaking an investigation in this complex area."*[143]

5.9.3 The Authority's Comments and Conclusion

190. The Authority agrees that not all discrimination is anti-competitive and furthermore that some price discrimination may have efficiency benefits. The Draft Competition Policy states that only price discrimination which cannot be justified on technical, economic or commercial grounds **and** which places rivals at a competitive disadvantage and / or exploits consumers, is likely to fall under the definition of unjustified discrimination in regulatory terms. Section 3.5.4 explicitly notes that objective justification of efficient discrimination for customers with similar circumstances is possible and that the ability of competitors to react to the discriminatory offer will play a role in the Authority's assessment.

191. The Authority disagrees that market exit should be a necessary condition to find that there has been a substantial lessening of competition. As noted above in section 2.4, the Authority can also view the threat of exit and the negative effects on potential entrants as a substantial lessening of competition. Furthermore, price discrimination can infringe the abuse of dominance prohibition where it unfairly exploits consumers.

192. In relation to the threshold for assessing possible price discrimination in the context of on-net and off-net calls, the Authority hereby clarifies that the 20% threshold is a rebuttable presumption that is only applicable to on-net off-net price discrimination.

193. It is not clear what specific "controversy" in the EU28 application of unjustified price and non-price discrimination Ooredoo is referring to. However, the Draft Competition Policy sets out the general approach the Authority will follow when investigating potential abuses.

5.10 Cross-subsidization

5.10.1 The Authority's view as expressed in the CD

194. The Draft Competition Policy defines the concept of cross-subsidization as the instance when a firm uses the profits it receives through a dominant position in one market to subsidize prices of its products or services in another market

[142] Ooredoo's submission to the Draft Competition Policy, para. 3.5.4.
[143] Ooredoo's submission to the Draft Competition Policy, para. 4.57.

where it faces greater competition. It notes that such conduct can (but does not have to) have exclusionary effects if an efficient competitor cannot compete against the subsidized prices.

195. The Draft Competition Policy also describes when the Authority may consider cross-subsidization as likely to have anti-competitive effects. It notes that one of the factors the Authority will specifically look into is whether *"the prices charged for the product or service subject to competition is lower than the Long Run Average Incremental Cost for providing that product or service"*[144].

5.10.2 SP's Responses to the CD

196. Ooredoo notes that in relation to directions that CRA has previously given on cost causation (prior to publishing the draft Competition Policy), it disagrees with the Authority's particular approach to calculating costs (including cost allocation methodologies). It argues that a finding of anti-competitive cross subsidization can only be found where there is unequivocal evidence based on multiple cost allocation principles.

197. Ooredoo also requests that the historical development of the market (such as the provision of free local calls) should be considered[145].

5.10.3 The Authority's Comments and Conclusion

198. In relation to Ooredoo's statement that it has concerns around the Authority's previous approaches to cost allocation, the Authority notes that there are inevitably a number of potential methodologies that could be used to allocate costs. When considering whether a dominant provider has abused its position, the Authority will base its decision on all the evidence it has at its disposal. It does not agree, however, that an infringement finding is only possible where the analysis shows cross subsidization using all potential cost allocation methodologies, since this would be a very high bar.

199. In assessing the extent to which cross subsidization can lead to a substantial lessening of competition, the Authority will bear in mind the historical and institutional context of Qatar.

5.11 Excessive pricing

5.11.1 The Authority's view as expressed in the CD

200. The Draft Competition Policy defines excessive prices as prices which have no reasonable relation to the economic value of the product or service supplied and which are unfair. It clearly states that firms, including dominant firms, are entitled to a reasonable profit given the specifics of the environment in which they operate.

201. The Draft Competition Policy specifies that, depending on the specifics of the case and the available data, the Authority can assess whether a return is

[144] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.5.
[145] Ooredoo's submission to the Draft Competition Policy, para. 4.59 et seqq.

reasonable or not by using benchmarks for both the costs of firms in comparable markets and the prices they charge.

202. The Draft Competition Policy provides a threshold to help firms assess their behaviour. *"the Authority will make an a priori assumption that prices of a dominant firm which are 100% higher than costs are likely to anti-competitive".*[146]

5.11.2 SP's Responses to the CD

203. In relation to excessive pricing, Ooredoo is concerned about the description of the investigation methodology and the reference threshold of 100% the Authority says it will use as a reference.

203.1 Ooredoo is concerned that costs may not always be investigated when the Authority investigates excessive pricing and that benchmarks may not be appropriate even if markets look similar.[147]

203.2 "*Ooredoo is also concerned that the process for determining the "more competitive" market is not defined and that the CRA needs to be careful that the process does not result in the CRA choosing a market with lower prices due to the selection process rather than due to more competition in the market*."[148]

203.3 With regard to the 100% threshold, "*It is also not clear how these benchmarks interact with the a priori assumption that prices over 100% higher than costs are excessive. For example, has this been undertaken by benchmarking costs and prices in similar markets already or is this just an assumption?*"[149]

5.11.3 The Authority's Comments and Conclusion

204. The Authority will attempt to compare costs and prices. However, depending on the availability of data, the Authority will consider other approaches. Using benchmarks for costs and/or prices is common practice when assessing excessive prices. When selecting the benchmark, the Authority will take into account characteristics of the market, as well as historical developments, to ensure that the benchmark is appropriate. With regard to Ooredoo's concern about how the Authority may select benchmark markets, the Authority reiterates that it would look at a market which it considers competitive and comparable.

205. The 100% threshold suggested by the Authority, where it will assume a priori that prices may be excessive, is an attempt to provide transparency and clarity to stakeholders. However, this "a prior" threshold will be rebuttable in individual cases.

5.12 Predatory pricing

5.12.1 The Authority's view as expressed in the CD

[146] CRA, Draft Competition Policy dated 20 May 2015, section 3.6.5.
[147] Ooredoo's submission to the Draft Competition Policy, para. 4.64 et seqq.
[148] Ooredoo's submission to the Draft Competition Policy, para. 46.65.
[149] Ooredoo's submission to the Draft Competition Policy, para. 46.67.

206. The Draft Competition Policy defines predatory pricing as pricing behaviour that has the objective of strengthening or maintaining a dominant firm's market power, and as such leads to the firm incurring short-term losses, which is likely to lead to foreclosure.

207. The Draft Competition Policy describes the general framework the Authority will follow when investigating potential abuses. It states that the Authority will consider the following factors:

- whether the firm under investigation is dominant in a relevant market;
- whether the firm under investigation sacrifices short run profits by setting prices below costs; and
- whether this pricing behaviour leads to, or is likely to lead to, foreclosure.

208. The Draft Competition also discusses how the Authority will apply different costing standards and specifically looks into Average Total Cost, proxied by Long Run Average Incremental Cost (LRAIC) and Average Avoidable Cost (AAC). It notes that where the data is not available or incomplete, the Authority may apply equivalent standards or reasonable proxies and estimates.

5.12.2 SP's Responses to the CD

209. In relation to the assessment of potential abuses and the costing standard the Authority may use, Ooredoo notes that:

209.1 it is concerned about situations when there is not sufficient data available to calculate LRAIC and AAC[150];

209.2 Ooredoo "*also reiterates its concerns over the impossibility of determining a single "true" cost allocation methodology. This implies that any assessment of abuse of dominance that is heavily reliant on cost estimates must be conducted in relation to multiple cost assessments, and provide unequivocal evidence under all approaches that the abuse has taken place and that it has generated harm to competition and consumers*."[151]

5.12.3 The Authority's Comments and Conclusion

210. Section 3.4 of the Draft Competition Policy clearly states that LRAIC and AAC are examples of the cost standards that the Authority will aim to apply where information is available. If cost information for these standards is not readily available, the Authority may apply suitable alternative standards, such as Fully Distributed Costs.

211. The Regulator will take a pragmatic approach and make a decision on what is a reasonable cost to provide a specific service. The CRA will weigh up all of the evidence available to it and make a judgement as to whether, on the balance of probabilities, an infringement has occurred.

[150] Ooredoo's submission to the Draft Competition Policy, para. 4.46.
[151] Ooredoo's submission to the Draft Competition Policy, para. 4.47.

5.13 Other abuses

5.13.1 The Authority's view as expressed in the CD

212. The Draft Competition Policy defines a number of other abuses of dominance, namely:

- bundling and tying, including predatory pricing bundles;
- exclusionary tying;
- customer lock-in through contract length; and
- exclusive distribution agreements.

213. The Draft Competition Policy defines bundling as *"the selling of two or more products or services together as a package"*[152]. It notes that bundles can have many benefits for consumers, but recognises that *"when bundling is offered by a dominant firm, it **may** have anti-competitive effects"*[153]. The Authority specifies explicitly the instances when bundling and tying can have anti-competitive effects and describes the process for investigation it will follow in Figure 7 of the Draft Competition Policy.

214. The Draft Competition Policy explains potential benefits but also the potential anti-competitive effects of customer lock-in contract length. With regard to the investigation process the Authority states: *"the optimal contract length will depend on the specifics of the relevant market. Thus, when investigating whether a given contract length can amount to an abuse of dominance, the Authority will weigh the potential benefits against the potential harms of the investigated contractual conditions, within the specific context of the development of the market. It may, without limitation, look into:*

- *barriers to switching;*
- *what share of customers take the offer and is therefore "tied up";*
- *availability of the same service in alternative contracts (at the same or different periods of time); and*
- *the upfront costs necessary to offer the product or service in question."*[154]

215. Finally, the Draft Competition Policy defines exclusive distribution agreements as those that require the customer to purchase exclusively, or to a large extent from one supplier. It explains that such agreements do not necessarily constitute abuse of dominance and refers to section 3.2.3 of the document for further details.

5.13.2 SP's Responses to the CD

216. With regard to the discussion of bundling and tying, Ooredoo makes the following comments:

216.1 It expresses concerns regarding the clarity of the definition of bundling and tying: "*it is not clear whether the bundling firm being dominant in at least one of*

[152] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.7.
[153] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.7., bold text not highlighted in Draft Policy Document.
[154] CRA, Draft Competition Policy dated 20 May 2015, section 3.5.9.

the markets is a condition for predatory pricing of bundles or is a potential abuse of dominance itself. Ooredoo would agree with this if it was a condition for the predatory pricing of bundles. If a dominant operator selling bundles is supposed to be an abuse of dominance then the CRA fails to clearly set out how the alleged abuse resulting from a case of bundling and/or tying would result in an actual or likely foreclosure effect."[155]

216.2 "*The CRA is also not clear on the test that it will apply when investigating predatory bundling. In section 3.5.7 of the Competition Policy it says that the standard predatory pricing test will be applied whereas section 3.5.8 of the Competition Policy implies that the test in Figure 7 within the Competition Policy is to be used for all bundling and tying investigations. The CRA should clarify which process is to be followed in order to avoid any confusion should there be an investigation*."[156]

217. In relation to bundling and tying, Vodafone notes that anti-competitive behaviour can occur in triple play bundles, where one element of the bundle (TV) falls outside the remit of the Authority. It therefore asks how the Authority will consider bundles which include non-telecommunications products.

218. In relation to customer lock-in through contract length, Ooredoo expresses concerns that potential analysis is only qualitatively described, which leaves a large degree of judgment[157].

219. In relation to exclusive distribution agreements, Ooredoo believes this kind of abuse is not "*particularly relevant in the context of telecommunications*". Nonetheless it provides an example where it believes exclusive distribution agreements can lead to anti-competitive outcomes (it uses the exclusive supply of the Apple iPhone to illustrate its point). [158]

5.13.3 The Authority's Comments and Conclusion

220. With regard to Ooredoo's concerns on **bundling and tying**:

220.1 The Authority does not consider bundling by a dominant firm to constitute abuse of dominance per se. Dominance is one of a number of conditions that need to be fulfilled for bundling and tying to have anti-competitive effects. Further conditions depend on the type of the conduct and were explained in the sections on predatory pricing bundles and exclusionary tying in the Draft Competition Policy.

220.2 The process in Figure 7 of the Draft Policy applies to the investigation of bundles - it outlines the conditions that need to be fulfilled for conduct to be deemed anti-competitive. The standard predatory pricing test is applied at the stage when the relationship between costs and prices is assessed.

221. The Authority notes that if a Dominant Service Provider supplies a bundle which contains a telecommunications service, then the bundle may fall within the jurisdiction of the Telecommunications Law, even if elements of the bundle fall outside the jurisdiction of the Telecommunications Law. Dominant providers

[155] Ooredoo's submission to the Draft Competition Policy, para. 4.72.
[156] Ooredoo's submission to the Draft Competition Policy, para. 4.73.
[157] Ooredoo's submission to the Draft Competition Policy, para. 4.81 et seqq.
[158] It is not clear that the rents Apple extracted were excessive and this amounted to abuse of dominance. However, the example demonstrates the potential power of exclusive distribution agreements.

are therefore under obligation to supply such telecommunications bundles in a way which does not amount to an abuse of a dominant position under the Telecommunications Law.

222. With regard to **customer lock-in,** the Authority notes that the length of lock-in period that could constitute an abuse will vary depending on the economic context of the conduct. For retail customers where there is limited investment made, a shorter lock-in period might constitute an abuse, whereas for wholesale customers where the supplier makes significant investments, only longer periods might amount to an abuse. The list of possible factors the Authority may look into, and which is included in section 3.5.9 of the Draft Competition Policy, is not exhaustive and empirical comparisons to similar markets can be undertaken where appropriate.

223. The Authority considers that **exclusive distribution** agreements can be relevant for the telecommunications sector.

5.14 Defenses to anti-competitive abuse of dominance

5.14.1 The Authority's view as expressed in the CD

224. In considering whether to issue a decision on an investigation into whether conduct is prohibited, the Authority will also take into consideration any arguments provided by the dominant firm as to why the anti-competitive conduct is justified. Such arguments may show either that the conduct is objectively necessary or that it generates efficiencies and so benefits consumers

225. In the Draft Competition Policy, the Authority poses the following questions:

In the Draft Competition Policy the Authority poses the following questions:

Question 10 Do consultees agree that the CRA should consider possible justifications in assessing whether conduct amounts to an abuse of a dominant position? If not, please provide a comprehensive and evidenced justification for your position.

5.14.2 SP's Responses to the CD

226. Vodafone noted it does "*not support possible justifications in assessing whether conduct amounts to an abuse of a dominant position*."[159] However, it does not provide further supporting argumentation or reasoning to support its statement.

227. Ooredoo supports possible justifications of a potentially abusive conduct[160] and agrees that objective necessity can be a possible defense[161].

5.14.3 The Authority's Comments and Conclusion

[159] Vodafone's submission to the Draft Competition Policy, para. CQ10.
[160] Ooredoo's submission to the Draft Competition Policy, para. para. 4.88.
[161] Ooredoo's submission to the Draft Competition Policy, para. para. 4.90.

228. By taking into account justifications for conduct that may otherwise be considered anti-competitive, the Authority can consider potential long-term benefits for consumers resulting from that conduct. Furthermore, these justifications are consistent with international best practice. For these reasons, the Authority does not accept Vodafone's objection to justifications of a potentially abusive conduct. However, the Authority notes that such justification must be proven by the defendant and shall only be applied in the limited and specific circumstances as set out in the Draft Competition Policy.

6 Merger and transfer of control

6.1 Process used to assess a merger

6.1.1 The Authority's view as expressed in the CD

229. The Authority notes that *"in the Article (47) of the 2006 Telecommunications Law, the parties directly involved in the merger or transfer of control are legally required to provide notification of the transaction*". Articles 79 – 85 of the 2009 by- Telecommunications Law outlines the procedure that the relevant parties must follow regarding the merger or transfer of control.

In the Draft Competition Policy the Authority poses the following questions:

Question 11. Do consultees agree with the approach to assessing the economic effects of mergers and transfers of control? If not, please provide a comprehensive and evidenced justification for your position.

Question 12. Do consultees agree with the approach to considering the efficiencies when assessing mergers and transfers of control? If not, please provide a comprehensive and evidenced justification for your position.

6.1.2 SP's Responses to the CD

230. Vodafone states that *"The principles in the merger control section follow those set out in the EU Merger Regulation and cover the criteria that one would expect to see in merger analysis."*[162]

231. Ooredoo highlights the *"importance of an appropriate consultation process with all market players, and not only those involved in the potential merger"*, and request that the draft policy reflect this.[163]

232. Ooredoo notes that *"The CRA has not specified time limits for the decision on whether a merger is anti-competitive"*. It believes that *"having clear deadlines for the two phases of investigation will provide a clearer picture to the parties involved in the transaction."*[164]

6.1.3 The Authority's Comments and Conclusion

233. The Authority may seek views on a notified transaction from relevant stakeholders.

234. The time scales to issuing a decision are set out in Article 82 of the 2009 Telecommunications By Law. This states that:

[162] Vodafone's submission to the Draft Competition Policy, para. 3.3.
[163] Ooredoo response paragraph 5.2.
[164] Ooredoo response paragraph 5.8.

"*The General Secretariat shall, within sixty (60) days from receipt of the above-mentioned application stipulated under Article (79), or from date of receipt of the additional information requested pursuant to the preceding Article:*

(1) approve the transfer of control with no conditions.

(2) conditional approval of the transfer of control. The conditions shall be related to the promotion and development of telecommunications markets in order to make them open and competitive in the State of Qatar and related to the protection of customers' interests.

(3) deny the transfer of control.

(4) issue an order extending the review period for an identified period of time.

(5) issue a notice to initiate an investigation regarding the proposed transfer of control and take one of the above-mentioned decisions set out in subparagraphs (1), (2) or (3) of this Article."

6.2 Constructing an appropriate counterfactual

6.2.1 The Authority's view as expressed in the CD

235. The Authority states its intention to *"measure the impact of a merger by comparing expected competitive outcomes if the merger occurs to those if it doesn't occur."*[165] While the status quo is often used to represent the counterfactual, this assumes "that the competitive outcomes in the absence of the merger will be similar to the current competitive outcomes. However, if the market is dynamic or unstable, that assumption will not always be an accurate reflection of the state of the market in the absence of the merger."

6.2.2 SP's Responses to the CD

236. Ooredoo asks whether the CRA proposed to analyse a merger *"without actually defining the market"* and *"recommends correcting this ambiguity so that the correct process is followed."*[166]

237. Ooredoo raises a concern about the "*significant amount of discretion available when constructing a counterfactua*l", and suggests that the CRA should explain in more detail how it will choose a counterfactual. In mentioning this, it cites an example relating to a merger involving a failing firm where a counterfactual could depend on *"whether there are any other potential purchasers of the failing firm that would result in a less anti-competitive situation"*.[167]

6.2.3 The Authority's Comments and Conclusion

238. The Authority confirms that it will define the markets relevant to the merger and in which it will then assess the merger's impact.

239. The Authority notes that in assessing a merger there may be several plausible counterfactuals. The Authority will use judgment and industry knowledge to

[165] Draft Competition Policy 4.3.1.
[166] Ooredoo response paragraph 5.5
[167] Ooredoo response paragraph 5.3

estimate the likely effects of the merger, given the potential alternative counterfactuals.

240. In the case where there is an alternative potential purchaser of a failing firm, for example, the CRA would need to determine whether this is a reasonable approximation of what would happen if the merger under investigation didn't occur.

6.3 Assessment of conglomerate mergers

6.3.1 The Authority's view as expressed in the CD

241. In Section 4.7 of the Consultation Document, the Authority outlines its approach to assessing the impact of a conglomerate merger, and how it would examine the substantial lessening of competition.

6.3.2 SP's Responses to the CD

242. Ooredoo believes that the CRA does not provide enough detail on "*the processes it will use to access whether there are any anti-competitive effects from conglomerate mergers*".[168]

6.3.3 The Authority's Comments and Conclusion

243. In its examination of whether a conglomerate merger leads to a substantial lessening of competition, the Authority notes that, as set out in the Competition Policy, it will look for evidence that illustrates the merging parties having a market position that would allow foreclosure, the economic incentives to foreclose a market, and the ability to negatively affect competition as a result.

244. Conglomerate mergers can create issues where bundling could be a concern. Therefore the potential impact of the merger will be assessed using the bundling framework set out in section 3.5.7 of the draft Competition Policy. It will consider whether the merged party can leverage market power via bundling. The competitive dynamics around the impact of bundling can often be complex and depend on the relative position of the merging parties in each market. However, the Authority considers that the following factors could be relevant:

228.1 dominance in at least one of the markets is more likely to suggest a merger which could negatively impact on competition, although this is not exclusively the case;

228.2 bundling of the merged parties' products must be technically and economically feasible; and

228.3 whether bundling could be predatory (i.e. whether the merged party has incentives to price in a predatory way).

6.4 Usage of quantitative tests in merger analysis

6.4.1 The Authority's view as expressed in the CD

[168] Ooredoo response paragraph 5.6

245. The Authority describes the factors that it will assess when considering whether the unilateral effects of a merger can lead to a substantial lessening of competition. It noted that it would consider market concentration, closeness of competition, ease of switching, direct evidence of unilateral effects, elimination of a strong competitive force, capacity constraints, or barriers to expansion.

6.4.2 SP's Responses to the CD

246. Ooredoo refers to the EC's use of quantitative tests in merger analysis, and notes that "*the Policy does not state that the CRA will undertake quantitative analysis*".[169]

6.4.3 The Authority's Comments and Conclusion

247. In assessing the effects of a merger on relevant markets, the Draft Competition Policy explains the evidence that the Authority might use, including, where available and relevant, quantitative analysis of the direct effects of the merger, whether provided to it by the merging parties, or estimated by the Authority.

248. The Authority notes that in addition it may also use the following thresholds in assessing whether the transfer of control is likely to lead to a substantial lessening of competition in the case of Horizontal mergers.

- if the post-merger market share is less than 25%, then the concentration is unlikely to give rise to concerns; and
- where the post-merger market share is greater than 50%, then it is likely to lead to a substantial lessening of competition.

249. The Authority may also consider evidence using the Herfindahl-Hirschman Index (HHI). In particular there is unlikely to be a substantial lessening of competition where the HHI:

- is less than 1000;
- between 1000 and 2000 and the delta (i.e. the change in pre and post-merger HHI) is less than 250; or
- where the HHI is greater than 2000 but the delta is less than 150.

6.5 Assessment of efficiencies

6.5.1 The Authority's view as expressed in the CD

250. The Authority notes that in assessing the effects of a merger it will consider the potential efficiencies that arise. The Authority will consider whether the efficiencies that could result from the merger will be likely to offset potential anti-competitive effects, where these efficiencies are specifically generated by the merger; passed onto consumers; and verifiable in their expected presence and magnitude.

6.5.2 SP's Responses to the CD

[169] Ooredoo response paragraph 5.7

251. Ooredoo notes that:

252. The Authority "*does not state how large the efficiencies have to be*" or the "*time period to be used when undertaking the analysis*".[170]

253. "*efficiencies may not have a significant impact on competition dynamics but still bring benefits to consumers in terms of quality, prices, range of goods or service*."[171]

254. "*CRA should demand a high level of proof that the efficiencies are verifiable, only achievable through the merger and will benefit consumers*."[172]

6.5.3 The Authority's Comments and Conclusion

255. The Authority notes that in assessing whether the merger leads to a substantial lessening of competition, it will assess both the harmful effects of the merger on competition, as well as the efficiencies arising from the merger. In doing so, it will assess efficiencies that result from the merger, can be expected to be passed onto consumers and are verifiable. It will consider whether these efficiencies are sufficient to offset any potential harmful effects of the merger.

256. It will assess efficiencies over the medium term, up to 12-24 months from the transaction.

257. The Authority agrees with Ooredoo that the efficiency may be realised across a number of dimensions of competition (quality, prices, range of goods) and that it will take these into account to the extent that they are verifiable. Furthermore, the Authority agrees that the merging parties need to provide strong and robust evidence as to the presence and likelihood of efficiencies.

[170] Ooredoo response paragraph 5.10.1-5.10.2.
[171] Ooredoo response paragraph 5.10.3
[172] Ooredoo response paragraph 5.11

7 Remedies for infringements of competition aspects of the Telecoms Law

7.1 General framework

7.1.1 The Authority's view as expressed in the CD

258. The Draft Competition Policy set out the remedial actions that the Authority can take if a service provider is found to have infringed the prohibition on abuse of dominant positions or other anti-competitive behaviour in an ex-post investigation. The Authority set out the remedies that it may consider, circumstances under which they might be applied, and how the Authority would assess what the appropriate remedies are.

259. In setting remedies, whether behavioural or structural, the draft Competition Policy noted that the Authority would be guided by two objectives:

260. **Effectiveness**. The proposed remedies must be able to successfully resolve the competition concerns in an efficient manner. This will involve addressing the specificity of the remedies, which must be sufficiently well targeted to not have adverse competition effects on other behaviour and are practical to implement.

261. **Proportionality**. This concerns the regulatory burden imposed by the remedies and the appropriateness of the level of intervention to the abuse of market power. Considerations of proportionality would ensure that the costs of implementing the remedy do not outweigh its benefits.

In the Draft Competition Policy the Authority poses the following questions:

Question 13 Do consultees agree with the approach to considering remedies as a condition of approving mergers and transfers of control? If not, please provide a comprehensive and evidenced justification for your position.

7.1.2 SP's Responses to the CD

262. Vodafone considers that the Authority's approach to setting remedies should take account of the EU framework for imposing sanctions and fines on market participants.[173]

263. Ooredoo states that the Authority should also explain how it would decide whether a remedy meets the effectiveness and proportionality criteria. In explaining its point, Ooredoo cites the four stages of the proportionality test used by the EC. These are that:

- there must be a legitimate aim for the remedy;

[173] Vodafone response 3.4.

- the measure must be a suitable way to achieve the aim, potentially with a requirement to provide evidence for the expected effect;
- the measure must be the minimum necessary to achieve the aim and there should not be a less intrusive way of intervening; and
- the measure must be reasonable and consider the interests of different parties.[174]

264. Vodafone supports the Authority's position to refer matters to the public prosecutor. It considers that this could serve as a deterrent to engaging in anti-competitive behaviour, *"since the necessary powers to impose fines and the CRA should use this power more."*[175]

265. Ooredoo states that it was common practice in the EC to undertake a market test of any potential remedies.[176]

266. Ooredoo notes that *"an excessive fine could cause financial difficulty for the penalised undertaking and could result in reducing its ability to compete."* It states that without an appeals process, this is particularly important. [177]

267. Both Vodafone and Ooredoo comment on the enforcement of remedies and undertakings. Vodafone notes that the competition policy was silent on what happens when a binding undertaking is made but subsequently not fulfilled.[178] Ooredoo notes that the Policy did not explain any "*proposals for appropriate monitoring mechanisms, which can ensure that the agreed remedies are actually implemented… Ideally the monitoring should be proportional and be as easy as possible*." [179]

7.1.3 The Authority's Comments and Conclusion

268. In relation to the setting of fines or other sanctions, the Authority notes that it does not have the authority under the current Telecommunications Law to set fines or sanctions.

269. The Authority considers that its stated principles in setting remedies (to ensure that they are effective and proportionate), are reasonable and provide clarity to market participants.

270. The Authority does not consider that it necessarily needs to market test or otherwise seek consultees' views on potential remedies, and believes that this could cause unnecessary delay. However, it may do so in cases where it thinks views of parties would be particularly valuable.

271. While the enforcement of the Authority's decisions is beyond the scope of the Competition Policy, the Authority notes that stakeholders may have redress to the Administrative Courts to protect their interests.

7.2 Interim remedies

[174] Ooredoo response paragraph 6.2 et seq.
[175] Vodafone response 3.4.
[176] Ooredoo response paragraph 5.14.
[177] Ooredoo response paragraph 6.4.
[178] Vodafone response 3.4.
[179] Ooredoo response paragraph 6.7.

7.2.1 The Authority's view as expressed in the CD

272. The draft Competition Policy notes that the Authority would consider applications from Complainants to impose a behavioural remedy prior to reaching a decision in certain cases. The Authority will consider applications for interim remedies where the Complainant can demonstrate that significant and irreparable harm would be likely to result in the absence of interim remedies.

7.2.2 SP's Responses to the CD

273. Vodafone strongly supports the approach to setting interim remedies noting that *"there was abuse of dominance and interim measures were not imposed, the chances of the aggrieved undertaking recovering its losses are slim and damage cases in the civil courts are lengthy processes."*[180]

274. Ooredoo considered that "*such power must be bounded and should not be abused. The imposition of interim remedies should only be confined to exceptional cases, where there is extensive and unequivocal evidence of harm already occurring in the market.*" [181]

7.2.3 The Authority's Comments and Conclusion

275. The Authority notes that it will only consider interim remedies to prevent significant, irreparable damage to a particular stakeholder, or for other reasons, such as to protect the public interest.

276. It considers "significant damage" to be where undertakings will be put at significant competitive disadvantage, including cases such as significant financial loss, damage to goodwill or reputation.

277. It considers "irreparable damage" to be damage which cannot be remedied at a later stage (such as insolvency, but it could also include other less severe damage).

7.3 Other remedies

7.3.1 The Authority's view as expressed in the CD

278. The Authority notes that it may issue a number of other remedies which include: issuing warnings, accepting binding undertakings, public acknowledgements of the Authority's decision, or referral to the public prosecutor for criminal investigation.

7.3.2 SP's Responses to the CD

279. Vodafone supports the Authority's position to refer matters to the public prosecutor. It considers that this could serve as a deterrent to engaging in anti-

[180] Vodafone response CQ6.
[181] Ooredoo response paragraph 4.23.

competitive behaviour, "*since the public prosecutor has the necessary powers to impose fines and the CRA should use this power more*."[182]

280. Vodafone notes that a requirement for a binding undertaking should be considered as complementary to fines that are levied. [183]

7.3.3 The Authority's Comments and Conclusion

281. The Authority agrees that threat of referral to the public prosecutor will provide an incentive not to engage in anti-competitive behaviour.

282. In relation to the suggestion that the requirement for a binding undertaking should be considered as complementary to fines, the Authority notes that it may issue different complementary remedies in any given decision. However, it also notes that undertakings are given voluntarily by the parties to a decision, and not imposed by the Authority.

[182] Vodafone response 3.4.
[183] Vodafone response 3.4.