[NON CONFIDENTIAL]

Ooredoo submission on the DRAFT COMPETITION POLICY

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1. Introduction and Executive Summary

1.1 Ooredoo thanks the Communications Regulatory Authority (CRA) for the opportunity to provide feedback to the consultation on the Draft Competition Policy ("the Competition Policy consultation") published by the CRA on 20 May 2015. Ooredoo would also like to thank the CRA for organizing a workshop on 23 June 2015 to provide further clarifications.

1.2 Ooredoo believes that the development of a competition framework is a step of fundamental importance for the sector, which will provide the CRA with significant powers to intervene and shape the future of competition going forward, and provide service providers with much needed clarity and certainty. Ooredoo is committed to work with the CRA towards the development of more effective and sustainable competition in the market. However, Ooredoo would like to stress the importance for the CRA to be acting for the protection of competition and not of competitors, in a balanced and proportionate manner, which is consistent with the underlying principles of economic efficiency and promotion of investment incentives. This would also be in line with the approach to competition policy in the European Commission (EC): **"the Commission is mindful that what really matters is protecting an effecting competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price choice, quality and innovation will leave the market".**[1]

1.3 Before responding to the specific questions outlined by the CRA in the consultation document, Ooredoo has set out in this section a number of general comments, which it believes require further discussion with the CRA and the other market participants.

The lack of an appropriate institutional framework

1.4 In most countries internationally, a competition law is defined at a national level and a specific competition authority is established. This is not the case in Qatar, where no national competition law or competition authority has been established.

1.5 This competition policy should therefore be understood in a context of an underdeveloped legislative and institutional framework within the area of competition policy. Ooredoo is concerned that the CRA has not sufficiently

[1] Source: Information from European Union Institution and Bodies, Communication from the Commission – guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para 6

considered the implications of this context. Ooredoo's key concerns in this context are discussed in this section.

Lack of institutional knowledge and experience

1.6 In the workshop with the CRA on 23 June 2015, both Ooredoo and QNBN have raised specific questions and comments on the current inadequateness of resources and skillsets within the CRA, in relation to competition economics and law. Whilst the CRA has indicated that some plan exists to increase the level of resources available within the CRA, no immediate plans seem to have been established.

1.7 Ooredoo is seriously concerned by this lack of expert resources in the field of competition economics and law and the implications of this for the thoroughness of the analysis that the CRA will be able to conduct.

1.8 Ooredoo urges the CRA to consider this serious issue and complement its current team with an adequate number of expert resources.

Striking a balance of powers within the CRA

1.9 Many jurisdictions internationally have recognised that the enforcement of competition policy requires the establishment of an independent expert institution. In the European Union (EU), this role is covered by the Competition Commission (CC), and every Member State also has a national Competition Authority and only a minority of States, like the UK, allow sector regulators to have concurrent powers on competition with the authority.

1.10 The institution of an independent competition authority for the appropriate implementation of competition law has occurred not only because of the need for specific skillsets, as discussed above, but because an appropriate balance between the exercise of ex ante and ex post powers by a sector regulator is very difficult to achieve, and this has been recognised in various occasions in those countries where concurrent powers are allowed. For example, in the UK, Ofcom has often been criticised for its limited use of its ex post powers and for deferring "too much" to the independent competition authority.

1.11 In Qatar, this issue is even more pronounced, as the CRA will be the only competition authority for the sector. Ooredoo agrees that some form on competition policy and authority might be required and that, in lieu of a nationwide competition authority, this role is probably best covered by the CRA (and would be aligned with the provisions of the telecommunications law). However, it is imperative that some form of independence is achieved through the institution of separate teams, and appropriate "Chinese walls" between the ex post and ex ante teams.

1.12 Without such an arrangement, there would be significant risks of conflict between the use of ex ante and ex post powers, which might lead to excessive or insufficient use of the powers that the CRA is empowered to wield.

Lack of an appropriate process for appeal

1.13 The imposition of competition policy powers by the CRA should be complemented by an increased level of accountability for its decisions, and the possibility for operators to appeal to an independent authority to review the appropriateness, and robustness of such decisions, when required.

1.14 For example, in the UK, any of the below parties with reason to challenge decisions made by regulatory and competition authorities may appeal to the Competition Appeal Tribunal ("CAT"):

1.14.1 Any party to an agreement in respect of which the Competition Market Authority (CMA) (or sectoral regulator) has made a decision;

1.14.2 Any person in respect of whose conduct the CMA (or sectoral regulator) has made a decision; or

1.14.3 Any third party (or the representative of third parties) who the Tribunal considers has a sufficient interest (or is representative of persons having such an interest) in a decision made by the CMA (or sectoral regulator).[2]

1.15 Once an appeal is lodged, the CAT has the power to take any of the following actions based on the merits of any appeal:

1.15.1 Confirm or set aside all or part of the decision;

1.15.2 Remit the matter to the CMA (or the sectoral regulator);

1.15.3 Impose, revoke or vary the amount of any penalty;

1.15.4 Give such directions, or take such other steps as the CMA (or sectoral regulator) could have given or taken, or

1.15.5 Make any other decision which the CMA (or sectoral regulator) could have made.

1.16 In the European Union, those affected by a European Commission decision may appeal to the EU General Court to overturn or amend a decision.[3] Following the General Court's ruling, either party (i.e. the EC or a third party) has the right to

[2] http://www.catribunal.org.uk/242/About-the-Tribunal.html

[3] See http://ec.europa.eu/competition/antitrust/procedures_101_en.html. Note that this right is not restricted to Article 101 TFEU decisions; the link is to one example.

appeal to the European Court of Justice, although this stage is restricted to legal disputes.

1.17 The EU General Court cites several examples of appeals against Commission decisions in the domain of alleged competition law infringements, spanning mergers, cartels, state aid, and abuse of dominance.[4] Across the examples, the actions taken by the General Court included annulment of decisions, reductions of fines, and the upholding of the Commission's decision.

1.18 In Qatar, the possibility for a meaningful appeal is denied to the operators. During the workshop on 23 June 2015, this issue was raised by operators, and the CRA response was that any decision by the CRA, whether in relation to ex ante regulation or ex post competition issues, can be appealed through Administrative Courts.

1.19 Expecting Administrative Courts in Qatar to be able to meaningfully review the analysis undertaken by the CRA in an area as complex as competition policy is clearly not realistic. As discussed above, competition law and economics are very complex subjects which require specific knowledge and skillsets. All the concerns raised in this respect about the CRA, are even more relevant and significant in the context of Administrative Courts. Furthermore, the CRA is well aware that the timescales for a judicial review through the administrative courts in Qatar is measured in years, thereby potentially defeating the very purpose for bringing forward a case for the review of a CRA decision.

1.20 Denying operators the possibility of a meaningful and timely appeal process is inconsistent with international best practice and potentially very harmful to the confidence that the sector and its investors might have for future investments and operations.

1.21 For these reasons, 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.

The need for an evidence-based process and the burden of proof

1.22 During the workshop with the industry on 23 June 2015, the CRA and their consultants, Frontier Economics, have repeatedly expressed the need for any complaint of alleged anticompetitive conduct to be evidenced based. In other words, it should not be possible for operators to raise competition complaints unless they are able to provide factual and concrete evidence to substantiate their complaints.

[4] See http://curia.europa.eu/jcms/jcms/Jo2_7033/

1.23 Ooredoo strongly agrees with this principle.

1.24 Without a minimum required "threshold" of evidence in order to file a complaint, operators would be given an inappropriate incentive to abuse the framework and overload the CRA (and the other operators) with an excessive and unnecessary number of complaints. This could also be used by operators to create negative publicity for their competitors and such abuse of the system should be strongly discouraged. It is also therefore vital that such a claimant must be proven to have a standing in the alleged case. There have been instances in the recent past where cases have been brought by participants without having a standing in the case, consuming unnecessarily resources from both the CRA and the defendant.

1.25 Ooredoo acknowledges that the Ex Post Investigation Procedures document[5] mentions the requirement for evidence to be submitted as part of a complaint. However, this is not sufficient. 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.

1.26 The applicable standard for Evidence under the English law is the civil standard of proof, i.e. proof on the "balance of probabilities". In Napp Pharmaceutical Holdings Ltd and Subsidiaries v. Director General of Fair Trading (CAT case number 1001/1/1/01 at paragraph 109) it was held that there must be "strong and compelling evidence of an infringement". In civil cases the burden of proof lies with the claimant. The practical burden which the claimant faces of proving a prima facie infringement in competition law is a heavy one, particularly because in practice it is commonly the party that is alleged to have breached the law (the defendant) which will, at least prior to disclosure possess the relevant documentary evidence relating to the alleged breach.

1.27 Ooredoo thus recognises that there is an issue of information asymmetry between operators, which limits the completeness of the evidence which the claimant might be able to provide. Only the CRA has the powers to request information from operators, and therefore conduct an appropriate and complete quantitative analysis. For this reason, Ooredoo believes that the ultimate burden of proof should fall on the CRA to demonstrate that any anticompetitive conduct has occurred. Whilst there must be an obligation for the Respondent to provide, within reason, the required information to enable the CRA to conduct its analysis, it is important that a presumption of innocence principle is adopted. At the same time, Ooredoo

[5] CRA, "Ex Post Investigation Procedures Document", February 2015

emphasises the importance of any finding under this competition framework to be unequivocally supported and evidenced by a thorough and rigorous quantitative analysis.

1.28 In the past, such rigor has not always been followed by the CRA and it has not been unusual for regulatory decisions to be based more on "theory" than on "facts". Whilst Ooredoo appreciates that the information available to the CRA has not always been complete, the seriousness of the effects of any finding of anticompetitive behaviour could be so profound that it is of vital importance that any such finding can be substantiated with unequivocal and robust quantitative analysis. For example, the CRA needs to consider that whilst it does not have direct power to determine the level of damages that could be requested by operators to the respondent in the case of a finding of anticompetitive behaviour, the quantitative analysis underpinning the finding will inevitably be used by an Administrative Court to determine such damages, if appropriate.

1.29 **To summarise, Ooredoo believes that:**

1.29.1 The 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;

1.29.2 The ultimate burden of proof should be on the CRA, as only the CRA has the power to obtain relevant information from all parties involved; and

1.29.3 Any finding of anticompetitive behaviour can only be reached if this is supported by robust, complete and through quantitative analysis.

Application of the EC framework to Qatar

1.30 Ooredoo notes that the CRA and their advisors have based the competition policy primarily on the basis of the EC's competition policy. Whilst the EC has a well-developed competition policy, which continues to evolve and improve over time, it is not appropriate to apply mechanically a similar approach to Qatar, without taking into account the local peculiarities of the market. It is also not entirely obvious why the EC's approach to competition policy is more appropriate for Qatar than the USA approach to competition policy. The CRA has failed to explain its preference and rationale for the EC approach.

1.31 The CRA needs to consider that no competition policy framework has ever existed (apart from the broad provisions within the telecommunications and Executive By-Law) in Qatar, and that such proposals are being introduced as part of a much wider reform of the sector, that includes movement away from ex ante regulation.

1.32 Such radical changes need to occur gradually, allowing the industry to adapt and adjust their commercial strategies accordingly. This does not mean that anticompetitive or harmful conduct should be allowed. Rather, Ooredoo believes that it would be beneficial for the industry if the CRA would introduce a period of gradual introduction of the new policy, which would also allow adequate education for market participants on the process and complexities of competition economics.

1.33 Moreover, Ooredoo believes that economic efficiency should always remain at the front of any regulatory or policy decision made by the CRA. The CRA should consider that past investment decisions have been made against the current and predicted regulatory background, and as such, some investment might not have been made, under different conditions and risk environments that are created by the regulatory landscape. Again, Ooredoo is not advocating that anticompetitive conduct should be tolerated to protect past investments, but rather that the benefits to consumers that have resulted from such investments should be taken into account. Also, current investment plans might take some time to adjust in response to significant changes in the regulatory and competitive background and such gradual adjustment should be allowed.

1.34 Therefore, whilst Ooredoo agrees that the CRA should be aspiring to introduce a "best in class" competition policy, its application should be less broad to begin with and target specific serious competition issues, such as cartels or serious abuse of dominance.

1.35 It is important to state that any abuse of market power should be subject to a **purpose-based test** to ensure that the application of such prohibitions do not increase the likelihood of regulatory error and capture potentially pro-competitive conduct. The competition principles that the CRA has utilized in its recent decisions have unfortunately not been subject to any such tests, but rather have been assumed to be a per-se offence. Such a view is unfortunately a blunt view of the facts and ignores international practice.

1.36 Ooredoo's concerns in this regard emanate from the current Telecommunications Law, in which the prohibitions against an abuse of dominance have been incorrectly applied and interpreted as a per se offence by the CRA. In doing so, the CRA does not inquire into whether such activities have any actual anti-competitive purpose or effect, preferring to take a literal interpretation of the prohibition as a means of establishing liability. Ooredoo considers that a key element of any abuse of market power offence must be that the impugned conduct has the **purpose** of substantially lessening competition in a communications market. This ensures that the provision would only capture that conduct which is actually intended to be anti-competitive.

1.37 The use of a proscribed purpose test has been implemented in the competition law regimes of a number of best practice jurisdictions. For example:

1.37.1 in Australia, the prohibition against "misuse of market power" requires a corporation to take advantage of its power for one of three prescribed purposes (e.g. "eliminating or substantially damaging a competitor")[6];

1.37.2 in Canada, section 78 of the Competition Act 1985, which prohibits an "abuse of dominant position", sets out a range of activities which are prohibited but attaches a purposive element to them rather than making the activities per se offences. For example: a margin squeeze is only prohibited if it is done "for the purpose of impeding or preventing the customer's entry into, or expansion in, a market"[7]; and selling products at below-cost price is only prohibited if done "for the purpose of disciplining or eliminating a competitor"[8].

1.38 In other overseas regimes, an effects-based test is used, requiring the impugned conduct to have the effect of substantially lessening competition in the market in order to constitute an abuse of market power. For example, under jurisprudence established by the European Court of Justice, a breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits abuses of dominance, will only occur if the conduct has an anti-competitive effect in a defined market in the form of harm to consumers[9]. Similarly, under the Australian telecommunications-specific competition law regime, the impugned conduct must have the "effect, or likely effect, of substantially lessening competition" in a telecommunications market[10].

1.39 While either a purpose or effects test is an option, Ooredoo submits that in the Qatari context, where the communications sector is still developing and there is a crucial need for investment and innovation in communications markets, a purpose-based test is more appropriate than an effects-based test.

1.40 A key reason for this is that an effects-based test is likely to be more susceptible to misapplication, potentially capturing both pro-competitive and anti-competitive conduct. Such an approach is also more likely to have the effect of encouraging regulatory error and overreach and deterring acceptable pro-competitive conduct. These consequences are likely to be magnified in the Qatari context given the

[6] Competition and Consumer Act 2010 (Cth), section 46(1).
[7] Competition Act 1985 (Canada), section 78(1)(a).
[8] Competition Act 1985 (Canada), section 78(1)(i).
[9] Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG [1998] ECR I-7791. See <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d55c95f82d0b804b95a293a6574c6148e1.e34KaxiLc3eQc40LaxqMbN4OaxiKe0?text=&docid=43749&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=660136>.
[10] Competition and Consumer Act 2010 (Cth), section 151AJ(2).

relative inexperience of the CRA and the lack of any developed competition law jurisprudence in Qatar to guide the application of this type of prohibition.

1.41 Ooredoo suggests that, within the competition policy, any abuse of market power provision needs to explicitly include a purpose-based element, requiring the impugned conduct to be done for a proscribed purpose. Ooredoo therefore recommends that the CRA amend the policy under section 2.4 and 2.7.2, currently effectively use a dual per-se offence and an effects based test to a single purpose based test. It would also mean that the CRA must change section 3.2 of the competition policy wherein it is stated *"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".*

1.42 Ooredoo also recommends that, within the competition policy, reference is made to international best practice with regards to the use of appropriate methodologies, processes, and standards in assessing relevant markets and the assessment of dominance within those markets.

1.43 The primary purpose of the competition policy must be to promote the long-term interests of consumers of communications services and applications in Qatar. The "long-term interests of consumers" (LTIC) principle reflects the position in Australia[11] and New Zealand[12] and provides an effective overarching principle for the interpretation of the substantive provisions of competition policy. 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".**

1.44 Furthermore, the competition provisions should be subject to a defence of objective justification modelled on EU jurisprudence, which the competition policy appears to do so at section 2.8 and 3.6, however, Ooredoo would add that it would be appropriate to include the possibility for 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. Such defences and exemptions are crucial to ensuring that the competition provisions are not applied in an overly

[11] Competition and Consumer Act 2010 (Cth), section 152AB(1): "The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services."
[12] Telecommunications Act 2001, section 18(1): "The purpose of this Part and Schedules 1 to 3 is to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers."

inflexible and abstract manner and have the effect of discouraging pro-competitive activity in communications markets.

1.45 In particular, Ooredoo considers that a defence of "objective justification", which would apply to all of the offences under the competition regime, needs to be incorporated into the competition provisions.

1.46 Within EU competition jurisprudence, "objective justification" exists as a defence to abuse of dominance under Article 102 of the TFEU. This defence has been applied to a number of situations by the EU courts, applying to conduct such as:

1.46.1 objectively necessary conduct - e.g. a lack of technical ability or capacity in a refusal to deal context[13];

1.46.2 reasonable measures to protect the commercial interests of the dominant firm - e.g. reasonable and proportionate counter-measures that respond to a competitor's conduct in the market[14]; and

1.46.3 conduct that is economically efficient, where the efficiencies outweigh the anti-competitive effects of the conduct and there are no other economically practicable or less anti-competitive ways of achieving the purported efficiencies[15].

1.47 While in the EU, the defence of objective justification is a matter of judicial interpretation rather than being explicitly codified in legislation, Ooredoo strongly urges that such defence be incorporated into the competition policy to prevent the CRA from taking a literal interpretation of the competition provisions and to deal with the lack of any specific competition law jurisprudence in Qatar which can otherwise serve to guide the application of this concept.

1.48 The Competition Policy appears to be silent on whether the proposed competition policy will have the ability for licensees to have certain types of anti-competitive conduct authorized by the CRA on the basis that the public benefits associated with the relevant conduct outweighs the anti-competitive concerns. The option for a licensee to submit an authorization application would be highly desirable, as there are likely to be a range of circumstances in a small market with a limited number of players where a degree of co-operation between licensees may have significant public benefits that need to be weighed up against the anti-competitive harm that would eventuate from the relevant conduct. This has been an issue historically in

[13] FAG-Flughafen Frankfurt/Main AG, OJ 1998 L 72/30.
[14] Case 27/76, United Brands Company and United Brands Continental BV v Commission [1978] ECR 207, [189]-[191].
[15] Robert O'Donoghue and A Jorge Padilla, The Law and Economics of Article 82 EC (Hart Publishing, 2006) page 230.

Qatar in relation to the deployment of super-fast broadband infrastructure and may also be an issue going forward. Ooredoo would strongly support the introduction of authorization provisions to apply to the merger control regime and prohibition against horizontal restraints.

1.49 Such a provision is likely to be more appropriate than the proposed de minimis exceptions modelled on the EU. In many EC countries there a few large operators competing in a market with a number of smaller operators, such as MVNOs. Therefore it can be appropriate to exclude the smallest operators from the competition policy threshold because the impact of any anticompetitive action by them, in the context of a large number of operators in the market, is likely to be small or unsuccessful. In comparison there are only three telecoms operators in Qatar with Ooredoo and Vodafone being the largest and QNBN having a comparatively small market share in many markets. With only three operators in the market, competitive dynamics could change more quickly and profoundly following action by any of the three operators and therefore the de minimis agreements would need to be considered in this context and could result in ex-post regulation not being correctly applied.

2. Comments on Annexure 1

2.1 Annexure 1, which was published by the CRA in conjunction with the draft competition policy document (Annexure 2), outlines the methodology that the CRA intends to follow in relation to market definition and dominance assessment, both in an ex ante and in an ex post context.

2.2 Ooredoo notes that the CRA has not asked specific consultation questions in relation to document. However, the CRA has indicated that operators can provide comments, if they wish to do so.

2.3 In this section, Ooredoo outlines its main comments on Annexure 1.

The market definition and dominance assessment process in an ex ante context

2.4 Ooredoo notes that it has already expressed its views on MDDD methodology in its response to the 2014 MDDD consultation and subsequently commented on the methodology proposed by the CRA in relation to market definition and dominance assessment, as part of its response to the initial MDDD consultation submitted to the CRA on 07 June 2015. Indeed, it is unclear why the CRA is again inviting comments on a methodology, after it has already applied it in the consultation on candidate markets.

2.5 In this section therefore, Ooredoo has only summarised the key comments and concerns set out in its previous response. For the full list of comments, Ooredoo refers the CRA to its 07 June 2015 response document.

Definition of candidate and relevant market

2.6 Ooredoo broadly agrees with the approach set out by the CRA for the definition of Candidate and Relevant Markets, which appears at a high level to be consistent with the approach used in other jurisdictions.

2.7 However, in relation to the definition of Candidate markets, Ooredoo has already expressed the following key concerns:

2.7.1 The CRA has not conducted an appropriate or sufficient assessment of whether geographic markets should be defined. Ooredoo disagrees with the CRA 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.

2.7.2 The CRA, in its definition of Candidate Markets seems to have already anticipated and concluded on the dominance assessment, before such consultation has even started. This is not appropriate and undermines the fundamental purpose and principles of regulatory consultations.

2.7.3 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.

2.7.4 The CRA is not considering that "homogeneous market conditions" need to be considered in the context of substitutability between services. In other words, whilst it is necessary for competitive conditions to be homogeneous in order to define a single market, this is not a sufficient condition. Product substitutability and other factors need also to be considered. Therefore, two services or customer segments cannot be considered as part of the same market simply on the basis that the competition conditions are expected to be similar for both services/customer segments. Appropriate consideration of demand-side substitutability is fundamental for the correct application of the market definition process.

2.8 In relation to the definition of Relevant markets, Ooredoo's main concern relates to the lack of an appropriate sequence of analysis. In particular, Ooredoo is concerned that the CRA has still not correctly set out the sequence of the assessment for the need for ex-ante regulation in a market.

2.9 Consistent with the European framework, the process for the definition of Relevant markets susceptible to ex-ante regulation should be based on the following four logical steps:

2.9.1 Step 1: Define the markets at the retail level. This market definition exercise should be based on considerations of substitutability across services and direct and indirect competitive constraints. The definition of retail markets should consider an appropriate time horizon, especially in sectors like telecommunications, where technological change can rapidly alter the boundaries of markets.

2.9.2 Step 2: For each retail market, identify whether the market is competitive in the absence of wholesale regulation. Once the retail markets are identified, the question should be asked whether the markets are prospectively competitive, irrespective of any wholesale regulation currently imposed. If the answer is yes, then no further action is needed and the market can be considered to be fully competitive (and therefore not included in the list of Relevant Markets). If the answer is no, then the analysis should proceed to step 3. The analysis should take into account any expected market developments to assess if any lack of competition in the market is durable and if the market is prospectively competitive.

2.9.3 Step 3: If retail market is not competitive, identity wholesale inputs and define wholesale remedies. The wholesale inputs relevant for the provision of the retail services for which there is a competitive concern should be identified and any genuine bottleneck constraint addressed through ex-ante regulation at the wholesale level. In identifying the wholesale markets corresponding to each of the retail markets defined, demand-side and supply-side substitutability of products should be considered. The analysis should be carried out from the perspective of an operator that wishes to compete in supplying end-users in the retail markets.

2.9.4 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. The question should then be asked whether the wholesale regulation considered would address the competitive concern at the retail level. If the answer is yes, then the process stops and only the identified wholesale markets should be included within the list of Relevant Markets (but the retail market should not). If the answer is no, then steps 2, 3 and 4 are repeated until a wholesale solution to the retail competitive problem is found. In some cases, a wholesale solution to a competitive problem at the retail level is not feasible or possible within a short to medium term. Only in those cases should the retail market be included within the list of Relevant Markets and regulated on an ex-ante basis.

2.10 Crucially, the last step appears to be missing in the process set out by the CRA. Ooredoo reiterates that following this process is fundamental to ensure that ex-ante regulation is only imposed on those markets that really require it. Ooredoo is concerned that, as set out at the moment by the CRA, the process will result in an excessive number of retail markets being defined as Relevant Markets and subject to ex ante regulation. This would not be consistent with international trends and the CRA's own view that retail regulation should be kept to a minimum.

2.11 Ooredoo therefore requests that the process is revisited by the CRA, to explicitly include the reassessment of retail markets in light of wholesale regulation, before imposing any regulation at the retail level.

Dominance assessment

2.12 Ooredoo broadly agrees with the criteria defined by the CRA for the assessment of dominance. However, Ooredoo has the following key concerns.

2.13 Whilst market share is a useful indication in the assessment of dominance, the CRA appears to be over-reliant on this criterion. Ooredoo invites the CRA to consider the small market size of the state of Qatar and therefore the inevitable difficulty of sustaining a large number of market players whilst achieving the necessary economies of scale. This implies a degree of inevitability that operators enjoy a "large" market share. However, by itself, this is not an indication of dominance or significant market power. Other factors and considerations need to be taken into account. This is particularly important in the context of the telecommunications sector, where fast technological innovation and product development are providing continues incentives to operators to compete and improve the service provided to customers, both in terms of quality and value for money.

2.14 Ooredoo is pleased to see that this has been partly recognised by the CRA in the statement "only if market shares come along with some non-negligible market barriers they can also be seen as indicative as a source of market power from an economic point of view".[16] Ooredoo considers this principle to be very important and invites the CRA to take it into account in practice every time a market definition analysis is required. Ooredoo also expects that when the CRA considers market shares, in combination with other factors, it will consider the evolution of market shares over time. For example, if market shares are volatile then a very high market share does not necessarily mean an operator is dominant. The analysis should also be conducted with a forward-looking approach in order to reflect the dynamic nature of the sector. In particular, expected network roll-out, market entry and prospective competition need to be taken into account as these will help ensure that regulatory measures put in place continue to be appropriate during their period of application. It should also be noted that expected future development in the market are likely to have an impact on current competitive behaviour.

2.15 However, Ooredoo notes that the CRA concludes the discussion on dominance assessment with a note which again highlights how the CRA is suggesting that it is possible to reach conclusions on dominance on the basis of market shares alone,

[16] Annexure 1, page 17

without the need for additional evidence or analysis: *"…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."* Ooredoo is particularly concerned with the *"in the absence of compelling evidence"* qualification which might be interpreted as an indication that the CRA might not perform an appropriate and thorough analysis of all available evidence. This would be inappropriate and contrary to regulatory best practice.

2.16 Ooredoo expects the CRA will provide fully evidenced justification, on the basis of appropriate quantitative analysis, for any market definition exercise it conducts, whether on an ex ante or ex post context.

2.17 As part of a fully evidenced justification, Ooredoo expects the CRA to look at the level of prices in the relevant market, particularly looking at how prices evolved historically. Another factor is the level of profitability that could be calculated through an estimation of the margins enjoyed by the firm. However, market shares, prices and margins are not the only factors to take into account. For instance, expansion by existing competitors or entry by new firms are other factors that must be analysed by the CRA. Product variety and level of innovations are also relevant factors to consider, as a significant level of innovation is generally an indication of healthy competition in the market.

The market definition and dominance assessment process in an ex post context

2.18 As set out by the CRA, the methodology and process for market definition and dominance assessment in the context of an ex-post investigation are very similar to those outlined in the context of ex-ante regulation.

2.19 Ooredoo agrees with the CRA that the key differences between the process in an ex-ante and an ex-post context are:

2.19.1 The definition of the market will tend to be more focused on the core products under investigation and might therefore result in a more narrowly defined market definition;

2.19.2 In an ex-post context, the definition of the market will be backward looking, rather than forward looking;

2.19.3 The Three Criteria Test (TCT) does not apply as not relevant

2.20 Furthermore, the ex-ante market definition might be different from the ex-post analysis. The former takes place only when there is a need for a new regulatory landscape while the latter always takes place in case of competition cases or

enquiries. Therefore, the outcome of the analysis could be different, for instance due to new technological developments or the entry of new players.

2.21 With regards to the backward looking perspective adopted by the Authority in the ex-post assessment, Ooredoo believes that the forward looking perspective cannot be excluded from the overall framework.

2.22 For instance, 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 CRA should clarify this aspect establishing what time perspective will be adopted in the relevant market assessment.

2.23 In relation to dominance assessment, the 40% market share threshold used by the CRA for presumed dominance is too low. For example, the EC has established the following principle, in relation to abuse of dominance cases:

2.23.1 Market share of 50% or more give raise to a rebuttable presumption of dominance; and

2.23.2 Market shares of 70% to 80% and above have been treated as clearly indicating dominance, subject to verification against other factors.[17]

2.24 Various cases show how market shares are not the only variable taken into account by Authorities in the assessment of dominance. For instance, the United Brands decision[18] is one of the most quoted cases in competition economics literature. The case refers to the charge of abuse of dominant position by United Brands Company, the company importing the Chiquita bananas from Latin America. The European Commission firstly found the company having a dominant position and the decision was upheld by the Court of Justice. However, this case is relevant because the Court clearly stated the various factors to take into account in relation to dominance.

2.24.1 Par.66: “In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.”

2.24.2 Par.109-110: “A market share of 40-45% "does not however permit the conclusion that UBC automatically controls the market. It must be determined having regard to the strength and number of the competitors.”

2.24.3 Par.126: “An undertaking's economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not incompatible with a

[17] See Case COMP/37.990 *Intel.*
[18] See Case 27.76.

dominant position, just as large profits may be compatible with a situation where there is effective competition."

2.25 Even within properly defined markets, the market elasticity of demand can vary considerably. Even holding that elasticity constant, the ability of other firms—rivals and prospective entrants, including producers of related products who may be able to convert their facilities to expand supply in response to a price increase differs enormously. In some instances, notably with constant marginal costs and no binding capacity constraints, their ability is unlimited (preventing any price increase) and in others, it is negligible. The notion that some given market share, say, 50%, conveys a particular level of market power or even a fairly narrow range is emphatically rejected.

3. Conduct, arrangements that constitute anti-competitive practices

3.1 This section provides Ooredoo's response to the specific questions set out in the CRA consultation document with regards to agreements between two or more undertakings.

Question 1

Do consultees agree that the anti-competitive conduct can apply to agreements between independent undertakings, and are there other forms of conduct that the prohibition should apply to?

3.2 Ooredoo agrees with the CRA that anti-competitive conduct can apply only to agreements between independent undertakings.

3.3 However, 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. In other words, the CRA needs to be careful not to confuse commercial responses for joint intentions. For example, if an operator is forced to increase tariffs for whatever reason, it is reasonable to expect other operators to potentially match the price increase, if it is profitable to do so. This should not be taken by the CRA to be an indication of potential joint agreement to behave anti-competitively.

Question 2

Do consultees agree with the approach to assessing whether agreements are prohibited as they amount to anti-competitive conduct?

3.4 Whilst Ooredoo recognises that many of the type of agreements identified by the CRA in the draft competition policy document could potentially constitute anti-competitive conduct, it remains unclear to Ooredoo which agreements the CRA considers to be anti-competitive by object rather than by effect – which Ooredoo believes in any case should be changed to refer to "Purpose / Intent".

3.5 This needs to be clarified by the CRA, so that it is possible for operators to respond on whether the classification remains correct. This needs to be provided by the CRA before the final competition policy is issued, as this is an important aspect of the competition policy, which operators need to be given the possibility to comment on.

3.6 In general, 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. Agreements and conducts should be assessed on a case by case basis wherever possible with the purpose based test.

3.7 Before discussing on the approach proposed by the CRA for the assessment of prohibited agreements, this section sets out Ooredoo's comments in relation to some of the specific conducts mentioned by the CRA in the draft policy document.

Horizontal agreements

3.8 The list of horizontal agreements that might cause competitive concerns presented in the document is incomplete. For example, it does not include production agreements or agreements on commercialisation. The CRA needs to add these forms of agreement and in any case make explicit that the list is non-exhaustive.

3.9 Notwithstanding Ooredoo's recommendations for a single purpose based test, 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.

Price or output fixing

3.10 Ooredoo acknowledges that agreements aimed at reducing price competition may constitute anti-competitive conduct and that this could be by object anti-competitive. In addition to the direct price of the product agreements may also relate to other areas such as discounts and payments for additional services. However, as mentioned above, the CRA will need to carefully undertake this assessment in order not to confuse commercial responses for price agreements. It would therefore be appropriate for the CRA to assess each scenario on its merits (purpose based test), rather than assuming a per se offence.

Market sharing

3.11 Ooredoo agrees that this could harm competition. However, the CRA should recognise that to-date, the Qatari fixed telecommunication market is characterised by a de facto market partitioning along geographic lines, which is not the result of anti-competitive conduct, but rather of the historical evolution of network roll-out by operators and various agreements which have in practice resulted in certain areas being served exclusively by one operator. As above, it would therefore be appropriate for the CRA to assess each scenario on its merits (purpose based test), rather than assuming a per se offence.

Fixing of trading conditions

3.12 Ooredoo agrees that these agreements could in principle harm competition. However, when investigating a particular trading condition the CRA should demonstrate that this has harmed competition and consumers. In other words, this conduct is not anti-competitive by object, but it might by effect. For example, agreements on trading conditions could relate to technical conditions for the supply or interoperability of products or services, which would be a legitimate agreement. It would therefore be appropriate for the CRA to assess each scenario on its merits (purpose based test), rather than assuming a per se offence.

Bid rigging

3.13 Ooredoo agrees that this could harm competition, as it would be evident that the purpose for such action was to harm competition and consumers in the long-term.

Information sharing

3.14 The implication in the Policy is that there are certain types of information sharing that are banned by object. Whilst Ooredoo agrees that sharing of future pricing information should be prohibited, the list of information is left open ended. In addition to this being clarified, it is important to note that whether the information exchange has an impact on competition depends on the specifics of each individual case and not all information exchanges will negatively affect competition. Therefore including such practices as per se offences would be inappropriate.

Group boycott

3.15 Ooredoo agrees that this conduct may harm competition, however the specific factors that lead to parties collectively boycotting certain suppliers or customers must be given adequate consideration. As an example, it may be possible to envisage a scenario where due to security concerns, parties boycott a particular supplier. It would not be appropriate in such circumstances to consider such action as an infringement. Therefore as above, Ooredoo recommends the CRA introduce a

single threshold test, based on purpose / intent, rather than assuming per se or objects based approach.

Joint purchasing

3.16 Whilst this conduct may in some cases harm competition, in practice it could generate significant benefits, through cost reductions, which would ultimately benefit consumers. Anticompetitive effects of joint purchasing should therefore be judged on a case by case basis.

Vertical agreements

3.17 Ooredoo does not agree with the CRA that vertical agreements are less likely to generate anti-competitive concerns. Whilst that might be the case in the context of certain market structures, Ooredoo believes that the potential for vertical agreements to have an anticompetitive effect, within the context of the telecommunications market in Qatar, should be seriously considered and taken into account. In particular, Ooredoo notes that the Qatari market has the somewhat unusual presence of an "upstream only" operator, QNBN, which, at present as no or very limited retail operations. Therefore, any vertical agreement between QNBN and other retail operators, which might constitute a vertical agreement, have the potential to significantly impact the competitive landscape of the market.

Exclusive distribution agreements

3.18 Ooredoo agrees in principle that this can have a negative effect on competition. Ooredoo is in particular concerned by exclusive distribution agreements which might be concluded by QNBN in those geographies where it is the only fixed network operator. More generally, exclusive distribution agreements could have an impact on competition whenever a firm, even if not dominant at the national level, is able to exclusively sell a necessary or highly desirable product to selected customers.

Single branding

3.19 Whilst Ooredoo agrees that the principle of single branding can result in anti-competitive outcomes, franchise agreements are generally seen as acceptable. This has been recognised in Europe, in that franchise agreements are excluded from the EC competition framework through the Block exemption regulation.[19] This should be adequately reflected in the Policy as currently the document appears to imply that franchise agreements will be considered as part of anti-competitive single branding

[19] The Block Exemption Regulation entered into force on 1 February 1989 and remained in force until 31 May 2000, when it was superseded by a Block Exemption Regulation on Vertical Restraints.

agreements. Ooredoo also notes that internationally, infrastructure sharing is also considered not to be anti-competitive, even if it is conducted under a single-branding agreement.

Retail price maintenance

3.20 Ooredoo agrees with the principle that retail price maintenance should be prohibited. However, Ooredoo stresses that it is important to consider the ex-ante regulation when investigating competitions concerns. In markets where Ooredoo is deemed to be dominant, the CRA currently regulates the retail prices Ooredoo can charge, through an ex post service profitability reporting. As the CRA has the power to regulate/request changes to many of Ooredoo's retail prices, this is effectively retail price maintenance imposed by the regulator as Ooredoo has no choice over the retail price it can charge.

Limited distribution

3.21 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. For example, consumer benefits from the consumption of some luxury products is reduced if these are widely available as negative network effects are present. Distribution could also be limited for reputational reasons, for example if some distributors do not meet specific criteria related to the reputation and brand of a product.

Market partitioning

3.22 Ooredoo agrees that this could result in anti-competitive outcomes. However, this should be judged on a case by case basis. Just because an agreement has facilitated price discrimination, it does not necessarily cause harm for consumers. In some cases, price discrimination may results in higher consumer welfare and some consumers may benefit as they are now able to afford a product.

Methodology for assessment of prohibited or anti-competitive conduct

3.23 Ooredoo agrees in principle with the factors outlined by the CRA in section 2.7.1 in relation to the assessment of agreements that might restrict competition. However, Ooredoo observes that:

3.23.1 The market position of competitors, whilst a relevant factor, should never be taken as an excuse to justify or allow anti-competitive behaviour. So, if competitors to the entities involved in the agreement have a strong market power, this in itself cannot justify a less rigorous analysis by the CRA or a more lenient assessment.

3.23.2 Similarly, the nature of the market can inform the analysis, but should not influence the findings of the analysis.

3.23.3 Ooredoo also believes that some additional factors should be taken into account by the CRA. For example, the nature of the product involved should be considered as this can affect the impact of an agreement.

3.23.4 In general, 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. This quantitative analysis would need to be clear and comprehensive in order to show that competition had been negatively impacted. Any decision by the CRA that an agreement harmed competition would have to be primarily based on quantitative analysis and not qualitative or theoretical arguments, although these would naturally supplement the quantitative analysis.

Question 3

Do consultees agree with the approach to identifying de minimis agreements where no anti-competitive effect can be presumed?

3.24 Ooredoo recognises that the principle of assuming that agreements between parties below a specific market share or size are unlikely to cause significant harm is in line with international practice, such as in the EU.

3.25 However, Ooredoo considers that this principle cannot be applied mechanically in the context of the Qatari market, and requires more careful consideration. The Qatari market is characterised by a limited number of competing operators and therefore each one of them can unilaterally influence the competitive landscape of the market. In this context, agreements between companies which might have limited market share at present might significantly distort competition going forward.

3.26 Ooredoo has concerns relating to the application of the 10% threshold and its relation to the definition of the market. This is because if markets are defined on a national level then QNBN could have a market share less than 10% yet have a monopoly on a key input in some geographic areas. This could result in a refusal to supply by QNBN not being investigated if the national market share is used. Therefore Ooredoo suggest that the 10% should be a soft threshold to stop abuse of power and anti-competitive agreements when an operator is only dominant in certain geographies.

3.27 In addition there have been examples where a company has been able to exert market power despite being a new entrant to the market. For example, when Apple launched the iPhone it did so through exclusive distribution agreements with an

operator in each country. Despite having a 0% market share as it had yet to enter the market, it was reported that in Europe, Apple negotiated deals allowing it to receive 10% of revenue made from calls and data from iPhone customers. This is despite operators previously campaigning against these deals.[20]

3.28 The example of these agreements highlight that de minimis agreements based purely on market share may result in the CRA not being able to investigate certain agreements and abuses. In a market that is developing at a rapid pace this could cause issues when a new product/service is expected to have high consumer demand in the future. In many European countries, such as France, competition authorities launched investigations into the exclusive distribution agreements mentioned above, and stopped the agreements.

3.29 The 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.

Question 4

Do consultees agree that the CRA should consider possible efficiency defences in assessing whether an agreement is consistent with the prohibition on anti-competitive behaviour?

3.30 Ooredoo agrees that the CRA should consider efficiency defences, as many agreements may have the aim and the effect of reducing costs, achieving better economies of scale and in general improve efficiency of service provision, which would ultimately benefit customers. For example information sharing could be used to benchmark performance against best practice and thus result in operational efficiencies which could benefit consumers.

3.31 The principles of the framework are in line with that in other jurisdictions such as the EU. There is a substantial burden of proof on the parties in the agreement to quantify not only the size of the efficiencies but also the likelihood of them occurring.

[20] http://www.ft.com/cms/s/0/17aa89d0-500b-11dc-a6b0-0000779fd2ac.html#axzz3dyBLpRFY

3.32 However, the burden of proof must be symmetrical – whilst any economic benefits from an agreement need to be quantified and demonstrated by the parties involved in the agreement, equally it is also necessary for the competition authority to quantify any economic losses due to the agreement, as qualitative arguments based on a simple review of market factors cannot be considered sufficient. Otherwise it would not be possible to decide whether or not the benefits outweigh the costs.

Question 5

Do consultees agree that the CRA should consider possible defences in assessing whether an agreement is consistent with the prohibition on anti-competitive behaviour?

3.33 Ooredoo agrees that the CRA should consider possible defences when assessing whether an agreement is anti-competitive, in fact we would go further and state that the CRA must consider possible defences.

3.34 There appears to be an implication in the CRA question, that some agreements will be exempt from the efficiency defence, which Ooredoo believes would not be appropriate. The CRA should confirm and specify which types of agreements it believes will not be subject to possible defences, as it is currently unclear.

4. Abuse of a dominant position

4.1 This section provides Ooredoo's response to the specific questions set out in the CRA consultation document with regards to abuses of a dominant position.

Question 6

Do consultees agree with the CRA's general approach to assessing whether conduct can be considered an abuse of dominant position as described in section 3.2?

4.2 Ooredoo has some general comments about the approach before some more specific comments on the factors to be analysed.

4.3 Whilst Ooredoo agrees with many of the points made in section 3.2 of the Policy document, as these will help to identify a dominant undertaking and its intent and strategic approach to abuse this position, this section does not refer to actual analysis on the impact on the market, rather it just focuses on the likelihood that some abusive behaviour 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 behaviour.

4.4 It is important to ensure that the implementations of ex-ante and ex-post regulations are consistent with each other. As a result the EC states that it will consider the *"specific facts and circumstances of each case. For example, in cases involving regulated markets, the Commission will take into account the specific regulatory environment in conducting its assessment. The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case".*[21]

Position of the dominant firm

4.5 Whilst Ooredoo agrees to some extent that the more dominant a firm is the more likely the anti-competitive conduct could increase the likelihood of anti-competitive foreclosure, Ooredoo emphasises that this should not be taken in isolation in determining whether the actual conduct is an abuse and had the purpose of lessening competition and harming consumers in the process as there are a number of factors that should be considered in combination with this.

Specific features of the market and economic context of the conduct

4.6 Ooredoo agrees with the principle that economies of scale and network effects can create barriers to entry. However, these factors can also generate benefits to consumers through reduced costs, which can pass through to prices, and network effects often occur because consumers get a benefit from having the same product or using the same service.

Positions of the dominant firm's competitors

4.7 Ooredoo agrees that the CRA should take the positions of competitors into account when investigating an abuse of dominance. In general other competition authorities assume that when other undertakings have small market shares, this increases the likelihood that an abuse of dominance has an impact on foreclosure and consumers. However, the low number of alternative operators in Qatar implies that Ooredoo's competitors can achieve a relatively high market share which can reduce the impact of any alleged conduct on competition and consumers.

Positions of suppliers or customers

4.8 Ooredoo agrees that these could have an impact on the effect of any alleged abuse. However, Ooredoo believes that the CRA should also consider the ability of competitors to make counter strategies in the case where the alleged abuse involves

[21] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 8

targeting specific groups of customers. If the competitors have the scope for counter strategies then this is unlikely to result in a reduction in competition.

Extent of abuse

4.9 Ooredoo agrees that this could affect the likelihood of competition being harmed. However, this would need to be demonstrated by robust quantitative evidence.

Evidence of exclusionary or exploitation strategy

4.10 Ooredoo acknowledges that any internal documents suggesting an anti-competitive strategy should be taken into account in the overall investigation, and such conduct is likely to increase the likelihood of harming competition because the alleged conduct will be designed for this purpose.

Evidence of actual foreclosure for exclusionary abuse

4.11 Ooredoo accepts that this could suggest that there has been an abuse of dominance. However, Ooredoo stresses that there needs to be a thorough investigation into the reasons why another company may perform worse or has left the market as there are a large number of factors that affect a firm's performance and if they leave the market. Therefore Ooredoo believes it is important to identify beyond reasonable doubt that the reason for foreclosure was the actual conduct.

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?

4.12 Ooredoo agrees to some extent with the high level approach outlined by the CRA. However, Ooredoo has some specific concerns which are set out below.

Market definition

4.13 Ooredoo has already commented on the process for market definition in Section 2. However, with regards to section 3.3.1 of the Competition Policy, Ooredoo is seriously concerned with the CRA statement that "the Authority can use market definition in ex post competition assessments to:

4.13.1 Determine whether a licensee is dominant in a market;

4.13.2 Help assess the effects of alleged anti-competitive activity in a market; or

4.13.3 Help consider whether a merger would lead to a substantial lessening of competition"

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

Assessing Dominance

4.14 Ooredoo has already emphasised in section **Error! Reference source not found.** that there are factors other than market share that can affect dominance so the CRA needs to undertake a careful analysis before designating a firm as dominant.

4.15 As already discussed, Ooredoo is concerned that the CRA has in the past placed excessive reliance on market share alone. Whilst it is uncommon for a firm to be found to be dominant with a market share of less than 40%, the contrary is not true – i.e. market shares of above 40% do not necessarily imply dominance. As mentioned in section 2, in the context of ex post abuse of dominance cases, the EC considers that only market shares above 70%-80% can be considered sufficient to presume dominance and even then other factors still need to be taken into account. Also, as noted above in relation to the iPhone example, there are cases where expected demand for a product could allow a firm to exert market power whilst being a new entrant. This emphasises the need for a thorough assessment of all relevant market factors.

4.16 Rapid technological change occurring in the telecoms markets imply that operators may be subject to competitive constraints even from services which have not traditionally be considered. For example, the increasing rise of OTT/VoiP providers is providing a significant competitive restraint on operators.

4.17 The threat of new entry or expansion by an existing competitor should be taken into account. In the case of Qatar, the reform of the licences which is likely to see QNBN be given a licence to operate at the retail level, is a significant competitive threat, considering that QNBN can rely on its existing network to expand at the retail level quickly and effectively.

Substantive assessment of the effects of the conduct

4.18 The 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.

4.19 Given the complex nature of estimating the impacts of any anti-competitive conduct and that some conduct is only anti-competitive "by effect", Ooredoo expects that the CRA will expand on this section.

4.20 This includes explaining how it will calculate the counterfactual. This is especially important in the case where the alleged conduct has been taking place over a long period of time as the telecommunications sector has changed significantly in recent years and the market is likely to be significantly different to the market prior to when the conduct started. In estimating the counterfactual it is important to consider how prices changed over time, comparing the infringement and non-infringement prices, as well as comparing to an appropriate comparator product in the infringement and non-infringement periods. This difference-in-difference analysis can remove issues common across products such as cost shocks which would be incorrectly missed if only a comparison of prices over time was used.

4.21 In analysing the effect the conduct has had on competition there are a number of different metrics the CRA could consider. Whilst some of these will depend on the type of conduct, such as evidence of foreclosure, the CRA should consider a number of quantitative metrics in order to determine that the conduct has had a significant negative impact on competition. These metrics could include, but are not limited to, prices, discounts, volumes, margins and customer switching behaviour. Ooredoo expects that the CRA would analyse a number of these factors in showing the effect on competition in order to provide a more robust judgement.

Imposition of remedies or sanctions

4.22 Ooredoo's comments on the imposition of remedies and sanctions in its response to question 14 of the consultation document below.

4.23 In principle, Ooredoo understands that the CRA might impose interim remedies in the case of very severe abuse of dominance which might cause immediate and irreparable harm. However, 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.

4.24 Ooredoo appreciates that it is appropriate for the CRA to have a power to issue regulatory instruments to deal with emergency situations and that this broadly reflects practice in a number of other jurisdictions. However, Ooredoo considers that the scope of the CRA's powers to issue an interim regulatory instrument should be limited to address concerns about the potential scope for arbitrary decision-making. In particular, Ooredoo recommends that there is an explicit requirement for the CRA to use reasonable efforts to undertake the normal steps as outlined in the Competition Policy and that the CRA should only be permitted to omit or truncate those steps if it is not "reasonably possible" for the CRA to observe those requirements due to the urgency of the situation. Such a proposal will ensure that the CRA retains the flexibility to issue an interim regulatory instrument to address

emergency situations while also ensuring that its use of that power observes key procedural fairness requirements where it is reasonable to do so.

General approach to investigating price-related abuse

4.25 In relation to investigations into price-related potential abuses, Ooredoo agrees with the CRA that the precise approach will depend to some extent on the specific case being investigated. However, 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.

4.26 For example, the CRA states that *"where relevant the cost will in most cases be determined for an 'Equally Efficient Operator'".* Whilst it is possible that an EEO approach will be the most commonly approach used in practice, Ooredoo expects the CRA to be outlining its approach and reasoning for such approach more fully. Similarly, 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. Whilst the approach will need to be adapted on a case by case basis, some general principles can be established.

4.27 Ooredoo also agrees in principle with the CRA regarding the need to use various cost standards in price-related abuse investigations. However, this can in practice result in very intensive data requirements. The CRA acknowledge this in the draft policy document and has reiterated during the workshop on 23 June 2015 that it intends to adopt a pragmatic approach and use alternative adjusted cost data wherever possible. Ooredoo is supportive of such pragmatic approach and will cooperate with the CRA in this respect.

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?

4.28 This section sets out Ooredoo's comments with respect to the specific conducts which might constitute abuse of dominance, as set out by the CRA.

Refusal to supply

4.29 In general, Ooredoo agrees that refusal to supply might constitute an abuse of dominance. However, we do have some concerns relating to aspects of refusal to provide essential facilities and intellectual property rights.

Refusal to supply access to facility or network

4.30 Ooredoo agrees with the CRA that undue refusal to provide access to essential facilities might have negative effects on competition. However, Ooredoo believes that the assessment of what constitutes and “essential facility” needs to be carefully considered and proportionate.

4.31 Ooredoo also 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.

4.32 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. If the list of essential facilities is unduly expanded to include services which are either not strictly essentials, or of which an operator does not have exclusive control, this would distort competition by unduly favouring inefficient market entry and expansion at the expenses of investment.

4.33 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. For a service to be considered an essential facility, it should be proven that it cannot be replicated in a profitable way, by an efficient operator, within an appropriately considered period of time.

4.34 In the Policy it 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.

4.35 Ooredoo reiterates that an ex ante framework for access to essential facilities is only now being developed. Therefore, an adequate transition period will be required in order to give time to operators to develop any wholesale service that might be included within the definition of essential facilities. Ooredoo has expressed its initial comments on these wholesale services as part of its response to the candidate market consultation submitted on 07 June 2015.

4.36 A "failure to supply" or a “refusal to deal” is not a per se offence. The impugned conduct must be demonstrated to have a meaningful and permanent impact on the competitive process in the defined market for anti-trust liability to exist. For example, in the European Union, establishing a "refusal to deal" (and therefore an

abuse of dominance) requires the following criteria to be satisfied, as reflected in the leading case of Bronner v Mediaprint:[22]

4.36.1 there must be a refusal to supply of a particular service or facility;

4.36.2 the service or facility must be essential or indispensable for competition; and

4.36.3 the refusal to supply must have an anti-competitive effect in the defined market in the form of harm to consumers; and

4.36.4 the refusal to supply must not be capable of objective justification.

4.37 Similarly, the European Commission's guidance on the application of Article 82 of the EC Treaty[23] in relation to abusive exclusionary conduct provides that the EC will typically only take enforcement action if all of the following circumstances are present:

4.37.1 the refusal relates to a product or service that is objectively necessary to be able to compete effectively in a downstream market;

4.37.2 the refusal is likely to lead to the elimination of effective competition in the downstream market; and

4.37.3 the refusal is likely to lead to consumer harm.

4.38 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. For example, in Verizon v Trinko[24], the United States Supreme Court held that anything short of an outright denial of access would not constitute a refusal to deal: *"It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose."*

4.39 Similarly, in the EU context, where the prohibition against a refusal to supply is arguably stricter than in the United States, the refusal to supply needs to have a

[22] Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG [1998] ECR I-7791. See, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d55c95f82d0b804b95a293a6574c6148e1.e34KaxiLc3eQc40LaxqMbN4OaxiKe0?text=&docid=43749&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=660136

[23] Now Article 102 of the Treaty on the Functioning of the European Union.

[24] Verizon Communications Inc v Law Offices of Curtis V Trinko LLP (2003) 540 US at 411. See, http://transition.fcc.gov/ogc/documents/opinions/2004/02-682-011304.pdf

permanent and enduring impact on the state of competition in the market to constitute an abuse of dominance. Under the EU's jurisprudence, a refusal to deal only constitutes an abuse of dominance where it involves the *"elimination or substantial reduction of competition to the detriment of consumers in both the short and the long term"*[25] Indeed, in the European Commission's submission to the OECD's roundtable on refusals to deal, it has stated[26]: *"A refusal to deal will only be unlawful if it can be shown that it will have an anti-competitive effect, with consequent long-lasting consumer harm. This does not mean that any competition must be altogether excluded from the market, but rather that effective competition is significantly diminished or eliminated.…Long-lasting consumer harm is in general only likely to arise if the refused product in question is essential for the customers to be able to compete effectively in a downstream market. This means that the refused product must constitute an objectively indispensable input for such competitors, and not merely a particularly suitable or convenient one. Put another way, there must be no economically viable, actual or potential, alternatives to the refused input…Typically, the Commission's concern will be that the refusal to supply is likely to lead to consumer harm on a downstream market via so-called input foreclosure. Such a refusal would normally preclude downstream rivals from obtaining supplies of the input altogether, thereby forcing them to exit the market, or only enable them to do so on terms that would not allow them to compete effectively with the dominant firm".*

Refusal to supply intellectual property

4.40 The refusal to supply intellectual property rights, especially for future innovation, is a potentially contentious case of abuse of dominance. This is because it could have disincentive effects for investment if the innovator, who has invested and undertaken a high level of risk, is then required to give access to the innovation to competitors who are free riding on the innovator's effort and risk. In this respect, the USA and EU take different approaches to requiring access to intellectual property. In particular, such refusal is not necessarily seen as an abuse in the USA. Even within the stricter EU framework it depends on the market structure (see case EFIM 2009)[27]. Whilst classing the refusal to provide intellectual property rights may improve static efficiency in the market, it may have a negative effect on dynamic

[25] Opinion of General Advocate Jacobs in Case C-7/797, Oscar Bronner GmbH &Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG [1998] ECR I-7791, [61]. See, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997C0007:EN:HTML

[26] European Commission, Roundtable on Refusals to Deal: Note by the European Commission, DAF/COMP/WD(2007)100, 4 October 2007, paragraph 14. See, http://ec.europa.eu/competition/international/multilateral/2007_oct_refusals_to_deal.pdf

[27] http://ec.europa.eu/competition/antitrust/cases/dec_docs/39391/39391_125_10.pdf

efficiency with the possibility that a new product does not come to market, thus potentially causing harm to the consumer through lost consumer surplus. Therefore Ooredoo believes this should not be included as an abuse of dominance.

4.41 This argument can be expanded more generally in relation to investments. The relationship between refusal to supply and protection and incentivisation of investment is a debated topic, in which jurisdictions take different approaches and that cannot be resolved in a mechanistic application of some rules. Ooredoo believes that such considerations merit a more extensive discussion in the context of this draft policy document.

4.42 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 stage. Ooredoo believes that this should be subject to a separate consultation.

Margin squeeze

4.43 Ooredoo agrees that margin squeezing would constitute an abuse of dominance. However, Ooredoo notes that in practice, determining whether a margin squeeze has occurred or not is complex and data intensive. The assessment of margin squeeze would often require careful analysis of various cost information, benchmarked against various sources to ensure that only relevant and efficient costs are included in the analysis. For example, whilst the costs of an incumbent are often considered to be lower than for a new entrant, due to economies of scale, equally, historically inefficiencies might need to be considered which might lead to the cost of a new entrant to be lower than that of the incumbent.

4.44 It is unclear why the draft policy document discusses some aspects of the approach related to margin squeeze assessment like the appropriate level of return, but not others like the level of efficiency or the level of product aggregation or bundle that should be considered.

4.45 Ooredoo believes that the CRA should either update the draft methodology document to include a discussion of all relevant aspects of the approach, or remove the discussion on the appropriate level of return and consult separately on all such methodological issues.

Predatory pricing

4.46 Ooredoo agrees that this would be construed as an abuse of dominance and that it is in line with the EC framework. However, Ooredoo once again stresses the issue relating to the cost standard that will be used in the situation where there is not sufficient data to calculate LRAIC and Average Avoidable Cost (AAC).

4.47 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.

Rebates, discounts and loyalty schemes

4.48 Ooredoo in principle agrees that this can be seen as an abuse of dominance and that this is broadly consistent with the EC guidelines on rebates, discounts and loyalty schemes.

4.49 However, it is really important that the CRA considers that discounts and loyalty schemes can provide very large benefits to consumers and that therefore, before concluding that such schemes are not allowed, very compelling evidence, including quantitative analysis, must be presented.

4.50 More guidance from the CRA would be useful in cases where prices are set between LRAIC and AAC, in which case it is less clear if an abuse of dominance has occurred. For example, the EC considers whether the rebate system uses an individualised or a standardised threshold. Individualised thresholds are more likely to generate the maximum loyalty enhancing effect whereas a standardised one may be too high for smaller consumers and too low to generate significant loyalty enhancing effects for larger consumers. Therefore if the scheme is a standardised one it is less likely to result in an abuse of dominance.

4.51 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.

Unjustified price or non-price discrimination

4.52 Ooredoo has a number of concerns in relation to this section.

4.53 Price discrimination can be welfare enhancing and therefore should allowed in all cases unless there is compelling evidence that competition is being harmed.

4.54 The CRA also gives a judgment that the wholesale inputs consumed by another 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%.

4.55 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. The Policy is currently unclear with regards to this in terms of the level of aggregation at which costs and prices will be compared (for example average cost versus customer/customer group specific costs), and the level of cost differences that is acceptable within the context of uniform pricing.

4.56 A fuller welfare analysis is required - 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.

4.57 Considering the significant controversy over the application of this alleged abuse of dominance in the EU[28], Ooredoo believes that the CRA should clarify the process involved in undertaking an investigation in this complex area.

Cross-subsidisation

4.58 Ooredoo agrees with the CRA that cross-subsidisation could constitute an abuse of dominance. Ooredoo is also pleased to see the reference to this including geographic areas as well as products considering that QNBN has a monopoly in parts of the country.

4.59 However, Ooredoo has substantial concerns over the directions that the CRA has given so far in this context. In particular, Ooredoo notes that an important part of any assessment of cross subsidisation is the manner in which product costs are calculated. The CRA has previously indicated that it considers it appropriate for the LRIC cost of all retail services to be calculated by applying the same mark-up, in percentage terms. Ooredoo believes that this is highly inappropriate.

[28] https://www.coleurope.eu/system/files_force/research-paper/gclc_wp_07-05.pdf

4.60 Retail costs and mark ups should be based on cost causality principles, which states that more costs should be attributed to the services that require a higher proportion of resources and activities in order to be delivered. This should be done on a cost item by cost item basis, choosing appropriate cost drivers and is unlikely to result in the same mark up to be applied to all services. Moreover, Ooredoo notes that it is generally the case that various cost allocation methodologies can be used, which are all consistent with the principles of cost causality and objectivity. Therefore, it is inappropriate for the CRA to be imposing a particular methodology over others.

4.61 In this context, Ooredoo is concerned that the CRA might be reaching inappropriate conclusions in relation to cross-subsidisation, on the basis of incorrect or suboptimal cost allocations. Ooredoo believes that any conclusion of cross-subsidisation can only be reached when there is unequivocal evidence of it, tested on the basis of multiple cost allocation principles.

4.62 Finally, Ooredoo also notes that some cross subsidisation might exist because of historical reasons and might be beneficial to consumers. For example, the provision of free local calls has always been a feature of Ooredoo's fixed line offers and therefore this requires a degree of cross subsidisation with other services. However, this does not per se result in any anticompetitive outcome. It will therefore be necessary for the CRA to be carefully considering any cross subsidisation allegation not as a per se abuse, but in relation to any effect it might have on competition.

Excessive pricing

4.63 Ooredoo agrees with the CRA that this could constitute an abuse of dominance. However, there are some concerns regarding the process to be taken in deciding whether or not a dominant operator has set excessive prices.

4.64 There is the implication that costs may not always be investigated as a benchmark when the CRA investigates excessive pricing. This is necessary as otherwise it may not be possible to determine whether the prices are "excessive". Other benchmarks are then considered to judge whether the prices are "unfair". This reflects the test introduced by the ECJ in the *United Brands*[29] case. This test has a central place in the European case law and although is not always used, due to various reasons such as no costing model, at least one of the components are regularly used. In determining whether a margin is fair, the economic value of the product to the purchaser is another element that can be considered. For example, the UK Court of Appeals overturned a High Court ruling in the *Attheraces*[30] case partly because they had not

[29] Case 27/76

[30] Court of Appeal, Attheraces v BHB [2007] EWCA Civ 38

taken the economic value to the purchaser into account. This was in line with the *Port of Helsinborg*[31] case.

4.65 When comparing the prices to benchmarks in other countries it is important to take into account that there are likely to be cost differences even in supposedly similar markets. Therefore it is important to take these into account when undertaking the benchmarking. 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.

4.66 When comparing prices to competing operators it is also important to note that the competitors may be following a different commercial strategy. For example, if they are undertaking a strategy of customer acquisition then they may be keeping prices low for a number of years in order to increase the size of their customer base before increasing them. This could give the impression that the dominant operator is setting excessive prices when it is not.

4.67 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?

4.68 The complexity of these cases highlights the need for an appeal process which has the capability to analyse specialist competition knowledge and arguments.

Bundling and tying

4.69 Ooredoo is pleased to see that the CRA has acknowledged that bundling has many pro-competitive effects that can benefit the consumer.

4.70 Bundling can have benefits for consumers by improving efficiency through economies of scale and scope as higher volumes reduce the per-unit cost and it can be cheaper to sell multiple products. The efficiency savings can result in lower prices. Additional benefits for consumers are achieved through simplifying choices and reducing search costs.

4.71 Market evidence suggests that consumers do actually prefer bundles to individual purchases. For example in the UK, 63% of telecommunications consumers bought triple-play bundles.[32] This has been steadily increasing over recent years, up from

[31] OECD, 2011, Working Party No. 2 on Competition and Regulation
[32] Ofcom, The Consumer Experience of 2014

57% in 2012. Initial evidence also suggests that quad-play bundles are also popular with consumers as TalkTalk added 1 million quad-play subscribers in FY14/15.[33] This suggests that bundling is popular amongst consumers even when they are able to buy the products separately.

4.72 However, it is not clear whether the bundling firm being dominant in at least one of the markets is a condition for the predatory pricing of bundles or is a potential abuse of dominance issue 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. The CRA would also need to specify a test to determine whether this was an abuse of dominance. Therefore the CRA should clarify this potential abuse of dominance to avoid it being misinterpreted.

4.73 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.

4.74 Importantly, when investigating a bundle, the CRA should give due consideration to certain factors when determining the effect of any bundling or tying arrangement namely: (i) accrual of benefits to the consumer (ii) foreclosure of competition in the market (iii) creation of barriers to new entrants and (iv) whether the bundling or tying creates improvements in the production or distribution of the services/goods.

4.75 It is also important that there is consistency between the ex-ante and ex-post regulations in this regard. This is because in the ex-ante MDDD consultation some markets were defined based on products being available in a bundle. This would result in there only being one market involved in a bundle and it could be inappropriate to apply ex-post regulation treating the markets as separate markets.

Exclusionary tying

4.76 Ooredoo broadly agrees with the analysis proposed by the CRA. In exclusionary tying the crucial step is to demonstrate the dominant position of the firm.

[33] http://www.talktalkgroup.com/press/press-releases/2015/demand-for-quad-play-drives-growth-for-talktalk.aspx

4.77 With regards to the specific analysis, the CRA does not specify what kind of costs type will be considered in case of predatory pricing. Different costs' measures could bring to different outcome, thus it is important that CRA clearly states what cost definition will be applied in this particular case.

4.78 Furthermore, Ooredoo believes that beyond the economic analysis, the CRA should also demonstrate the ability of the firm to exert its market power and the incentive behind the alleged exclusionary practice.

4.79 International benchmarking with other countries could also help in the analysis to see if the tying is a consolidated practice in the telecommunications industry.

Customer lock-in through contract length

4.80 Whilst the description of the conduct as set out by the CRA is consistent with that used in other jurisdictions, Ooredoo has concerns relating to the process of any investigation of contract length.

4.81 In particular, the issues that the CRA appears to be focusing on are predominantly qualitative. This leaves any decision more open to a larger degree of judgement. To avoid this, when balancing the costs and the benefits of any conduct it is also very important to undertake quantitative analysis.

4.82 Examples of quantitative analysis could be to benchmark customer switching patterns in Qatar to similar markets, and to compare the price elasticities in these similar countries.

4.83 Using quantitative analysis will also help to identify whether or not this is actually causing consumer harm in the market. If there is not sufficient evidence of consumer harm then it is rarely optimum for there to be intervention in the market as there is a risk any intervention could worsen the situation.

Exclusive distribution agreements

4.84 Whilst Ooredoo agrees that this can be an abuse of dominance, it does not believe this to be particularly relevant in the context of telecommunications.

4.85 In the context of the sector, exclusive distribution agreements can become anticompetitive when the distributor is a supplier in control of a product that is highly desired by consumers, for example a desirable handset, even when there is the potential to purchase from other suppliers.

4.86 For example, this occurred in Europe when Apple entered exclusive distribution agreements with operators for the initial launch of the iPhone. Even though there are other choices of handset supplier, offering the iPhone had the potential to make

an operator more competitive, thus improving Apple's bargaining position. This allowed Apple to demand a significant proportion of revenue from voice and data on iPhones.

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?

4.87 Ooredoo considers that the Policy covers all the main categories of conduct that could be considered an abuse of dominance.

Question 10

Do consultees agree that the CRA should consider possible justifications in assessing whether conduct amounts to an abuse of a dominant position?

4.88 Ooredoo agrees that the CRA should consider possible justifications in assessing whether the conduct is an abuse of dominance, as we have highlighted in sections 1.35 to 1.49. However, the list of possible defences is not complete.

4.89 The CRA should, like the EC does[34], consider a defence relating to the conduct being a competitive response to action taken by certain competitors that require the company to protect its commercial and economic interests. This only applies as a defence to pricing relating abuses. For example, if a large competitor to the dominant firm set very low prices for a period of time it may be optimal for the dominant firm to reduce its prices in order to minimise its short run losses. In assessing this defence the EC applies a proportionality test.

4.90 Ooredoo agrees that objective necessity is a possible defence for an alleged abuse of dominance. In particular, Ooredoo believes that this includes a failure by a party to provide the appropriate commercial assurances that it will fulfill its obligations. Also, in the case of an essential facility, technical reasons such as the facility being capacity constrained, the cost of granting access being substantial and the access seeker not being technically able to use the facility, should all be considered as possible defences. In the case of granting access to essential facilities it is also important to allow the access granter to achieve a financial return because essential facilities often require a substantial amount of investment. Allowing an adequate return on these large investments is important to maintain incentives to invest and innovate for future network rollouts.

[34] http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

4.91 Ooredoo also agrees with the CRA that efficiency defences should be considered. Many alleged pricing abuses could result in economies of scale and refusal to supply cases may be justified if the infrastructure owner is not allowed an adequate rate of return on investments in order to protect incentives to invest.

5. Merger and transfer of control

5.1 This section provides Ooredoo's response to the specific questions set out in the CRA consultation document with regards to the assessment of mergers.

5.2 In general, Ooredoo would like to stress the importance of an appropriate consultation process with all market players, and not only those involved in the potential merger, to be conducted. This is consistent with the approach in other jurisdictions, where operators are generally invited to comment on the potential merger and any remedy that might be required. Ooredoo invites the CRA to amend the draft policy to include such process as part of its assessment.

Question 11

Do consultees agree with the approach to assessing the economic effects of mergers and transfers of control?

5.3 While Ooredoo agrees with many of the high level principles in the approach, there are concerns about the practical implementation of the merger approach:

5.3.1 In comparing the post-merger situation to an appropriate counterfactual the CRA is taking the correct approach. However, there is a significant amount of discretion available when constructing a counterfactual. Therefore, the CRA should set out how it will decide between a number of potentially appropriate counterfactuals as this can have a significant impact on whether there is a substantial lessening of competition.

5.3.2 Furthermore, when considering the existence of failing firms, the CRA should also consider whether there are any other potential purchasers of the failing firm that would result in a less anti-competitive situation.

5.4 The CRA should also state what the counterfactual will be when there are competing bids for a company. For example, will the CRA compare each bid to the counterfactual of the prevailing conditions as is done in the UK or will it undertake a comparative analysis of the mergers. The CRA should also clarify its approach when there are parallel transactions occurring within a market.

5.5 The Policy says *"which will usually require the Authority to define the relevant markets".* Does this mean that the CRA could undertake the proposed analysis of the

markets *without* actually defining the market? Defining the market is an important part of analysing mergers and transfers of control as it is not possible to correctly identify competitive forces that may restrain a merged entity from behaving in an anti-competitive market without correctly defining the market. Ooredoo recommends correcting this ambiguity so that the correct process is followed.

5.6 The CRA does not give much detail on the processes it will use to access whether there are any anti-competitive effects from conglomerate mergers. This is especially relevant for Qatar where, due to their only being two mobile operators, a conglomerate merger is a distinct possibility. By being able to leverage some market power in both markets this could result in a reduction of competition. These mergers are becoming increasingly common, such as BT/EE in the UK where the authorities currently have concerns.

5.7 The Policy also refers to the EC undertaking some quantitative tests when investigating a merger. However, the Policy does not state that the CRA will undertake quantitative analysis. This is important for deciding whether a merger is likely to result in a Substantial Lessening of Competition (SLC) as otherwise the decision could be purely based on theoretical arguments and qualitative observations.

5.8 The CRA has not specified time limits for the decision on whether a merger is anti-competitive. This is common in other jurisdictions, such as the UK and EC, where the competition authority has deadlines as well as two phases of investigation so that mergers that are less likely to cause anti-competitive issues are cleared sooner than one requiring a full and in-depth investigation. Furthermore, having clear deadlines for the two phases of investigation will provide a clearer picture to the parties involved in the transaction making the entire process more efficient.

Question 12

Do consultees agree with the approach to considering the efficiencies when assessing mergers and transfers of control?

5.9 This approach differs to the EC's approach despite using the O2 Ireland and 3 Ireland merger as an example of how efficiencies have been judged. The EC specifies three criteria (source: EC document referenced in the consultation):

5.9.1 Verifiability

5.9.2 Merger specificity: efficiency savings can't be achieved through other activities such as infrastructure sharing which are less anticompetitive.

5.9.3 Benefit to consumers

5.10 The CRA is also not clear on the process that will be followed when assessing the efficiency savings:

5.10.1 Whilst the CRA state they will analyse the magnitude and timeliness they also do not state how large the efficiencies have to be, whereas the EC states "substantial enough to counteract a merger's potential harm to consumers (p.175)[35].

5.10.2 The CRA also does not state the time period to be used when undertaking the analysis, yet at the same time states it will consider the timeliness of the efficiencies. Many efficiencies are likely to occur over a number of years, especially in the context of network rollouts. The EC generally takes the view of two to four years due to the difficulties in predicting market conditions beyond that point. Less weight is also placed on efficiency savings in the future. In general the actual approach of the CRA in this regard is a bit vague and would benefit from being clarified.

5.10.3 The CRA states that one of the stages of the efficiencies' assessment is to assess the resulting impact on the competition in the market. With this regards, 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.

5.11 Ooredoo believes that when considering efficiencies the CRA should demand a high level of proof that the efficiencies are verifiable, only achievable through the merger and will benefit consumers. This is especially important as some efficiency savings can be hard to achieve presenting a high risk of anti-competitive consequences if the merger is cleared.

Question 13

Do consultees agree with the approach to considering remedies as a condition of approving mergers and transfers of control?

5.12 Ooredoo does not believe that the CRA has provided sufficient information on the approach it intends to take when deciding whether remedies are required in order to clear a merger. The CRA should specify how it will decide on whether the remedy will offset any negative impacts.

5.13 The draft policy is not clear whether the remedies are to be suggested by the merging parties or whether they will be imposed upon the merging parties if they wish to go ahead with the merger. The EC are very clear that they can only consider commitments made by the merging parties and cannot "impose unilaterally other conditions to the authorisation decision".

[35] European Commission, Case no COMP/M.6992, Hutchison 3G UK/Telefonica Ireland

5.14 In deciding on whether the proposed remedies are appropriate it is also common practice, such as in the EC, to take the view of market participants into account through a market test before confirming that the conditions should suffice in mitigating any competition concerns. The CRA should consult with market participants as this can help to highlight any potential problems with the remedies or issues that may have been missed.

6. Remedies for infringement of competition aspects of the Telecoms Law

6.1 This section provides Ooredoo's response to the specific questions set out in the CRA consultation document with regards to the remedies the CRA could impose.

Question 14

Do consultees agree with the approach to remedies for infringements of competition aspects of the Telecommunications law?

6.2 While Ooredoo agrees with the high level principles of effectiveness and proportionality it has concerns relating to the practical implementation of the remedies.

6.3 Fines are often imposed on undertakings found guilty of anti-trust offences. Ooredoo notes that there is no mention of caps to fines in the draft policy document. Ooredoo understands that this is because this is covered in the relevant articles of the Telecommunications Law. However, this is currently under review and Ooredoo has not yet had visibility of the proposed changes to the current telecommunications law and whether such changes includes changes to maximum fines or just the mechanism for their imposition, and indeed the proposed new Communications Law. This limits the comments that Ooredoo is able to provide at this stage.

6.4 The EC framework includes caps on the fines as a percentage of revenue, for example 10% of annual turnover although it is rare a fine reaches this level. This is important because an excessive fine could cause financial difficulty for the penalised undertaking and could result in reducing its ability to compete. In the current context of no effective appeals process this becomes even more important.

6.5 In addition to following the principles of effectiveness and proportionality, the CRA should also explain how it will decide whether a remedy meets the criteria. This is particularly important as there can be a subjective element to deciding whether one

remedy is more appropriate than another. In the EC there are four stages to the proportionality test:[36]

6.5.1 There must be a legitimate aim for the remedy

6.5.2 The measure must be a suitable way to achieve the aim, potentially with a requirement to provide evidence for the expected effect

6.5.3 The measure must be the necessary to achieve the aim and there should not be a less intrusive way of intervening

6.5.4 The measure must be reasonable and consider the interests of different parties.

6.6 It is also common practice in the EC to undertake a market test of any potential remedies. This is useful to ensure that the remedies will be effective and proportional as market participants may raise additional issues around the potential success of the regulation. The Director General at the EC stated "Market testing is a key tool which allows us to tailor the remedies to the competition concerns."[37] Ooredoo believes the CRA should undertake a market test before confirming remedies.

6.7 The Policy is currently silent on proposals for appropriate monitoring mechanisms, which can ensure that the agreed remedies are actually implemented. Whilst this can be more straightforward for some structural remedies, behavioural remedies may need monitoring to ensure that they are being implemented. Ideally the monitoring should be proportional and be as easy as possible. This could include screening of the market, reporting obligations and trustees.

7. Conclusion

7.1 Ooredoo agrees that a competition framework would help to develop the sector. However, whilst Ooredoo broadly agrees with many points in the competition framework, it has a number of key concerns especially relating to how the CRA will implement the framework and undertake investigations.

7.2 Balancing ex-post and ex-ante powers is a complex task and for this reason concurrent powers are not often adopted in other jurisdictions. Whilst Ooredoo understands the reasons for it in the context of Qatar, it is important the ex-ante and ex-post teams within the CRA are kept separate in order to avoid conflict and either excessive or insufficient use of the powers.

[36] P Craig and G de Burca, EU Law (5th edn OUP 2011) 526

[37] http://ec.europa.eu/competition/speeches/text/sp2012_07_en.pdf

7.3 Ooredoo also believes it is important that the CRA should gradually introduce the proposals in relation to this competition framework, to allow commercial strategies to adjust and for the implementation of ex-ante remedies before ex-post powers are used.

7.4 Investigations into anti-competitive behaviour should only be instigated when the complainant has passed a minimum threshold of factual and robust evidence. This would also reduce the incentive for a complainant to abuse the framework for its own commercial advantage. However, due to information asymmetries the ultimate burden of proof should lie with the CRA and any decision of anti-competitive behaviour should be supported by robust, complete and thorough quantitative analysis.

7.5 Ooredoo believes that it is important that any investigation for abuse of market power should find evidence that it was done for the purpose of harming competition before any remedial or punishing action is taken. This will also reduce the chance of regulatory error which could result from inappropriately mistaking commercial responses for b anti-competitive conduct.

7.6 Furthermore the CRA should not determine that some forms of conduct are anti-competitive per se because, in addition to the regulatory risk of mistaking commercial responses for anti-competitive behaviour, there may efficiency defences or objective justifications for the conduct, that may not be taken into account if the conduct was seen as anti-competitive per se. Ooredoo disagrees with the CRA's approach and believes defences should be heard for all conduct and should only be found to be anti-competitive if they are for the purpose of harming competition.

7.7 There is currently no meaningful and timely appeals process in Qatar. This is a serious concern to Ooredoo as it is of upmost importance that there is a method for operators to appeal to an independent authority to review the appropriateness and robustness of the CRA's decisions, especially as the CRA has little experience in undertaking analysis in the complex field of competition policy.

7.8 With regards to the dominance assessment Ooredoo broadly agrees but has concerns that the CRA will place too much emphasis on market shares when it should also look at a number of other factors because it is not always the case that a high market share results in dominance. In undertaking the dominance assessment, Ooredoo expects that the CRA will provide a fully evidenced justification based on quantitative analysis.

7.9 In conclusion, Ooredoo believes that the competition framework set out by the CRA is providing the CRA with excessive scope for discretion and insufficient information on how the framework will be applied in practice.

7.10 Ooredoo would also invite the CRA to set out a program of gradual introduction of the policy, which would enable both the CRA and market players to develop the required skills and knowledge which are necessary for the successful application of the framework. Further workshops and consultations on the topic would also be beneficial, in particular to clarify the balance and interaction between the ex-ante framework which is still under consultation and the ex-post competition policy.