VODAFONE'S SUBMISSION TO THE COMMUNICATIONS REGULATORY AUTHORITY'S ("CRA') CONSULTATION DOCUMENT ON DRAFT COMPETITION POLICY DATED 20 MAY 2015 ("CONSULTATION DOCUMENT")

Vodafone Qatar Q.S.C. (**"Vodafone"**) appreciates the opportunity to provide comments on the Consultation Document. Vodafone Comments comprises of PART 1: General Comments, PART 2: Comments on Annexure 1 and PART 3, Comments on Annexure 2

PART 1: GENERAL COMMENTS

1.1 Policy decision to move to ex-post competition investigation in Qatar

Vodafone understands that the Ministry has issued a policy decision to move away from ex-ante regulation to ex-post regulation. Vodafone has not seen any policy paper to this effect and any rationale used to come to such a decision. This raises a significant concern for Vodafone on the transparency of policy making in the telecommunications Sector. Vodafone is not opposed to policy changes that are made based on objective evidence for the purpose of improving the telecommunications sector to the benefit of consumers. However, the proposal to move from a substantially ex-ante regulatory regime to an ex-post competition enforcement system is a major policy change, with significant implications for the industry and consumers. It is Vodafone's view that such a move must firstly be subject to public consultation and secondly if all facts showed that the move was indeed the right move for the sector should be implemented on a phased basis to allow sufficient time for the new system to be implemented effectively.

The European experience shows that market liberalisation and deregulation takes a long time in order to be successful. The process of deregulation began in Europe in 1988 and it is still not complete. The Qatar market liberalisation is still in its infancy and Vodafone believes that there is still a need for ex-ante regulation on the retail level. The first steps in the deregulation of telecoms markets in Europe was to abolish legal barriers to entry for new operators, while in parallel ensuring that competitors had access to existing network infrastructure (Open network provisions). To this day, many telecommunications markets across Europe are subject to ex-ante regulation, where the conditions of competition are deemed insufficient to warrant removal of regulatory measures from dominant or incumbent operators. It is however important for the CRA to realise that the fact that the success of a regulatory framework depends on the specific market that it seeks to regulate. Hence, the fact that a regulatory approach is successful in one country does not automatically imply that it is suitable for another. [1]

[1] A Closer Look at Telecom Deregulation: The European Advantage by Viktor Mayer-Schonberger and Mathia Strasser – Harvard Journal of Law & Technology, Volume 12, Number 3, summer 99 at 567. This is conceded even by strong advocates of comparative analysis. See e.g. Pablo T Spiller & Carlo G. Gardilli, the Frontier of Telecommunications Deregulation: Small Countries Leading the Pack, in Regulators revenge, supra note 5, at 39.

Furthermore, the Telecommunications Law No 34 of 2006, Executive By-Law No 1 of 2009 and Individual Licenses include ex-ante retail regulation as a requirements related to dominance in relevant retail markets. The CRA is empowered to shift is policy emphasis only to the extent allowed by the relevant law.

1.2 Effective wholesale regulation

Vodafone strongly supports a view that wholesale regulation is much preferable to retail regulation. However, wholesale remedies must be in place and effective before retail regulation is lifted. By using the Three Criteria Test the CRA is attempting to apply a test that is generally applied in developed markets where there are a full suite of wholesale remedies in place. In contrast there are no access remedies in place in Qatar.

The TRA in Bahrain is currently undertaking a strategic review of the telecommunication markets and is recommending the move away from ex ante remedies once it is satisfied that appropriate wholesale remedies are in place[2]. As the TRA states:

> *TRA emphasises that the implementation is subject to the SMP operator first meeting, in practical operational and "market tested" terms, prescribed terms and conditions for "fit-for-purpose" wholesale products (i.e. terms and conditions which allow OLOs to, whenever relevant, a) replicate the retail products and services of the SMP/dominant operator in the relevant market(s) and b) have access to equivalent products as the wholesale provider has (e.g. broadband access and backhaul fibre for LTE operators).*

1.3 Resourcing of the Communications Regulatory Authority ("CRA")

Ex-post competition analysis requires substantial and dedicated resources. To effectively implement the policy of ex-post assessment, the CRA will need to have sufficient expertise and resources to implement the policy and ensure that there is no loss of competition. Currently the CRA is not sufficiently resourced and experienced to handle ex-post investigations across all areas of the telecoms market. This is a fact acknowledged by the CRA itself. Without adequate resourcing and experience, there is a significant risk that ex-post competition investigations will be compromised to the detriment of competition. Vodafone also notes that the draft competition policy is largely effects-based relying heavily on economic analysis. As a practical matter, the CRA will need to have the resources to (i) comply with its own policy; and (ii) be able to investigate and deal with cases (particularly abuses of dominance) in a clear and timely manner. Given the likely significant resources that are required, a substantial transition period will be needed to allow the CRA to get resourced and get up to speed before the policy is implemented. Vodafone considers that, at minimum, a twelve month transitional period is required before moving away from ex-ante regulation.

[2]http://www.tra.org.bh/media/document/Strategic%20Market%20Review_Draft%20Report_Public%20version.pdf p. 6.

1.4 Assessing dominance

The Consultation Document refers to the need to assess dominance as a first step in ex-post competition analysis, and proposes essentially to carry out an initial assessment in each and every case. While Vodafone entirely agrees that establishing dominance is a pre-requisite to assessing competitive harm, individual case-by-case assessments are not necessary or appropriate given the size and structure of the Qatar telecoms market. To ensure effective competition, Vodafone submits that the CRA should adopt a position similar to that pertaining in the EU, where periodic assessment of markets are made in order to determine whether a particular operator has a dominant position. Following these period assessments, the relevant regulatory authorities then decide on the most appropriate means of ensuring competition in the market.[3] The Qatari framework differs in that once dominance is established certain remedies apply automatically.

[3] Article 7 of the European Commission Electronic Communications Framework Directive

PART 2: COMMENTS ON ANNEXURE 1

2.1 Application of the Three Criteria Test

The Consultation correctly mentions the applicable provisions of the Applicable Regulatory Framework ("**ARF**") which deal with Market Definitions and Dominance Designation; however Vodafone submits that (i) the inclusion of the Three Criteria Test ("**TCT**") as part of the ex-ante MDDD criteria is not in line with the applicable regulatory framework and (ii) the application of the TCT is not relevant in ex-post investigations.

Article 42 of the Telecommunications Law no 34 of 2006 ("**Telecoms Law**") provides that:

> *"The General Secretariat shall undertake the designation of the service providers and determination of the extent of their significant market power or dominance in the market and must prior to making such designation the General Secretariat shall perform the following:*
>
> *1. determine relevant products and services markets including the geographic scope or territory;*
> *2. determine the standards and methodology to be applied in determining the degree of market power or other standard of significant market power or dominance in relevant markets; and*
> *3. conducting an analysis of the relevant products and services markets through applying the identified standards and methodology in specific circumstances. "*

The orders designating service providers as having significant market power or dominance must specify the relevant products and services markets and the standards and methodology and circumstances relied upon to justify such designation.

Article (42) also notes that:

The Executive By-Law. regulations, rules and orders shall specify the standards, methodology and operations for market power designation.

Article (72) of the Telecommunications By-Law No.1 of 2009 ("Executive By-Law") sets out the requirements placed upon the General Secretariat as below.

> *The General Secretariat shall issue a notice which establishes the standards and methodology that it will apply in determining whether Significant Market Power exists in a particular relevant market. The General Secretariat shall publish the methodology on the website of the Supreme Council and may be modified from time to time by it.*
>
> *The methodology may include the following elements and any other relevant factors which will be applied in accordance with criteria set out in third paragraph of this Article:*
>
> *(1) definition of the relevant telecommunications market or markets in terms of products and geographic scope.*
> *(2) assessment of market power based on a review of the economic and behavioural characteristics of the relevant market and an examination of the extent*

to which a Service Provider, acting alone or jointly with others, is in a position to behave independently of customers or competitors.

The methodology may include the following criteria for assessing the degree of market power in a relevant market:

(1) market share.
(2) absolute and relative size of the firm in the relevant market
(3) degree of control of facilities and infrastructure that would be uneconomical for another person to develop to provide services in the relevant market.
(4) economies of scope and scale.
(5) absence of countervailing buyer power, including customer churn characteristics.
(6) structural and strategic barriers to entry and expansion.
(7) any other factors relevant to evaluating the existence of market power in a particular market

The methodology may also provide guidance on the parameters that will be used for measuring market share (number of lines, number of minutes, revenues or other relevant metrics), and for ease of administration, the General Secretariat may, in the absence of evidence to the contrary, may deem that an individual Service Provider with a share of more than 40 percent of the relevant market is a Dominant Service Provider.

The applicable regulatory framework in Qatar is explicitly prescriptive on the remedies that should be applied when an entity is found to have SMP. The law clearly requires a two-step process whereby markets are defined and market power is assessed and dominance or lack of dominance is declared on the basis of that assessment. The Law and Licenses then specify to a considerable degree the applicable remedies including retail tariff notification and approvals. Vodafone submits that for the CRA to move to the TCT, the Telecommunications Law will need to be revisited and amended accordingly as it contains automatic remedies that need to be imposed once a Service Provider is found to have SMP. These remedies do not provide the CRA with the required flexibility to determine whether ex-ante regulation is indeed justified in terms of the TCT.

2.2 Step 1 Identification of Candidate Markets

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

2.3 Step 2 Identification of Relevant Markets

The Consultation Document proposes that following identification of the Candidate Markets, the TCT will be used to determine whether that market should be classified as a Relevant Market susceptible to ex ante regulation. As mentioned above Vodafone submits that this step of the process is not in line with the ARF.

Vodafone is also of the view that the CRA is in any event applying the TCT incorrectly. The overall telecoms sector consists of a number of different market segments and functionally the relevant markets are typically made up of wholesale (upstream) and retail (downstream) markets. There is

naturally a level of inter-dependency between the relevant defined markets, both vertical and horizontal. Under the European Regulatory Framework, one of the key principles when assessing the appropriate level of regulatory intervention in a given market is recognition that ex-ante regulation in retail markets should be introduced (or retained) if ex-ante regulation of relevant (upstream) wholesale markets is not sufficient to correct market failure (i.e. lack of effective or sustainable competition). Furthermore, ex-ante regulation should in any case only be introduced (or retained) if competition law (i.e. ex-post regulation) is not sufficient to deal with market failures (i.e. to prevent anti-competitive conduct due to abuse of a dominant position and/or collusive behaviour).

> *The European Commission ("**EU**") recommended in 2003 that the TCT be used to test for, and substantiate the requirements for regulatory intervention in an upstream market. In the latest review (2014) of the List of Relevant Markets in the EU the following reiterative steps were used:*
>
> *(i) Is there a problem in the retail market?*
>
> *(ii) Identify the closest, non-replicable wholesale market;*
>
> *(iii) Analyse the wholesale market by applying the TCT;*
>
> *(iv) If Significant Market Power ("SMP") by an operator exists in the wholesale market, impose remedies;*
>
> *(v) Revisit to see if the problem in the retail market is solved;*
>
> *(vi) If the problem is not solved, identify the **next closest non-replicable wholesale market** in the relevant value chain and repeat steps III, IV, V and VI.*
>
> *Remedies can thus be aimed at the fundamental bottleneck, so that regulation can be applied at the retail level only where unavoidable.*

Therefore, Vodafone believes that even if the first criterion (High barriers to entry) of the TCT is not met for the mobile market[4] in isolation, competition problems in the markets may still remain, based on current revenue market shares. Vodafone is facing declining revenue market share in both International and Pre-paid market segments. Applying the above logic regarding the TCT, the next closest non-replicable wholesale market must now be identified, which is the fixed access market, where major barriers to entry do exist. Access to ducts remains an issue. Thus the first criteria is now met (high barriers to entry), and the second criterion for the mobile market is also met (lack tendency to competition based on current market shares) and Vodafone submits that third criteria -lack of effective competition law is also met, which makes it susceptible to ex-ante retail regulation. The third criteria is discussed in more detail below. It is still the mobile market being tested, even though the high barriers to entry exist in a downstream wholesale market. Thus,

[4] I.e. the markets for *Retail International Outgoing Call Services via a Mobile Device [both for Residential and Business customers] and the market for Mobile Services [Voice and Broadband] for Residential customers*.

if there is a competition related problem in a market the TCT should be applied to its final conclusion.

Further, according to Ecorys in its final report for DG Connect on the EU Market Definition 2014 further states that if all wholesale measures in the value chain do not rectify the problem, intervention in the retail market may be warranted.

2.4 Insufficient General Competition Law to deal with the problem in the Qatar Market

To the extent the CRA continues to consider the TCT as relevant to ex-post analysis, Vodafone submits that the third criterion (existing competition law insufficient to deal with competition problems) is, in any event triggered in respect of many, if not all markets. A similar presumption that competition law remedies are not sufficient to deal with market failures in the electronic communications sector exist in EU markets which have much more mature competition instruments available to ensure effective ex-post remedies and is used to justify ex-ante regulation in many cases.

The CRA is only currently consulting on its Competition Policy for ex-post investigations. The Policy identifies the conduct that is prohibited by the Telecommunications Law and the Telecommunications By-Law and describes how the CRA will investigate conduct which may have infringed the relevant law. Vodafone submits that consultation on the Competition Policy does not satisfy the third criteria of the TCT which measures whether existing ex-post competition law is sufficient to address any potential anti-competitive practice in the market under consideration. Vodafone submits that the application of the competition policy once completed need to be tested and proven before a conclusion can be reached when applying the TCT that Ex-post competition law is in fact sufficient.

An effective competition policy requires not only adequate regulatory resources and clear assessment criteria, but also the ability to appeal and challenge decisions made – both for complainants and those subject to infringement decisions. As previously mentioned, it is Vodafone's view that effective dispute resolution; implementation and enforcement of the ARF have been and remain a major concern and impediment to effective competition in Qatar. Vodafone's complaints[5] on unlawful retail pricing have not elicited any response from the CRA for 5 months, in direct contravention of Article 3.12 of its own Dispute Resolution Rules. Until there is a proven track record by the CRA of enforcing its decision and Competition Policy, then competition law cannot be found to be effective.

State of competition in the Qatar Telecommunications Market

Vodafone, as a matter of public policy, supports the appropriate necessary level of regulatory intervention to ensure well-functioning markets in order to support healthy competition which

[5] DISPUTE RESOLUTION COMPLAINT AGAINST OOREDOO IN ACCORDANCE WITH ARTICLE 61 OF TELECOMMUNICATIONS LAW 2006 AND DISPUTE RESOLUTION RULES dated 03 December 2014 ("Hala Smart Pack" call rates below the cost standard specified by the CRA)
DISPUTE RESOLUTION COMPLAINT AGAINST OOREDO Q.S.C. IN ACCORDANCE WITH ARTICLE 61 OF TELECOMMUNICATIONS LAW 2006 AND DISPUTE RESOLUTION RULES dated 08 December 2014 (Below cost pricing in the International Calling Market)
DISPUTE RESOLUTION COMPLAINT AGAINST OOREDOO Q.S.C. IN ACCORDANCE WITH ARTICLE 61 OF TELECOMMUNICATIONS LAW 2006 AND DISPUTE RESOLUTION RULES dated 09 December 2014 ("Ten Times" data offer is likely below the fully allocated historical cost of providing the service)

brings the maximum benefits to markets and consumers. Therefore Vodafone does not in principle support indefinite retail regulation in markets that tend towards competitiveness. However, where market failure is apparent due to abusive, exclusionary or anti-competitive practices of a dominant operator and the underlying wholesale problems are not effectively addressed, decisive retail regulation intervention is required in the interest of the market and consumers, until such a time that the market failure is observed by means of factual market indicators to be resolved.

The retail market in Qatar continues to be plagued by such conduct. Even though Ooredoo is currently subject to retail rate regulation and tariff pre-notification requirements in all retail markets based on its dominant market share, the CRA has shown itself to be unwilling and/or unable to enforce these obligations

2.6 Step 3 Market Analysis and Dominance Designation

Vodafone submits that this step should follow the step 1 – Market Definition. The provisions of the ARF mentioned in the Consultation Document are all relevant and Vodafone would like to highlight the provisions of Article 72 (2) of the Executive By-law which are set out above.

2.7 Step 4 Obligations of a DSP

Vodafone agrees that the obligations of the DSP are set out in the ARF and most of them apply automatically, for example the tariff approval requirements and abuse of dominance requirements like prohibition of predatory pricing and excessive pricing.

2.8 Ex Post Competition Policy Investigation approach

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

Vodafone submits that the conditions of competition in all candidate markets are such that ex-ante regulation should continue to be applied until such deficiencies are adequately addressed. This can be done most effectively and efficiently by ensuring adequate wholesale regulation is in place.

The consultation document only provides that the procedure for ex-post market definition is different to the procedure of ex-ante assessment. It is not clear in principle that this should be the case (see comments above); however in any event there is no mention of the type of test or criteria the CRA will use to define markets in an ex-post investigation, neither is there any mention of the tests that will be used to assess dominance. Vodafone submits that the CRA need to provide all the relevant detailed information of the tests and procedures it intends to follow in ex-post processes.

The consultation document provides relatively limited information on remedies and potential sanctions available and does not include any guidance as to the CRA's intended enforcement policy. Vodafone notes with concern that the penalties, as described are not adequate to act as a deterrent to abusive behaviour and it is not clear how any conditions or penalties imposed would be monitored or enforced.

PART 3: COMMENTS ON ANNEXURE 2

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

Vodafone notes that the Consultation Document provides that Section 2 describes the agreements and practices that will be considered to have as their object or effect to prevent or substantially lessen competition. However it is not clear which categories of agreements are going to be treated as anti-competitive by object and which will be subject to an effects based analysis. Vodafone would welcome clarity in this respect.

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

3.2 Abuse of Dominance

As mentioned above, the Policy takes a highly economics based approach to dominance issues. Such an approach is to be recommended where robust data is available to undertake and defend such economic analysis. However, as above, the CRA needs to ensure the policy is appropriate and workable in the context of the market in Qatar. The CRA will need to factor in some pragmatic approaches to look into abuse of dominance cases where the required data is not available, including in particular in assessing other relevant factors such as market behaviour, internal documents etc. The non-existence of data should not serve as a reason for the CRA not to look into the abuse of dominance cases brought to it. Vodafone understands that that it is to up to the undertaking alleging abuse of dominance to submit evidence to the CRA for investigation; however such evidence will usually be limited to information that the complainant has at its disposal e.g. from publicly available sources. In this respect Vodafone submits that the CRA should use its powers to request the necessary information to aid it with the investigation and where possible use information available to it for purposes of the investigation for example the data from the regulatory accounting separation.

Experience in Europe suggests margin squeeze cases can be difficult to make out (as complainants do not have access to the cost information necessary to fully evidence the complaint) and can be difficult for regulators to identify the relevant cost and pricing factors in the dominant operator's behaviour. Depending on market conditions, it may be more appropriate to maintain ex-ante regulation of a dominant incumbent's prices rather than rely on enforcement through an ex-post margin squeeze case. Vodafone is of the view that market conditions in Qatar do necessitate ex-ante regulation to be maintained.

With regards to mixed bundles, Vodafone submits that triple play is an important feature of the Qatar market and Ooredoo remains dominant in fixed voice and broadband markets. Although the third aspect of triple play falls outside of the CRA remit i.e. content for IP TV, the CRA needs to have the ability to investigate where such bundled products have the effect of lessening competition. Such intervention becomes even more important where the incumbent has exclusive agreements with content providers which mean no one else can offer the bundled services in Qatar. Vodafone notes that the Consultation Document recognises that tying and bundling of products can amount to an

abuse under certain circumstances, however it is not clear from the policy how the CRA would deal with such bundling and exclusive agreements for non-telecommunications products cases.

3.3 Merger Control

The principles in the merger control section follow those set out in the EU Merger Regulation and cover the criteria that one would expect to see in merger analysis.

3.4 Remedies

Remedies are critical to the application of any competition policy. The competition policy as proposed is in large based on the EU competition framework. In this respect Vodafone submits that the same standards should be adopted for remedies and/or fines. The European Commission fining policy is aimed and punishment and deterrence. The fines in the EU reflect the gravity and duration of the infringement. The remedies as contained in the Consultation Document are very light touch remedies dependent on binding undertakings.

Below are examples of the fines levied in the EU. Vodafone has used the same cases provided as examples in the Consultation Document:

- In the Bouygues Telecom case, A French appeal case confirmed the competition authority's 2009 decision about Orange Caraibe, which was fined for having unfairly harming the development of competition in Gaudeloupe, Martinique and French Guiana. The company was sued by Bouygues Telecom Caraibe and Outremer Telecom, which complained about Orange's exclusive agreements with independent retailers, exclusivity clauses with the only recognised handset repair company in the French West Indies, its customer loyalty programme and discriminatory price differentiation between on-net and off-net calls. Orange Caraibe had an over 75 percent share in the three territories, according to Martinique Premiere. The EUR 63 million fine was reduced to EUR 59.5 million in a first appeal, which has now been confirmed by the Court of Cassation. Orange told AFP that it recognised the decision and that it had already made provisions for the fine.[6]

- In the Wanadoo case for predatory pricing the European Commission imposed a fine of EUR 10.35 million on Wanadoo Intercative, a subsidiary of France Telecom, for abuse of a dominant position under Article 82 of the EC Treaty. According to the European Commission's decision, the company engaged in predatory pricing by charging retail prices below cost for its ADSL-based Internet access services, from the end of 1999 up to October 2002.[7]

- In 2009 the Competition Authority of the Slovak Republic found that three major Slovak banks.Slovenská sporiteľňa a.s., Československá obchodná banka a.s. and Všeobecná úverová banka a.s had infringed EU Competition Rules. They decided to terminate in a coordinated manner contracts concerning current accounts that the Czech company Akcenta CZ a.s. had with them and not to enter into any further contracts with it. Akcenta is a non-bank financial

[6] http://www.telecompaper.com/news/court-confirms-eur-595-mln-fine-for-orange-caraibe--1058232

[7] IRIS 2003-8: Exta, European Commission Wanadoo Fined for Abuse of Dominant Position in the Market for high-speed internet access. Annemarie Jansen

institution providing services involving cashless foreign exchange transactions. It therefore needs to have current accounts in banks in order to carry on its activities, which include foreign-exchange transfers from and to abroad, including for its customers in Slovakia. In the Competition Authority's view, the three banks colluded because of their dissatisfaction with the fact that their profits had fallen as a result of the business carried on by Akcenta which they regarded as a competitor providing services to their customers. The Slovak authority imposed fines on Československá obchodná banka (€3 183 427), Slovenská sporiteľňa (€3 197 912) and Všeobecná úverová banka (€3 810 461) for infringing competition law.[8]

The above are a few examples of the fines levied for abuse of dominance and breach of competition law in the EU. Such fines create a significant deterrent effect.. Vodafone submits in this respect that Ex-post competition law enforcement requires fines to be levied that are significant enough to deter non-compliance.

Article 5.11 provides that the Authority may consider some anti-competitive behaviour to be a very severe infringement of the Law and the Authority may refer such cases to the Public Prosecutor for criminal investigation as per Article 46 of Telecoms Law.

Vodafone submits that there is no requirement under Article 46 that the anti-competitive behaviour to constitute a severe infringement in order for the Authority to refer the anti-competitive behaviour or abuse of dominance to the Public Prosecutor. Article 46 provides the following:

> *"If a service provider engages in anti-competitive practices or a dominant service provider abuses its dominance, the General Secretariat may issue decisions to remedy anti-competitive practices or abuse of dominance and in particular the following:*
> 1. *obliging the concerned persons to cease the actions or activities causing such practice or to make specific changes in such action or activities to eliminate or reduce their negative impact on competition;*
> 2. *obliging the concerned service providers to submit periodic reports to the General Secretariat to determine the extent of their compliance with its decisions;*
> 3. *refer the matter to the public prosecutor to initiate criminal proceedings against the violator."*

Vodafone believes that the CRA's power to refer the matter to the public prosecutor can serve as a deterrent, since the public prosecutor has the necessary powers to impose fines and the CRA should use this power more. Vodafone is aware of at least three cases where the CRA has found the DSP to have acted in an anti-competitive way and to-date neither of the decisions have been enforced by the CRA or taken to the public prosecutor.

The competition policy is silent on what happens when a binding undertaking is made but subsequently not fulfilled. Vodafone submits that the policy should clearly set out the steps that the CRA will take if and when the undertaking is not fulfilled. Furthermore a requirement for a binding undertaking should be considered as complementary to fines that are levied as being required to

[8] http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-02/cp130013en.pdf. Court of Justice of the European Union Press Release No 13/13 Luxemburg, 7 February 2013. Judgement case C-68/12 Protimonopolny urad Slovenskej republiky v Slovenska sporitel na a.s

enter into an undertaking is not necessarily a deterrent. Rather, it may incentive anti-competitive behaviour.

Consultation Questions and Answers

CQ1 Do consultees agree that the prohibition of anti-competitive conduct can apply to agreements between independent undertakings, and are there other forms of conduct that the prohibition should apply to? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone agrees that the prohibition of anti-competitive conduct can apply to agreements between independent undertakings.

CQ2 Do consultees agree with the approach to assessing whether agreements are prohibited as they amount to anti-competitive conduct, if not, please provide a comprehensive and evidenced justification for your position

Vodafone has no objection with the approach to assessing whether agreements are prohibited as they amount to anti-competitive

CQ3 Do consultees agree with the approach to identifying the deminimis agreements where no anti-competitive effect can be presumed? If not, please provide a comprehensive and evidenced justification for your position

Vodafone has no objection to the deminimis provisions in the consultation document.

CQ4 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? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone is of the view that efficiency defences should only be used by those undertakings that are not dominant in the relevant markets that are affected by the agreement. This is supported by the fourth criterion that needs to be fulfilled for the efficiency defence – No elimination of competition. In markets where an undertaking has a dominant position, there is no sufficient competition. The consultation document provides in this regard that "whether the agreement would eliminate competition depends on the degree of competition prior to the agreement, the level of competitive constraints imposed on the parties through the agreement and on the impact of the restrictive agreement on competition (i.e. the reduction in competition that the agreement brings about). The greater the reduction of competition caused, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated)".

CQ5 Do consultees agree that the CRA should consider possible defences in assessing whether an agreement is consistent with the prohibition of anti-competitive behaviour? If not please provide a comprehensive and evidenced justification for your position

Please refer to the answer for CQ4.

CQ6 Do consultees agree with CRA's general approach to assessing whether conduct can be considered an abuse of a dominant position as described in section 3.2? If not, please provide a comprehensive and evidenced justification for your position.

Please refer to comments under 3.2 above. Furthermore Vodafone strongly supports the Authority's powers to impose interim measures before it completes its investigation (which could take months or years). Interim measures will be critical especially in alleged predatory pricing and margin squeeze cases as the chances of irreparable harm are big in the absence of interim remedies. If the Authority does indeed find that there was abuse of dominance and interim measures were not imposed, the chances of the aggrieved undertaking recovering its losses are slim and damage cases in the civil courts are lengthy processes.

CQ7 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 3.3? If not, please provide a comprehensive and evidenced justification for your position.

Please refer to comments under 3.2 above. Generally Vodafone has no objection to with the description of the assessment process save for the first step of the process, which Vodafone believes should be dropped.

CQ8 for each of the potential categories of conduct listed in section 3.4 of the draft competition policy, do consultees consider that the conduct as described amounts to an abuse of a dominant position? If not, please provide a comprehensive and evidenced justification for your position. Please provide a separate answer for each of:

- *(i) refusal to supply (section 3.5.1)*
- *(ii) margin squeeze (section 3.5.2)*
- *(iii) predatory pricing (section 3.5.11)*
- *(iv) rebates, discounts and loyalty schemes (section 3.5.3)*
- *(v) unjustified price or non-price discrimination (3.5.4)*
- *(vi) cross-subsidization (section 3.5.5)*
- *(vii) excessive pricing (section 3.5.6)*
- *(viii) bundling and tying (section 3.5.7)*
- *(ix) exclusionary tying (section 3.5.8)*
- *(x) customer lock-in through contract length (section 3.5.9)*
- *(xi) exclusive distribution agreements (section 3.5.10)*

Vodafone has no objection to the abuse of a dominant position as described in the document.

CQ9 Do consultees consider that the Competition Policy should list any other categories of conduct which amounts to an abuse of a dominant position? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone submits that the conducts listed in the Competition Policy are largely in line with international practice, however Vodafone does not believe that the list should be an exhaustive list as other unforeseen categories of conduct not mentioned in the Competition Policy could potentially amount to abuse of a dominant position.

CQ10 Do consultees consider that the Competition Policy should consider possible justifications in assessing whether conduct amounts to an abuse of a dominant position? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone agrees with the Authority that having a dominant position is not in itself anti-competitive, it is however the abuse of such a dominant position that is anti-competitive. Based on this Vodafone does not support possible justifications in assessing whether conduct amounts to an abuse of a dominant position.

CQ11 Do consultees agree with the approach to assessing the economic effects of mergers and transfers of control? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone has no objection to assessing the economic effects of mergers and transfers of control.

CQ12 Do consultees agree with the approach to considering the efficiencies when assessing mergers and transfers of control? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone has no objection to the approach to considering the efficiencies when assessing mergers and transfers of control.

CQ13 Do consultees agree with the approach to considering remedies as a condition of approving mergers and transfers of control? If not, please provide a comprehensive and evidenced justification for your position.

Vodafone has no objection to the approach of considering remedies as a condition of approving mergers and transfers of control.